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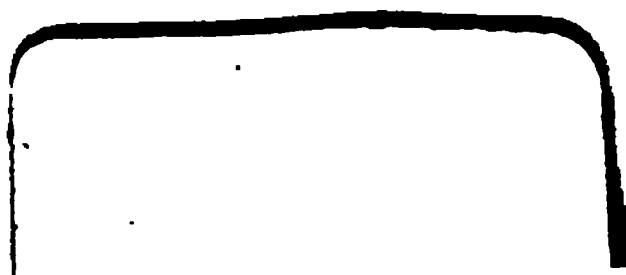
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THE LAW  
OF  
COLLATERAL ATTACK  
ON  
JUDICIAL PROCEEDINGS

BY  
JOHN M. VANFLEET  
        
JUDGE OF THE THIRTY-FOURTH JUDICIAL CIRCUIT OF INDIANA

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# PREFACE.

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THE advice of the sages of the profession, to study its mysteries with unflinching devotion, induced me to investigate the Law of Judgments. Having read up the subject in such standard works as Smith's Leading Cases, Wells on *Res Adjudicata*, Bigelow on Estoppel and Freeman on Judgments, it seemed to me to be in much confusion, and this suggested the idea of writing a book. I made a short abstract of all the cases that could be found in the United States Digest, and in the English Digests, examining, perhaps, fifty different titles, and found that about one-fifth of the whole concerned the doctrine of Collateral Attack. As there was no text-book on that branch, it seemed best to work it up first. Commencing with the last published report of Texas, each digest citation was read and abstracted, and each case cited by the court and counsel was noted for examination. A careful search of the index of the volume was then made for cases not found in the digests. The next preceding volume was treated in the same manner, and so on back to the first, except that, after about twenty volumes were examined, the searching of their indexes was omitted. This was done because the digest references, and the citations of court and counsel in the later volumes, gave substantially all the cases in the older ones. Of course, the citations of the court and counsel, not only of their own reports but of all others, were taken. The reports of each of the other states, and of the United States, England, Scotland, Ireland, Canada, Sandwich Islands, Australia and New Zealand were proceeded with in the same manner. The cases on this subject were culled from all the principal text-books on Administration, Admiralty, Assessments, Attachment, Constitutional Law, Criminal Law, Eminent Domain, Estoppel, Evidence, *Habeas Corpus*, Injunctions, *In Rem*, Judgments, Judicial Sales, Jurisdiction, Limitations, Mandamus, Officers, Pleadings, Practice, Remedies, *Res Adjudicata*, Sheriffs, Torts, and Wills; and from the Abridg-

ments of Bacon, Comyn and Viner, and from the American and English Encyclopædia of Law, so far as published. These cases were examined in the original reports. The English reports were followed back until they were printed in Latin. A few cases from these old folios are given at second hand, but all the others were taken either from the original reports or from the American Reports, or American Decisions or the National Reporter System.

The design being to make the work exhaustive, not only the reports of the courts of last resort, but also those of the Appellate, Circuit, City, County, Criminal, District, *Nisi Prius*, Superior, Supreme and Surrogate courts were examined. To find all the cases, was impossible; yet, the percentage overlooked will be found small, I trust. It seems to me that a small collection of abstracts from the court of appeals of New York and from the supreme courts of Ohio and of the United States, was lost, but I am not certain about that, and have no way to verify it at present. A few cases which merely announce the general rule that a judgment is not void for errors, without showing what they were, have been omitted. Also, perhaps two thousand cases cited, upon examination, were found to involve the doctrine of *res judicata* or setting aside in equity only, and were omitted for that reason. The facts were stated so meagerly in many cases that I found it impossible to determine with certainty the doctrine involved. All such cases were rejected; and probably some errors were committed in doing so. But very few cases were found in Scotland, and no decision was discovered in Great Britain nor in any of her colonies, depending upon irregular process or service, and but very few concerning irregular administration proceedings. In some of the Canadian and Australian provinces, none were found. As it was my purpose to write from these abstracts, the necessity to have them accurate was apparent; and each case was read until it seemed to me that it was understood, and the abstract was made accordingly. If occasionally one has been misunderstood, it will not be surprising. From the whole of these abstracts, the analogies, comparisons, definitions and principles contained in the first chapter, were deduced. And from all the cases contained in each chapter, title, division, or subject, respectively, and not from any preconceived ideas, the principles which seemed to me to govern it, were formulated. The reader will notice that numerous cases from all the courts, English and American, have

been criticised. This may seem presumptuous. Still, my advantage was very great. While they had but a small segment of the circle in view, the whole lay spread out before me. In my opinion, one who has no views of his own upon controverted questions, ought not to write a text-book concerning them. I trust no one will think that I place myself on the same level, either in respect to general knowledge or ability, with the many distinguished jurists criticised. I also trust that I may not be thought wanting in veneration or respect for them. If there are any criticisms that seem too bold or lacking in proper respect, I pray that they be not ascribed to design. The subject discussed involves titles worth hundreds of millions,<sup>1</sup> besides personal rights that cannot be estimated in money, and it is to be regretted that some master mind has not taken hold of it. But for the last seven years, with such ability as has been vouchsafed me, it has been wrought upon with unflagging industry, and with great zeal and delight. During that time no vacations have been taken, and it is safe to say that, on the average, six hours per day have been spent upon it. If any one thing has been learned more thoroughly than another, it is that dogmatic assertions and arrogant opinions have no proper place in the law. To find judges of eminence differing upon nearly every question considered, is enough to shake one's confidence in his own infallibility. And, although the principles which seem to me to govern this important and complicated branch of the law, have been wrought out with much labor and thought, yet that my conclusions are invariably correct, is too much to expect. If my views are wrong in section 1, in respect to the general principles which govern in a collateral attack, and in section 17, in regard to the distinction between *res judicata* and collateral attack, and in sections 60 to 67, concerning what it is that confers jurisdiction and the power to adjudicate in respect to it, and in section 329, in regard to the sufficiency of process and service to shield the proceedings collaterally, then all or nearly all my opinions are worthless. But if they are right with respect to those matters, then, on the whole, they stand on a solid foundation, and the chief errors consist in

1. An Ohio case involved the title to land worth ten millions, and one in New Jersey involved six millions in bonds; while a recent one in the Supreme Court of the United States held a New York judgment of over a million dollars void. These last two cases seem to me to be wrong. See sections 127 and 750.

their application to particular cases. But wherever they are wrong, the work itself furnishes the means for correction, as it gives the views and reasons of all the courts upon each matter considered.

Those who are curious will find a list of the principal matters discussed by me, by reference to the index—title, PRINCIPLE INVOLVED IN. Another thing most thoroughly learned is, that the locality in which the court sits has nothing to do with its ability. Many courts of which I knew nothing, and which, with the narrowness ignorance always breeds, I regarded as of little consequence, I now hold in high esteem. No apology is offered for citing from inferior and intermediate courts. While the court is inferior, the judge or judges presiding may be very superior.

The whole work is arranged in alphabetical order, like an encyclopædia, as nearly as practicable. This arrangement extends into the sections. Much time and thought have been spent upon the index. The matters treated being substantially new in text-book writing, I am not unmindful of the old maxim, *Nihil simul est inventum et perfectum*. The various reports were examined down to and including the following numbers and dates:

AUSTRALIAN REPORTS, A. D. 1890.

ENGLISH, IRISH, SCOTCH and CANADIAN REPORTS, A. D. 1891.

SANDWICH ISLANDS, or HAWAIIAN REPORTS, volume 7.

NEW ZEALAND REPORTS, volume 3.

UNITED STATES SUPREME COURT, volume 143.

ILLINOIS APPEALS, volume 39.

MISSOURI APPEALS, volume 44.

ATLANTIC REPORTER (Maine, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, New Jersey, Pennsylvania, Delaware and Maryland), volume 23.

FEDERAL REPORTER, volume 48.

NEW YORK SUPPLEMENT (New York Intermediate Courts), volume 17.

NORTH EASTERN REPORTER (Illinois, Indiana, Ohio, New York and Massachusetts), volume 30, page 726.

NORTH WESTERN REPORTER (Michigan, Wisconsin, Minnesota, Iowa, Nebraska and Dakota), volume 51, page 960.

PACIFIC REPORTER (California, Nevada, Oregon, Washington, Colorado, Kansas, Territories), volume 29.

SOUTH EASTERN REPORTER (Georgia, South Carolina, North Carolina, Virginia and West Virginia), volume 14.

SOUTHERN REPORTER (Louisiana, Mississippi, Alabama and Florida), volume 10.

SOUTH WESTERN REPORTER (Missouri, Arkansas, Texas, Tennessee and Kentucky), volume 19, page 197.

JOHN M. VANFLEET.

ELKHART, INDIANA, Oct. 12, 1892.

# TABLE OF CONTENTS.

## CHAPTER I.

### PRINCIPLES, ANALOGIES, COMPARISONS AND DEFINITIONS.

	Section.
Principle involved in a collateral attack on judicial proceedings—Duty of the courts— <i>Stare decisis</i> , . . . . .	1
Direct attack, defined—Illustrations, . . . . .	2
Collateral attack, defined—Illustrations, . . . . .	3
Extrinsic evidence, attempt to use, is a collateral attack, . . . . .	4
Fraud, Mistake or excusable neglect—Suit to set aside for—Fraud of judge, . . . . .	5
Irregular motion or petition to set aside judgment, . . . . .	6
Purchasers at judicial sales, garnishees and subsequent attachers—Motions by, when collateral—Contra, . . . . .	7
Purchasers at judicial sales—Motions and suits by and against, when direct attacks, . . . . .	8
Service, contradicting—When collateral, . . . . .	9
Service, contradicting—When direct, . . . . .	10
Service, defective—Suit to set aside for, collateral, . . . . .	11
Strangers—Attacks by, . . . . .	12
Subsequent agreements, . . . . .	13
Analogy between void deeds and void judgments, . . . . .	14
Appeal from inferior tribunals not given—Effect, collaterally, . . . . .	15
When void collaterally, . . . . .	16
Collateral attack distinguished from <i>res judicata</i> —(Criminal and civil action—"Incidentally cognizable"—"Inferred by argument"— <i>In rem</i> —Interlocutory orders—Letters of administration—Marriage and divorce—Motions—Pleading former adjudication, necessity of—"What might have been decided"—Rule in collateral attack—Rule in <i>res judicata</i> ), . . . . .	17

## CHAPTER II.

### THE TRIBUNAL—CONSTITUTIONAL INFIRMITIES IN ITS ORGANIZATION.

SCOPE OF CHAPTER II, . . . . .	18
PART I.—CORPORATE ORGANIZATION OF THE TRIBUNAL, . . . . .	19-21
PART II.—THE JUDGE—CONSTITUTIONAL INFIRMITIES OF, . . . . .	22-25
Part I.—Corporate organization of the tribunal, . . . . .	19-21
Government unconstitutional or revolutionary, . . . . .	19
Tribunal not lawfully organized under the constitution, . . . . .	20
Comments on Section 20, . . . . .	21

## CHAPTER II—Continued.

	Section.
Part II.—The judge—Constitutional infirmities of, . . . . .	22-25
Judge, appointment or election of, invalid under the constitution, . . . . .	22
Comments on section 22, . . . . .	23
Judge personally disqualified by the constitution, . . . . .	24
Judge residing in wrong place according to the constitution, . . . . .	25

## CHAPTER III.

THE TRIBUNAL—STATUTORY AND COMMON-LAW INFIRMITIES  
IN ITS ORGANIZATION.

SCOPE OF CHAPTER III, . . . . .	26
PART I.—CORPORATE ORGANIZATION OF THE TRIBUNAL, . . . . .	27-33
PART II.—THE JUDGE—STATUTORY AND COMMON-LAW INFIRMITIES OF, . . . . .	34-57
Part I.—Corporate organization of the tribunal, . . . . .	27-33
Place where held, unlawful, . . . . .	27
Place where held, unlawful—Acts void, . . . . .	28
Statute authorizing tribunal to be organized, not yet in force, or repealed, . . . . .	29
Time when court held, unlawful—Principle involved—Presumptions, . . . . .	30
Time unlawful—Acts not void—Organized at wrong time, . . . . .	31
Time unlawful—Acts void, . . . . .	32
Time unlawful—Sundays and holidays, . . . . .	33
Part II.—The Judge—Statutory and common-law infirmities of, . . . . .	34-57
Principle involved in Part II, . . . . .	34
Judge appointed or selected by wrong officer, body or person, . . . . .	35
Judge appointed irregularly, . . . . .	36
Judge <i>de facto</i> —Principle involved, . . . . .	37
Judge <i>de facto</i> —What constitutes, . . . . .	38
Judge <i>de facto</i> —What constitutes. Principles discussed in Kansas cases, . . . . .	39
Judge <i>de facto</i> by holding over—Old and new both acting—Person of same name qualifying, . . . . .	40
Judge <i>de facto</i> —What does not constitute, . . . . .	41
Judge disqualified by common law or by statute, . . . . .	42
Judge disqualified by having been counsel, . . . . .	43
Judge disqualified by interest—Principle involved, . . . . .	44
Judge disqualified by interest—Acts not void, . . . . .	45
Judge disqualified by interest—Acts void, . . . . .	46
Judge disqualified by indirect interest, . . . . .	47
Judge disqualified personally—Occupant of office—Infant justice, . . . . .	48
Judge disqualified by relationship—Acts not void, . . . . .	49
Judge disqualified by relationship—Acts void, . . . . .	50
Judge, oath of, irregular or wanting, . . . . .	51
Judges, one, illegal—Consent of parties, . . . . .	52
Judge, presumptions concerning, . . . . .	53
Judge qualified, but absent—Clerk's entries—Stranger writing record, . . . . .	54
Judges, quorum absent as shown by the record—Quorum absent, but record reciting their presence, . . . . .	55

## TABLE OF CONTENTS.

ix

### CHAPTER III. Part II—Continued.

Section.

Judges—Resignation or rotation, . . . . .	56
Judges—Wrong one acting—Changing circuits—Disqualifications, none existing, . . . . .	57

## CHAPTER IV.

### JURISDICTION DEFINED—HOW GIVEN—HOW ADJUDICATED— MISTAKES OF LAW OR FACT.

Jurisdiction defined and illustrated, . . . . .	58
Jurisdiction over subject-matter—What is, . . . . .	59
Jurisdiction, allegations give, . . . . .	60
Jurisdiction, allegations, sufficiency of, to confer—Tests of jurisdiction, .	61
Jurisdiction, how and when adjudicated, . . . . .	62
Jurisdictional facts adjudicated by an inferior court, . . . . .	63
Jurisdiction { Branch I, exercised by reason of a mistake of law, . } { Branch II, exercised by reason of a mistake of fact, . }	65-67
Scope of these two branches of jurisdiction, . . . . .	64
Principle involved in Branch I, . . . . .	65
Principle involved in Part I of Section 65—General subject or class— Particular case—Illustrations, . . . . .	66
Jurisdiction exercised under the constitution, the statutes and the com- mon law, . . . . .	67

## CHAPTER V.

### JURISDICTION TAKEN BY REASON OF A MISTAKE OF LAW IN CONSTRUING THE CONSTITUTION.

PRINCIPLE INVOLVED IN CHAPTER V, . . . . .	68
PART I.—PROCEEDINGS WITHIN CHAPTER V NOT VOID, . . . . .	69-74
PART II.—PROCEEDINGS WITHIN CHAPTER V VOID, . . . . .	75-82
PART III.—CONSTITUTIONAL DEFENSES DISREGARDED, . . . . .	83-86
PART IV.—CONSTITUTIONAL PROCEDURE DISREGARDED, . . . . .	87-88
Part I.—Proceedings within Chapter V not void, . . . . .	69-74
Appeals, . . . . .	69
Bills of credit, . . . . .	70
Clerk's judicial acts—Fees, . . . . .	71
Intoxicating liquors—Liquor-license bond—Penalties, . . . . .	72
Tax-assessments, . . . . .	73
Criminal proceedings—Confiscation— <i>Ex post facto</i> —International law, .	74
Part II.—Proceedings within Chapter V void, . . . . .	75-82
The leading case, . . . . .	75
Administrator, appointment of, . . . . .	76
Appeals—Clerk's judicial acts—Contempts, . . . . .	77
Crime created—Colored person—Drunk—Larceny—License to do business—Vagrant, . . . . .	78
Criminal jurisdiction, . . . . .	79
Divorce—Imprisonment in a civil case—Injunction—Interstate com- merce laws—Intoxicating liquors, . . . . .	80
Justice's jurisdiction—Lien—Mayor's court—Ordinance—State law repugnant to constitution of United States— <i>Ex post facto</i> State law, .	81



CHAPTER V. Part II—Continued.		Section.
Tax assessment—Terms of court—Vessel, lien upon—Witness com-		
pelled to criminate himself, . . . . .		82
Part III.—Constitutional defenses disregarded, . . . . .		
Jeopardy—placed in, twice, by splitting a cause, . . . . .		83–86
Section 83, continued, . . . . .		83
Jeopardy—Placed in, twice, by discharge of jury— <i>Ex parte</i> Bigelow, . . . . .		84
113 U. S. 328, . . . . .		85
Section 85, continued, . . . . .		86
Part IV.—Constitutional procedure disregarded, . . . . .		
Affidavit instead of information—Information instead of indictment, . . . . .		87–88
Jury denied, and <i>vice versa</i> —Witness, compulsory process for, denied, . . . . .		87
		88

## CHAPTER VI.

### JURISDICTION TAKEN BY REASON OF A MISTAKE OF LAW IN CONSTRUING A STATUTE OR THE COMMON LAW.

PRINCIPLE INVOLVED IN CHAPTER VI.—DIVORCE STATUTE CON-		
STRUED IN WISCONSIN, . . . . .		89
PART I.—CIVIL PROCEEDINGS, GENERAL, . . . . .		
		90–129
PART II.—CIVIL PROCEEDINGS, SPECIAL, . . . . .		
		130–184
PART III.—CONTEMPT PROCEEDINGS, . . . . .		
		185–199
PART IV.—CRIMINAL PROCEEDINGS, . . . . .		
		200–212
Part I.—Civil proceedings, general, . . . . .		
		90–129
Appellate proceedings—Appeal from interlocutory decree, . . . . .		90
“Balance due”—Consent to judgment, what is, . . . . .		91
Contemporaneous construction, . . . . .		92
Courts—Which has jurisdiction, . . . . .		93
“Debt,” in statute—Dissolution of corporation—Divorce—Alimony in		
lieu of dower—Fees and expenses, . . . . .		94
“Indebted”—(Procedure to recover), . . . . .		95
“Instrument in writing,” . . . . .		96
Judges—Number necessary, . . . . .		97
Judges—Wrong one acting, . . . . .		98
“Laborer”—Land under water, . . . . .		99
Law or equity, . . . . .		100
Lien—Lottery, . . . . .		101
Mandamus, . . . . .		102
Married woman’s enabling act—Mortgaged premises sold on execution, . . . . .		103
Municipal mortgage, . . . . .		104
Municipal precincts—(Representation of), . . . . .		105
New trials by justices—Non-resident’s land, acquiring lien upon, . . . . .		106
Official misconduct, . . . . .		107
Ordinances, . . . . .		108
“Payment of money”—Pending suits, repeal of law, . . . . .		109
“Process,” . . . . .		110
Prospective statute—Replevin, . . . . .		111
Retrospective statute—(Administrator appointed—Allowance to widow		
—Homestead for widow), . . . . .		112
Service—Foreign corporation, on, . . . . .		113

# TABLE OF CONTENTS.

xi

CHAPTER VI. Part I—Continued.	Section.
Service—Length of time of, . . . . .	114
Service—Personal out of state, . . . . .	115
“State”—Meaning of, in statute, . . . . .	116
State court interfering with federal court, and <i>vice versa</i> , . . . . .	117
State statute not yet in force—Wrong statute applied—Statute of other state misconstrued, . . . . .	118
State and federal statutes in conflict, . . . . .	119
State or federal statute.—Congressional election contest, perjury in, . . . . .	120
State or federal statute.—Fugitive from justice, . . . . .	121
State practice in federal court, . . . . .	122
State stay law in federal court, . . . . .	123
Supreme court—Statute misconstrued by, . . . . .	124
Supreme and appellate courts of Indiana, . . . . .	125
Territorial or federal statutes, . . . . .	126
Trust, power to deviate from, . . . . .	127
Vacation order, power to make, . . . . .	128
Venue of action, . . . . .	129
Part II.—Civil proceedings, special, . . . . .	130–184
Title A.—Attachment and garnishment proceedings, . . . . .	130–133
Title B.—Bankruptcy, insolvency and poor debtors’ proceedings, . . . . .	134–141
Title C.—Condemnation proceedings, . . . . .	142–143
Title D.—Confiscation and forfeiture proceedings, . . . . .	144–145
Title E.— <i>Habeas corpus</i> proceedings, . . . . .	146–148
Title F.—Injunction proceedings, . . . . .	149–150
Title G.—Partition proceedings, . . . . .	151–155
Title H.—Probate proceedings, . . . . .	156–178
Title I.—Receivership, replevin bail or stay of execution proceedings, . . . . .	179–180
Title J.—Strays, proceedings to impound and sell, . . . . .	181
Title K.—Tax proceedings, . . . . .	182–184
Title A.—Attachment and garnishment proceedings, . . . . .	130–133
Administrators—Assault and battery, . . . . .	130
Bond, necessity of, . . . . .	131
Contract or tort—Distress warrant, . . . . .	132
Dredge-boat, . . . . .	133
Title B.—Bankruptcy, insolvency and poor debtors’ proceedings, . . . . .	134–141
Amount of debts, . . . . .	134
“Change of circumstances,” . . . . .	135
Copartners, . . . . .	136
Estate of deceased partner, . . . . .	137
“Inability to endure,” . . . . .	138
“Proper authority,” . . . . .	139
Second application for discharge, . . . . .	140
Tort, . . . . .	141
Title C.—Condemnation proceedings, . . . . .	142–143
Railroad lands condemned, . . . . .	142
Street removed by railway, . . . . .	143
Title D.—Confiscation and forfeiture proceedings, . . . . .	144–145
Corporate property, . . . . .	144
“Forfeit his vessel,” . . . . .	145

CHAPTER VI. Part II—Continued.		Section-
Title E.— <i>Habeas corpus</i> proceedings, . . . . .		146-148
"Criminal matter," . . . . .		146
Debt or fraud, . . . . .		147
Void discharge held valid, . . . . .		148
Title F.—Injunction proceedings, . . . . .		149, 150
Injunction against managing officers of corporation, . . . . .		149
Injunctions against municipal corporations, . . . . .		150
Title G.—Partition proceedings, . . . . .		151-155
Persons not entitled to have partition, . . . . .		151
Property not subject to partition sale—Dower unassigned, . . . . .		152
Property not subject to partition sale—Undivided interest, . . . . .		153
Time of granting partition, . . . . .		154
Title to property partitioned, party having no, . . . . .		155
Title H.—Probate proceedings, . . . . .		156-178
Administrator or executor, appointment of, . . . . .		156
Administrator, executor or guardian, resignation of, . . . . .		157
Executor of executor recognized as executor, . . . . .		158
Loan of money by administrator, . . . . .		159
Probate sales—Authority in statute, . . . . .		160
Probate sales—Bond, necessity of, . . . . .		161
Probate sales—"Care for and preserve"—Court, which one, . . . . .		162
Probate sales—"Debts," meaning of, . . . . .		163
Probate sales—"Estate lies"—"Estate shall be," . . . . .		164
Probate sales—Heir—Unborn child, . . . . .		165
Probate sales—Inherent power of court, . . . . .		166
Probate sales—Joint administrator, . . . . .		167
Probate sales—Married woman's land, . . . . .		168
Probate sales—Permissive statute, . . . . .		169
Probate sales—Sell, exchange, mortgage—Mortgages, . . . . .		170
Probate sales—"Sell the whole"—Part, . . . . .		171
Probate sales—Time—Time of sale—Time for settlements, . . . . .		172
Probate sales—Title of decedent, . . . . .		173
Probate sales—"Ward," . . . . .		174
Probate sales—Widow's consent to sale, . . . . .		175
Probate sales—Widow's quantity of interest in land, . . . . .		176
Probate sales—Widow's rights—"Value" of, given in land instead of money, . . . . .		177
Probate sales—Will, sale authorized by, . . . . .		178
Title I.—Receivership, replevin bail or stay of execution proceedings, . . . . .		179-180
Receiver in "an action," . . . . .		179
Replevin bail or stay of execution—"Entering on docket"—Time of entry, . . . . .		180
Title J.—Strays—Proceedings to impound and sell, . . . . .		181
"Discover on his land," . . . . .		181
Title K.—Tax proceedings, . . . . .		182-184
Railroad-aid tax in Alabama, . . . . .		182
Street assessment—Owner of lot, . . . . .		183
Treasurer assessed as tenant, . . . . .		184

## TABLE OF CONTENTS.

xiii

<b>CHAPTER VI—Continued.</b>	<b>Section.</b>
<b>Part III.—Contempt proceedings, . . . . .</b>	<b>185-199</b>
<b>Title A.—Contempts in inferior courts, . . . . .</b>	<b>185-191</b>
<b>Title B.—Contempts in superior courts, . . . . .</b>	<b>192-199</b>
<b>Title A.—Contempts in inferior courts, . . . . .</b>	<b>185-191</b>
Principle involved in Title A, . . . . .	185
Affidavit refused—Appeal refused, . . . . .	186
Appearance by attorney, . . . . .	187
Bond in replevin, . . . . .	188
Clerk, contumacious—Constable, contumacious, . . . . .	189
Fine, power to inflict—Implied power—Newspaper article—Pardon by mayor, . . . . .	190
Time of action, . . . . .	191
<b>Title B.—Contempts in superior courts, . . . . .</b>	<b>192-199</b>
Attorney disbarred, . . . . .	192
Bond in criminal case—Conflict of jurisdiction, . . . . .	193
“Costs and expenses”—Court allowance—Debt, . . . . .	194
Execution awarded, . . . . .	195
Fees of referee, . . . . .	196
Imprisonment, . . . . .	197
Jury committed, . . . . .	198
Jury service refused, . . . . .	199
<b>Part IV.—Criminal proceedings, . . . . .</b>	<b>200-212</b>
Principle involved in Part IV, . . . . .	200
“Breach of the peace,” . . . . .	201
Forgery of “document,” . . . . .	202
Forgery of engrossed bill, . . . . .	203
Grand jury, power to empanel, . . . . .	204
Larceny of “bundles of cornstalks,” . . . . .	205
Larceny—“Digging Potatoes,” . . . . .	206
Larceny—Grand or petit, . . . . .	207
Libel of corporation, . . . . .	208
Limitations, statute of, . . . . .	209
Malicious mischief—Perjury, . . . . .	210
Vagrants, . . . . .	211
Writing, complaint not in, . . . . .	212

## CHAPTER VII.

### JURISDICTION TAKEN BY REASON OF OVERLOOKING UNDISPUTED LAW.

<b>SCOPE OF CHAPTER VII, . . . . .</b>	<b>213</b>
Principle involved in Chapter VII, . . . . .	214
<b>Attachment and garnishment—Garnishment of cities—Garnishment of     exempt person, . . . . .</b>	<b>215</b>
<b>Contempts—Ditches and drains, . . . . .</b>	<b>216</b>
<b>Highways—Homestead, . . . . .</b>	<b>217</b>
<b>Injunctions against crimes, . . . . .</b>	<b>218</b>
<b>Judge, special, unauthorized, . . . . .</b>	<b>219</b>

## CHAPTER VII—Continued.

Section.

Larceny in ship—Malicious prosecution—Mandamus—Partition—Place of event occurring, . . . . .	220
Privateer—Prize—Railroad statute, . . . . .	221
Sheriff, motion against in wrong court, . . . . .	222
Taxation of exempt property, . . . . .	223
Time of holding election, . . . . .	224

## CHAPTER VIII.

JURISDICTION TAKEN BY VIRTUE OF DEFECTIVE PLEADINGS,  
BONDS OR PRELIMINARY MATTERS, OR IN THEIR AB-  
SENCE, OR BY VIRTUE OF WRONGFUL PROCEDURE.

SCOPE OF CHAPTER VIII, . . . . .	225
PART I.—CIVIL PROCEEDINGS, GENERAL — PLEADINGS AND PRELIMINARY MATTERS, DEFECTIVE OR WANTING, 222-236	
PART II.—CIVIL PROCEEDINGS, SPECIAL, . . . . .	237-297
PART III.—CRIMINAL PLEADINGS, DEFECTIVE, . . . . .	298-321
PART IV.—PROCEDURE, WRONG, . . . . .	322-328
Part I.—Civil proceedings, general—Pleadings and preliminary mat- ters, defective or wanting, . . . . .	226-236
Absence—Age—Appeal—Citizenship or residence—Cognovit, . . . . .	226
Condition—Consideration—Defects—Demand, . . . . .	227
Due—Premature action, . . . . .	228
Entitling of cause, wrong, . . . . .	229
Exhibition of license—Exhibits omitted—Fence—Herd law—Illegal note, . . . . .	230
Limitation, action barred by—Stay of execution—Partly void—Prayer excessive, . . . . .	231
"Purchased" in confession—Request, . . . . .	232
Setting aside judgments—Severable cause—Street—Stockholder's suit— Title to land before justice of the peace, . . . . .	233
Uncertainty, . . . . .	234
Venue, change of—Jurisdiction taken on imperfect, . . . . .	235
Void judgments—Other void matters, . . . . .	236
Part II.—Civil proceedings, special, . . . . .	237-297
Title A.—Preliminaries wanting, . . . . .	237-241
Title B.—Pleadings, defective, . . . . .	242-291
Title C.—Bond, defective, . . . . .	292-297
Title A.—Preliminaries wanting, . . . . .	237-241
Scope of Title A, . . . . .	237
Attachment proceedings, premature—Bail, . . . . .	238
Bond for costs, omitted—Clerk in insolvency, . . . . .	239
Contempt proceedings, premature—Garnishment—Married woman, . . . . .	240
Sewer rate — Street assessment—Tax judgment, . . . . .	241
Title B.—Pleadings, defective, . . . . .	242-291
Sub-title I.—Matters of form, . . . . .	242-255
Sub-title II.—Matters of substance, . . . . .	256-291

# TABLE OF CONTENTS.

XV

CHAPTER VIII. Part II. Title B—Continued.	Section.
Sub-title I.—Matters of form, . . . . .	242-255
Scope of, and principle involved in, Sub-title I, . . . . .	242
Address of petition, wrong, . . . . .	243
Filing omitted—Heading omitted, . . . . .	244
“Information and belief” in attachment affidavit, . . . . .	245
“Information and belief” in <i>capias</i> proceedings, . . . . .	246
“Information and belief” in affidavits in other special proceedings, . . . . .	247
Prayer, alternative—Omitted, . . . . .	248
Time of executing or filing papers—Filing, . . . . .	249
Venue omitted—Venue changed, transcript imperfect, . . . . .	250
Verification of pleadings, principle involved, . . . . .	251
Verification, affiant improper, . . . . .	252
Verification, jurat, wanting, . . . . .	253
Verification, official before whom made, wrong, . . . . .	254
Verification, prematurely made, . . . . .	255
Sub-title II.—Matters of substance, . . . . .	256-291
Principle involved in sub-title II, . . . . .	256
Division A.—Attachment and garnishment, . . . . .	257-264
Division B.—Bankruptcy, insolvency and poor debtors’ proceed- ings, . . . . .	265-267
Division C.— <i>Capias</i> proceedings . . . . .	268-271
Division D.—Condemnation, confiscation, exemption and for- feiture proceedings, . . . . .	272-274
Division E.—Probate petitions to sell, mortgage, etc., . . . . .	275-288
Division F.—Tax proceedings, . . . . .	289-291
Division A.—Attachment and garnishment, . . . . .	257-264
Principle involved in Division A, . . . . .	257
“Absconds”—Alternative, . . . . .	258
Amount of claim, . . . . .	259
“Any of his property”—Apprehensive—“Dollars”—Due, . . . . .	260
Intent to defraud, . . . . .	261
Just—Last resided, . . . . .	262
Nature of claim or demand or cause of action, . . . . .	263
Non-residence—Obvious—Secretly departed—Vexing—Volun- tarily leaving, . . . . .	264
Division B.—Bankruptcy, insolvency and poor debtors’ proceed- ings, . . . . .	265-267
Amount of debts—“Attached on contract”—Consideration of claim, . . . . .	265
Names of creditors—Partners, individual assets of, . . . . .	266
Premature new petition, . . . . .	267
Division C.— <i>Capias</i> proceedings, . . . . .	268-271
Colorable allegations, . . . . .	268
General allegations, . . . . .	269
Material allegations omitted—“Absconds”—Amount—Fraudu- lent refusal to pay—Freeholder—Intent to defraud—Justify belief, . . . . .	270
Affidavit wanting, . . . . .	271

CHAPTER VIII. Part II. Title B. Sub-title II—Continued.	Section.
Division D.—Condemnation, confiscation, exemption and forfeiture proceedings, . . . . .	272-274
Highway established, description of route—"Householders"—Material allegation omitted—Name of road corporation, . . . . .	272
Railway location, description of route by reference—Refusal to relinquish right of way, . . . . .	273
Confiscation against married woman—"Voluntarily"—Exemption from execution—Forfeiture of gaming device, . . . . .	274
Division E.—Probate petitions to sell, mortgage, etc., . . . . .	275-288
Principle involved in Division E, . . . . .	275
Amounts and values, gross and not itemized, . . . . .	276
Amounts and values, omitted, . . . . .	277
Circumstances and condition—"Debts," . . . . .	278
Description of land in petition, defective, . . . . .	279
Description of land by reference to other papers—Donation, "Estate of decedent," . . . . .	280
Evidence, instead of facts—Exhaustion of personalty, . . . . .	281
Exhibits and schedules, omitted, . . . . .	282
Limitations, claim barred by, . . . . .	283
Material allegation omitted—Inconsistent positions of supreme court of Alabama—"Orphan"—Two petitions, . . . . .	284
Necessity for sale, . . . . .	285
Object or purpose in selling, unlawful, . . . . .	286
Premature petition to sell—Residence—Same or similar import—Surplusage, . . . . .	287
Division F.—Tax proceedings, . . . . .	288
Due, not yet, or premature petition, . . . . .	289
Exempt property—Formal defects in petition—Immaterial allegations—Increase of assessment, unlawful—Lien—"Personally Examined," . . . . .	290
Object or purpose of assessment, unlawful, . . . . .	291
Title C.—Bond, defective, . . . . .	292-297
Scope of, and principle involved in, title C, . . . . .	292
Approval, defective, . . . . .	293
Condition, defective, . . . . .	294
Obligee, improper—Penalty, insufficient, . . . . .	295
Sureties, improper—Unsealed, . . . . .	296
Bond wanting, . . . . .	297
Part III.—Criminal proceedings, defective, . . . . .	298-321
Title A.—Preliminary matters, . . . . .	298-300
Title B.—Pleadings, defective, . . . . .	301-321
Title A.—Preliminary matters, . . . . .	298-300
Examination, preliminary, . . . . .	298
Grand jury impaneled by wrong judge—Fictitious indictment—Number of grand jurors, . . . . .	299
Grand jury, talesmen selected irregularly, . . . . .	300
Title B.—Pleadings, defective, . . . . .	301-321
Sub-title I.—Matters of form, . . . . .	301-303
Sub-title II.—Matters of substance, . . . . .	304-321



## TABLE OF CONTENTS.

xvii

<b>CHAPTER VIII. Part III. Title B—Continued.</b>	<b>Section.</b>
Sub-title I.—Matters of form, . . . . .	301-303
Duplicity—Information and belief—Name fictitious, . . . . .	301
Transcript on change of venue, seal omitted—Transcript wanting, . . . . .	302
Verified by improper person—Verification wanting, . . . . .	303
Sub-title II.—Matters of substance, . . . . .	304
Principle involved in Sub-title II, . . . . .	304
Division A.—Charge defective in particular crimes, . . . . .	305-321
Affray—Assault and battery—Billiard-table keeper, . . . . .	305
Breach of the peace, attempt to provoke, . . . . .	306
Burglary—Cheat and defraud, . . . . .	307
Disorderly person—Disturbing public meeting, . . . . .	308
“Facts and circumstances,” . . . . .	309
False pretenses—Fornication—Intoxication, . . . . .	310
Larceny, estoppel against the state—Feloniously, omitted, . . . . .	311
Larceny or loan—Lost property, finder of, . . . . .	312
Larceny, etc.—Possession—Property or not, . . . . .	313
Limitation, crime barred by, . . . . .	314
Malicious mischief, . . . . .	315
Name of owner or person injured—Non-repair—Obstructing highway, . . . . .	316
Place or venue, . . . . .	317
Profane swearing—Runaway slave, . . . . .	318
Sunday labor, . . . . .	319
Time—Time, impossible, . . . . .	320
Trespass—Unlawfully—Value, omitted, . . . . .	321
<b>Part IV.—Procedure, wrong, . . . . .</b>	<b>322-328</b>
Title A.—Kind or nature of, wrong, . . . . .	322-326
Title B.—Oral instead of written pleadings, . . . . .	327-328
Title A.—Kind or nature of, wrong, . . . . .	322-326
Attachment proceedings instead of personal, . . . . .	322
Civil instead of criminal procedure, . . . . .	323
Equitable instead of legal procedure, . . . . .	324
Legal instead of equitable procedure—Misjoinder of proceedings, . . . . .	325
Motion instead of suit or action—Motion, title adjudicated on, . . . . .	326
Title B.—Oral instead of written pleadings, . . . . .	327-328
Principle involved in Title B—Proceedings not void—Criminal procedure, . . . . .	327
Oral pleadings—Void—Criminal procedure, . . . . .	328

## CHAPTER IX.

### JURISDICTION TAKEN OVER THE PERSON BY VIRTUE OF DEFECTIVE PROCESS, SERVICE OR PROOF OF SERVICE, OR IN THEIR ABSENCE; OR BY VIRTUE OF AN UNAUTHORIZED APPEARANCE.

<b>SCOPE OF CHAPTER IX, AND PRINCIPLE INVOLVED IN PROCESS AND SERVICE, . . . . .</b>	<b>329</b>
<b>PART I.—PROCESS, . . . . .</b>	<b>330-383</b>
<b>PART II.—SERVICE, DEFECTIVE OR WANTING, . . . . .</b>	<b>384-500</b>
C. A.—ii	

## CHAPTER IX—Continued.

	Section.
Part I.—Process, . . . . .	330-383
Title A.—Preliminaries to issuing process, . . . . .	330-346
Title B.—Process, defective or wanting, . . . . .	347-383
Title A.—Preliminaries to issuing process, . . . . .	330-346
Principle involved in title A, . . . . .	330
Sub-title I.—Affidavit to authorize publication, defective or want- ing, . . . . .	331-343
Sub-title II.—Order for publication, defective or wanting, . . . . .	344-346
Sub-title I.—Affidavit to authorize publication, defective or want- ing, . . . . .	331-343
Division A.—Matters of form, . . . . .	331-334
Division B.—Matters of substance, . . . . .	335-343
Division A.—Matters of form, . . . . .	331-334
Entitling omitted, . . . . .	331
Filed or made too late—Made too long before being used, . . . . .	332
Information and belief, . . . . .	333
Person making affidavit or instituting proceedings, improper, . . . . .	334
Division B.—Matters of substance, . . . . .	335-343
Cause of action—Cause stated too generally, . . . . .	335
Sub-division I.—Diligence or ability to find defendant or his agent in the state, not shown, . . . . .	336-339
Sub-division II.—Other matters of substance, defective or want- ing, . . . . .	340-343
Sub-division I.—Diligence or ability to find defendant or his agent in the state, not shown, . . . . .	336-339
Ability to find defendant in the state, . . . . .	336
General or inferential allegations concerning diligence, . . . . .	337
“Satisfaction” of judge as to diligence, . . . . .	338
Sheriff’s want of diligence, . . . . .	339
Sub-division II.—Other matters of substance, defective or want- ing, . . . . .	340-343
Material allegation omitted from affidavit to authorize publica- tion—Curative statute of Wisconsin, . . . . .	340
Non-residence or absence, affidavit of, false in fact or wanting, . . . . .	341
Preliminary writ, wanting—Stayer, notice to give new, . . . . .	342
Unknown heirs or owners—Affidavit that names are unknown, wanting, . . . . .	343
Sub-title II.—Order for publication, defective or wanting, . . . . .	344-346
Clerk instead of judge makes the order, and <i>vice versa</i> —Filed with clerk—Order recorded by clerk, . . . . .	344
Mailing copy to defendant—Names omitted from order, . . . . .	345
Newspaper, designation of, defective—Option of plaintiff, . . . . .	346
Title B.—Process, defective or wanting, . . . . .	348-383
Scope of, and principle involved in, Title B, . . . . .	347
Sub-title I.—Matters of form, defective or wanting, . . . . .	348-354
Sub-title II.—Matters of substance, defective or wanting, . . . . .	355-382
Sub-title III.—Process in <i>capias</i> and criminal proceedings, wanting— Kidnaping, . . . . .	383

# TABLE OF CONTENTS.

xix

## CHAPTER IX. Part I. Title B—Continued.

	Section.
Sub-title I.—Matters of form, defective or wanting, . . . . .	348-354
Address to defendant, . . . . .	348
Blanks filled by improper person—Deputation in blank, . . . . .	349
Date of writ, irregular—Directed to wrong officer—Filing of com- plaint, not stated, . . . . .	350
Kind of process, wrong—Unverified, . . . . .	351
Language of process—Newspaper with "patent inside," . . . . .	352
Seal, omitted or wrong, . . . . .	353
Warning to appear and show cause, omitted—Amount of demand, omitted, . . . . .	354
Sub-title II.—Matters of substance, defective or wanting, . . . . .	355-382
Division A.—Cause of action, or purpose of proceeding, misde- scribed, . . . . .	355
Division B.—Name of defendant, wrong or wanting, . . . . .	356-364
Division C.—Name of plaintiff—Order for publication—Place of appearance—Property misdescribed, . . . . .	365-370
Division D.—Signature to process—Style of process—Subsequent alterations and amendments, . . . . .	371-375
Division E.—Time for appearance, uncertain or wrong, . . . . .	376-382
Division A.—Cause of action, or purpose of proceeding, misde- scribed, . . . . .	355
Division B.—Name of defendant, wrong or wanting, . . . . .	356-364
Christian name, wrong or wanting, . . . . .	356
Corporate name, . . . . .	357
"Estate"—Fictitious, . . . . .	358
"Heirs," . . . . .	359
Initials, . . . . .	360
Omitted, but described, . . . . .	361
"Persons interested," . . . . .	362
Surname, . . . . .	363
Unknown children, . . . . .	364
Division C.—Name of plaintiff—Order for publication—Place of appearance—Property misdescribed, . . . . .	365-370
Christian name, wrong or wanting—Firm name—"Heirs," . . . . .	365
Surname, . . . . .	366
Comments on sections 356 to 366, . . . . .	367
Order for publication, misdescribed in published notice, . . . . .	368
Place of appearance, . . . . .	369
Property misdescribed or not described, . . . . .	370
Division D.—Signature to process—Style of process—Subsequent alterations and amendments, . . . . .	371-375
Defective signature, . . . . .	371
Person signing, wrong, . . . . .	372
Want of signature, . . . . .	373
Style of process, . . . . .	374
Subsequent alterations and amendments, . . . . .	375
Division E.—Time for appearance, uncertain or wrong, . . . . .	376-382
Hour for appearance, . . . . .	376
Month, omitted—Past time, fixed, . . . . .	377

CHAPTER IX. Part I. Title B. Sub-Title II. Division E—Continued.		Section.
Sunday—Term changed by law—Term, commencement of, wrongly stated, . . . . .		378
Time for appearance—Too distant, . . . . .		379
Time for appearance—Too soon—Administrator's notice—Per- sonal service—Publication, . . . . .		380
Time for appearance, wanting, . . . . .		381
Time for appearance—Year omitted, . . . . .		382
Sub-title III.—Process in <i>capias</i> and criminal proceedings, wanting —Kidnaping, . . . . .		383
Part II.—Service, defective or wanting, . . . . .		384-500
Principle involved in Part II, . . . . .		384
Title A.—Appearance—Due process of law, . . . . .		385-387
Title B.—Constructive service, force and effect of, . . . . .		388-398
Title C.— <i>In rem</i> , or <i>quasi in rem</i> , . . . . .		399-416
Title D.—Substituted service, effect of, . . . . .		417-419
Title E.—Unauthorized proceedings, . . . . .		420-435
Title F.—Mode of service, wrong, . . . . .		436-445
Title G.—Paper in which publication is made, unlawful — German —Order for publication, varied from—Sunday, . . . . .		446
Title H.—Person making service, improper, . . . . .		447-450
Title I.—Person served or not served, or person accepting service— Errors, concerning, . . . . .		451-461
Title J.—Place of service or accepting of service—Errors concerning, . . . . .		462-467
Title K.—Proof of service in domestic court, false in fact, . . . . .		468-482
Title L.—Proof of service in foreign, and other state, court, false in fact, . . . . .		483
Title M.—Proof of service, insufficient in law, . . . . .		484-487
Title N.—Time of making service, improper, . . . . .		488-493
Title O.—Service wanting in proceedings not <i>in rem</i> , . . . . .		494-498
Title P.—Service wanting in proceedings where it is dispensed with by statute, . . . . .		499-500
Title A.—Appearance—Due process of law, . . . . .		385-387
Appearance, effect of—Attachment—Process, wrong in kind, . . . . .		385
Appearance, right of, denied—Alien enemy— <i>In rem</i> , . . . . .		386
"Due process of law," . . . . .		387
Title B.—Constructive service, force and effect of, . . . . .		388-398
Scope of, and principle involved in, Title B—Errors in constructive service—Power of the court to adjudicate upon, . . . . .		388
Section 388, continued—Collateral validity of judgments on construc- tive service—Protection they afford plaintiff, . . . . .		389
Non-resident—Divorce against, on constructive service—Principle involved, . . . . .		390
Non-resident—Divorce against, on constructive service, effect of, on children and property, . . . . .		391
Non-resident—Insolvent's discharge against, on constructive service, . . . . .		392
Non-resident—Personal judgment against, on constructive service, what is, or is not—Leading cases considered, . . . . .		393
Non-resident—Personal judgment against, in particular proceedings— Attachment proceedings — Guardianship proceedings — Personal judgment, valid, . . . . .		394

CHAPTER IX. Part II. Title B—Continued.	Section.
Non-resident—Revivor against, . . . . .	395
Non-resident—Right, title or interest of in property, adjudicated upon constructive service—Quieting title, . . . . .	396
Resident—Divorce against, on constructive service—Partition against, . . . . .	397
Resident—Proceeded against as a non-resident, upon constructive service, . . . . .	398
Title C.— <i>In rem</i> , or <i>quasi in rem</i> , . . . . .	399-416
Principle involved in, and effect of, proceedings <i>in rem</i> or <i>quasi in rem</i> —Definition, . . . . .	399
<i>In rem</i> —Is notice necessary—Custom of London, . . . . .	400
Administrator or guardian, appointed without notice—Notice of appointment having been made, omitted, . . . . .	401
Administrator, claim allowed against, without notice, . . . . .	402
Administrator, distribution by, without notice, . . . . .	403
Administrator's or guardian's final discharge without notice, . . . . .	404
Administrator's or guardian's petition to sell land, allowed without notice—Sales not void—Administrator's second sale, . . . . .	405
Section 405, continued—Sales void, . . . . .	406
Administrator, removed without notice, . . . . .	407
Adoption of child without notice to parent, . . . . .	408
Attachment proceedings without notice, . . . . .	409
Bankruptcy and insolvency proceedings without notice, . . . . .	410
Condemning or assessing for public purpose without notice, . . . . .	411
Infants, proceedings against, without notice, . . . . .	412
Insanity inquest, held without notice, . . . . .	413
Pauper, removed without notice—Perishable goods, sold without notice—Slave, . . . . .	414
Widow's rights, set-off without notice, . . . . .	415
Will, probated without notice—Setting aside, . . . . .	416
Title D.—Substituted service, effect of, . . . . .	417-419
Scope of, and principle involved in, Title D, . . . . .	417
Foreign corporations, . . . . .	418
Partner or joint debtor, . . . . .	419
Title E.—Unauthorized proceedings, . . . . .	420-435
Scope of, and principle involved in, Title E, . . . . .	420
Sub-title I.—Consent of plaintiff, wanting, . . . . .	421-423
Sub-title II.—Consent of defendant, wanting, . . . . .	424-435
Sub-title I.—Consent of plaintiff wanting, . . . . .	421-423
Civil proceedings—Not void, . . . . .	421
Civil proceedings—Void, . . . . .	422
Criminal, or <i>quasi</i> criminal proceedings—Consent of state, wanting, . . . . .	423
Sub-title II.—Consent of defendant, wanting, . . . . .	424-435
Division A.—Consent appearing in record, insufficient in law, . . . . .	424-427
Division B.—Person appearing or consenting for defendant, unauthorized in law, . . . . .	428-429
Division C.—Person appearing or consenting for defendant, unauthorized in fact, . . . . .	430-432
Division D.—Fraud, collusion and duress—Appearance or service made by, or lawful service prevented by, . . . . .	433-435

<b>CHAPTER IX. Part II. Title E. Sub-title II—Continued.</b>	<b>Section.</b>
Division A.—Consent appearing in record, insufficient in law, . . . . .	424-427
Power of attorney, defective, . . . . .	424
Waiver of service or consent to judgment, defective, . . . . .	425
Waiver of service indorsed on complaint, . . . . .	426
Waiver of service indorsed on summons, . . . . .	427
Division B.—Person appearing or consenting for defendant, unauthorized in law, . . . . .	428-429
Corporation officer—Garnishee—Infant, by attorney—Infant, by guardian, . . . . .	428
Partner, confessing for firm, . . . . .	429
Division C.—Person appearing or consenting for defendant, unauthorized in fact.—(See Title I, sections 451-463, <i>infra</i> ), . . . . .	430-432
Agent or attorney, unauthorized—Non-resident defendant, . . . . .	430
Joint defendant or maker, . . . . .	431
Foreign and other state, . . . . .	432
Division D.—Fraud, collusion and duress—Appearance or service made by, or lawful service prevented by, . . . . .	433-435
Arbitration, . . . . .	433
Divorce—Drunk, . . . . .	434
Privileged person—Decoyed into state—Extradited or fraudulently held—Foreign consul—General privilege, . . . . .	435
Title F.—Mode of service, wrong, . . . . .	436-445
Copy of process, not certified—"Each defendant"—Indorsed with amount—Offered, but not read, . . . . .	436
Copy of process, omitted, . . . . .	437
Copy of process, mailing, omitted, or wrong, . . . . .	438
Manner of making personal service—"Executed"—"Served"—"Summoned," . . . . .	439
Personal service out of state, instead of publication, . . . . .	440
Posting of notice instead of publication—Posting, defective, . . . . .	441
Publication instead of personal service—Publication instead of posting—Publication without personal service—Publication without posting, . . . . .	442
Reading instead of copy, . . . . .	443
Substituted service by copy, instead of personal, . . . . .	444
Summons instead of warrant, . . . . .	445
Title G.—Paper in which publication is made, unlawful—German—Order for publication varied from—Sunday, . . . . .	446
Title H.—Person making service improper, . . . . .	447-450
Principle involved in title H— <i>De facto</i> officer—Special illustrations, . . . . .	447
Deputy—None in fact, . . . . .	448
Deputy—Return in name of—Plaintiff serves his own writ—Private person, serving, . . . . .	449
Special constable, . . . . .	450
Title I.—Person served or not served, or person accepting service—Errors, concerning, (See sections 430-432, <i>supra</i> .) . . . . .	451-461
Acceptance of service by agent or attorney, . . . . .	451

# TABLE OF CONTENTS.

xxiii

## CHAPTER IX. Part II. Title I—Continued.

Section.

"Agent"—"Known agent"—"Managing agent"—"Station agent,"	452
Agent of foreign corporation—Agency adjudicated,	453
Attorney in fact,	454
Corporation officer, wrong one served,	455
Creditors, not all served,	456
"Designated person,"	457
Father, mother or guardian, defective service, upon,	458
Father, mother or guardian, failure to serve—(Near relatives),	459
Guardian served, but minor not served,	460
Plaintiff, service made on, for defendant,	461
Title J.—Place of service or acceptance of service—Errors as to,	462-467
"Abode"—("Last and Usual"—"Usual"),	462
County—District,	463
"Most public places"—(Office instead of residence—Store instead of house),	464
Omission to state place of service in the return,	465
State, acceptance of service outside of,	466
State, service made on president of corporation, outside of,	467
Title K.—Proof of service in domestic court, false in fact,	468-482
Scope of, and principle involved in, title K—Inferior courts, generally—Superior courts, generally—(Receiver of partnership),	468
Attachment proceedings,	469
Bankruptcy, insolvency and poor debtors' proceedings—Concealed debtor,	470
Confession,	471
Copy of process served, contradicted by return,	472
Criminal proceedings,	473
Eluding service—Identity of defendant,	474
Infants—Married women,	475
Non-resident contradicting return,	476
Place, residence or location, contradiction of record, concerning,	477
Probate proceedings,	478
Publication, contradicting,	479
Recital contradicts return,	480
Replevin— <i>Scire facias</i> ,	481
Time of event or service—Attaching creditors—Service too short—Sunday,	482
Title L.—Proof of service in foreign or other state court, false in fact,	483
Foreign judgments—Other state judgments,	483
Title M.—Proof of service, insufficient in law,	484-487
Affidavit proving publication, bad in form or substance—Verification,	484
Person making proof of service, improper—Age, color and sex—	
"Clerk"—"Editor"—"Foreman"—"Printer"—"Proprietor"—	
"Publisher,"	485
Recital showing service, defective—Absence—Ambiguous—Dates, blank—"Foregoing defendants"—General recital of "due notice"—Want of service shown by recital,	486



CHAPTER IX. Part II. Title M—Continued.	Section
Return showing service, defective—Attachment return failing to show ownership—Delivery to defendant—Member of family—Name omitted from copy—Signature of officer, wanting—Too late, . . .	487
Title N.—Time of making service, improper, . . . . .	488-493
Inferior courts—Constructive service, too short, . . . . .	488
Inferior courts—Personal service, too short, . . . . .	489
Superior courts—Constructive service, too short, . . . . .	490
Superior courts—Personal service, too short, . . . . .	491
Time of service, wrong, indefinite, too late, or on Sunday, . . . .	492
Comments on sections 488 to 492, . . . . .	493
Title O.—Service wanting in proceedings not <i>in rem</i> , . . . . .	494-498
Principle involved in Title O—Absent person—Appeal bond—	
Contempt—Crime, . . . . .	494
Cross-complaint—Want of service upon, . . . . .	495
Garnishment—Gravel road, . . . . .	496
Heirship—Highway vacated—Lien declared—Lost note or record, .	497
Partition—Prisoner of war—Revivor—Sheriff—Vacating and reinstating, . . . . .	498
Title P.—Service wanting in proceedings where it is dispensed with by statute, . . . . .	499-500
Appeal bond—Bail bonds—Corporate contributor—Cost bond—Delivery or forthcoming bond—Replevin bond—Stayer of execution, .	499
Surety in judgment, . . . . .	500

CHAPTER X.

JURISDICTION EXERCISED BY VIRTUE OF A LAW REPEALED BY IMPLICATION.

Principle involved in Chapter X, . . . . .	501
Bankruptcy statutes—Confession, . . . . .	502
Confiscation statute repealed by treaty, . . . . .	503
Court exercising jurisdiction, abolished, . . . . .	504
Crime—Jurisdiction over, transferred to another court by implication, .	505
Crime—Law creating, repealed by implication, . . . . .	506
Liquor license—Right to, repealed by implication, . . . . .	507
Ordinance repealing statute by implication, . . . . .	508
Probate license to mortgage land issued from wrong court—Probate license to sell land, . . . . .	509
Procedure under statute repealed by implication, . . . . .	510
Punishment by virtue of a statute repealed by implication, . . . . .	511
<i>Quo warranto</i> , . . . . .	512
Removal of cause from State to United States court by virtue of a statute repealed by implication, . . . . .	513

## CHAPTER XI.

JURISDICTION EXERCISED OVER THE SUBJECT-MATTER  
WITHOUT COLOR OF AUTHORITY.

	Section.
SCOPE OF, AND PRINCIPLE INVOLVED IN, CHAPTER XI, . . . . .	514
PART I.—EXECUTIVE OR LEGISLATIVE FUNCTIONS, OR THE FUNCTIONS OF ANOTHER GOVERNMENT, USURPED, . . . . .	515
PART II.—RELIEF DEMANDED EXCEEDS THE POSSIBLE POWER OF THE COURT IN ANY CASE, . . . . .	516-520
PART III.—SUBJECT-MATTER OUTSIDE OF LIMITS OF STATE, . . . . .	521-523
PART IV.—SUBJECT-MATTER WITHIN THE STATE BUT NOT WITHIN THE COUNTY OR DISTRICT—ADMINISTRATOR'S OR- DER TO SELL OR MORTGAGE—MOTION IN WRONG COUNTY, . . . . .	524
PART V.—STATUTE CONFERRING JURISDICTION, DIRECTLY RE- PEALED—ADMINISTRATOR'S ORDER TO SELL LAND —BANKRUPTCY—CONFESSION—CONVICTION—POOR DEBTOR, . . . . .	525
Part I and section 515.—Executive or legislative functions, or the func- tions of another government, usurped, . . . . .	515
Part II.—Relief demanded exceeds the possible power of the court in any case, . . . . .	516-520
Amount too large, . . . . .	516
Amount too small, . . . . .	517
Civil proceedings, generally—Accounting—Bastardy—Foreign At- tachment—Legacy—Married Woman—Naturalization—Setting aside judgments—Tax assessments—Title to land—Validity of rate, . . . . .	518
Criminal proceedings, . . . . .	519
Comments on sections 518 and 519, . . . . .	520
Part III.—Subject-matter outside of limits of State, . . . . .	521-523
Administrator's order to sell land—Divorce, grounds of—Lien—Par- tition—Receiver—Will, . . . . .	521
<i>De facto</i> possession of foreign state, . . . . .	522
Crime committed outside of state, . . . . .	523
Part IV and section 524.—Subject-matter within the State but not within the county or district—Administrator's order to sell or mortgage— Motion in wrong county, . . . . .	524
Part V and section 525.—Statute conferring jurisdiction, directly repealed —Administrator's order to sell land—Bankruptcy—Confession— Conviction—Poor debtors, . . . . .	525

## CHAPTER XII.

**JURISDICTION TAKEN OVER THE SUBJECT-MATTER BY REASON OF A MISTAKE OF FACT, OR THE RIGHT TO CONTRADICT THE RECORD ON THAT POINT.**

	Section.
Scope of, and principle involved in, Chapter XII—Commissioners exercising judicial powers—Justices and other inferior courts—Other state judgment, . . . . .	526
Administrator, appointment of, under a mistake of fact—(Assets—Debts—General illegality of appointment—Necessity of appointment—Prior appointment by another court—Temporary administrator—Will, but administrator appointed)—Bond of administrator—Final settlement—Order—Petition to sell—Resignation—Suit on bond, . . . . .	527
Administrator's sale to pay barred claims—(Sales, but no debts—Sale, description of land), . . . . .	528
Administrator's sale, not necessary, . . . . .	529
Administrator's sale—(Title to land adjudicated—Widow's claim), . . . .	530
Amounts and values—(Bankrupt's discharge—Distribution—Justice's judgment—Gravel roads—Guardian's petition—Larceny—Newly discovered evidence—Payments wrongfully credited—Rental value—Replevin—Streets—Tax assessments—Widow's right to whole estate—Wife—Will, probate of), . . . . .	531
Attachment and garnishment—Bankruptcy and insolvency—Bond for appeal, . . . . .	532
Collusion—(Agent—Attorney—Divorce—Garnishee—Guardian—Insolvent—Public officer), . . . . .	533
Condition of property—(Abandoned—Built—Deserted—Foreign or Domestic—Indivisibility—Occupied—Platted lands—Possession—Public or private property), . . . . .	534
Section 534 continued . . . . .	535
Consideration wanting—Constable appointed, . . . . .	536
Contempt proceedings, . . . . .	537
Contract made—Contract upon condition, . . . . .	538
Crime—Bum boat case—Same crime—Simony—Contrary cases, . . . .	539
Dates and times—Contradicting record, concerning—Day wrong, . . . .	540
Section 540, continued—Hour wrong, . . . . .	541
Section 540, continued—Term or vacation, . . . . .	542
Default, set aside—Defense made—Dismissal on merits—Distribution of funds—Ditch—Division of damages, . . . . .	543
Divorce—Election—Equity, . . . . .	544
Exemptions, generally—Exemption of homestead, . . . . .	545
Exemption from taxation, . . . . .	546
Exempt wages, . . . . .	547
Expense of street improvement—Ferry—Filing of answer—Forfeiture, . .	548
Forged claim—Forged entries—(Attorney—Clerk's entries—Justice's entries—Subsequent alterations), . . . . .	549

## CHAPTER XII—Continued.

Section.

Fraud in domestic judgments—Principle involved—(Divorce Insurance— Naturalization—Negligence—Partition—Sheriff's deed), . . . . .	550
Fraud in administrator's appointment or final settlement, . . . . .	551
Fraud in administrator's order to sell land, . . . . .	552
Fraud in administrator's or guardian's purchase at his own sale, . . . . .	553
Fraud in bankruptcy, insolvency and poor debtors' proceedings, . . . . .	554
Fraud in criminal acquittal, . . . . .	555
Fraud in justice's conduct, . . . . .	556
Fraud in <i>lis pendens</i> agreement—Partition—Petitioners—Trustee, . . . . .	557
Fraud in foreign and other state judgments—Will, . . . . .	558
Gambling debt—Highway, . . . . .	559
Identity of causes—Injunction violated, . . . . .	560
Insolvent's discharge, . . . . .	561
Judge, errors of fact, concerning—Jury impaneled, . . . . .	562
Levy—License to sell liquor—Limitation or lapse of time, . . . . .	563
<i>Lis pendens</i> agreement— <i>Mandamus</i> —"Manifest injury to service," . . . . .	564
Maps, plans and surveys, . . . . .	565
Maturity of claim, . . . . .	566
Naturalization, . . . . .	567
Newly discovered evidence—Non-suit—Ordinance, . . . . .	568
Payment before suit or judgment—(Allowance—Award—Foreclosure— Note—Street assessment—Tail xen—Tax judgment in Minnesota), . . . . .	569
Perjury, . . . . .	570
Place of occurrence of event in civil causes, . . . . .	571
Place of occurrence of event in criminal causes, . . . . .	572
Place of existence of thing—(Assets of decedent, none in state), . . . . .	573
Place of existence of thing—Court, place of holding, . . . . .	574
Place of existence of thing—Highway, location of, . . . . .	575
Place of existence of thing—Land or sea, . . . . .	576
Place of existence of thing—Railroad, location of, . . . . .	577
Place of existence of thing—Spring, location of—Taxable property, loca- tion of, . . . . .	578
Preemption—Priority, . . . . .	579
Revivor—"Settled as per agreement filed," . . . . .	580
Specific performance—Splitting causes of action, . . . . .	581
Tax judgments, . . . . .	582
Title to land before justice of the peace—Title to land before superior court—Quieting title—Replevin, . . . . .	583
Tort or contract—Unfounded—Unconscionable—Unlawful preference— Unreasonable—Usury, . . . . .	584
Wills—Codicils—Forged Wills—Revocation, . . . . .	585
Comments on sections 526 to 585, . . . . .	586

## CHAPTER XIII.

JURISDICTION TAKEN OVER THE PARTY OR PERSON (AFTER  
DUE APPEARANCE OR SERVICE) BY REASON OF A  
MISTAKE OF LAW OR FACT.

	Section.
Scope of, and principle involved in, Chapter XIII, . . . . .	587
Administrator, guardian, etc.—Appointed, recognized or removed by a mistake of law fact—Officer <i>de facto</i> , . . . . .	588
Section 588, continued—Appointment of administrator, etc., irregular— Appointment omitted—Usurper—Natural guardian acting, . . . . .	589
Section 588, continued—Appointment of wrong person, . . . . .	590
Section 588, continued— <i>De facto</i> officer—Contrary cases, . . . . .	591
Section 588, continued—Notice of application to remove, wanting—Prac- tice and procedure in appointing, and in suits by and against—Mis- joinder—Non-joinder—Plaintiff in petitions to sell land, quiet title, etc. —Administrator sued in wrong court, . . . . .	592
Section 588, continued—Successor appointed without removing the in- cumbent—Guardians, . . . . .	593
Age of criminal, . . . . .	594
Age of soldier, . . . . .	595
Age of ward, . . . . .	596
Alien enemy—Bankrupt trader, . . . . .	597
Capacity of party, dual—Administrator, . . . . .	598
Capacity of party misdescribed or not described, . . . . .	599
Consent of father to enlistment of son—Consent of husband—Consent to use of property—Contractor of prison labor, . . . . .	600
Corporation organized, . . . . .	601
Dead person treated as living—Principle involved, . . . . .	602
Death of party before suit brought, proceedings not void, . . . . .	603
Death of party before suit brought, proceedings void—Corporation de- funct—Service incomplete, . . . . .	604
Death of defendant pending suit for land, . . . . .	605
Death of defendant pending suit for damages, . . . . .	606
Death of plaintiff pending suit, . . . . .	607
Death wrongfully assumed, or administrator of living person, . . . . .	608
Section 608, continued, proceedings not void, . . . . .	609
Section 608, continued, proceedings void, . . . . .	610
Distributees, errors concerning their rights—Distributees in criminal proceedings—Fees of surveyor—Female imprisoned, . . . . .	611
Heirs, errors concerning their rights, . . . . .	612
Husband, exempt from wife's debt—Indian, exempt, . . . . .	613
Infant defendants, . . . . .	614
Infant plaintiffs, disabilities removed, . . . . .	615
Insane persons, . . . . .	616
Landlord and tenant—Legal estate, . . . . .	617
Legatees, . . . . .	618
Married woman, coverture erroneously adjudicated not to exist, . . . . .	619
Married woman, coverture not shown by the record, . . . . .	620
Married woman, coverture shown by the record, but disregarded—(Surety- ship—Will), . . . . .	621

# TABLE OF CONTENTS.

xxix

<b>CHAPTER XIII—Continued.</b>	<b>Section.</b>
Married woman, disabilities removed, . . . . .	622
Married woman, liability of, not shown by the record—Married woman as plaintiff, . . . . .	623
Minister of the gospel—Orphan, . . . . .	624
Owner or occupant of land—Owner of personalty, . . . . .	625
Ownership of cause of action, or plaintiff or petitioner, improper—Legal owner of cause of action, . . . . .	626
Section 626, continued—Official plaintiff, wrong—Bastardy proceedings— Criminal proceedings—Overseer of highway—Tax proceedings, . . . . .	627
Section 626, continued—Partition plaintiff, wrong, . . . . .	628
Section 626, continued—Petitioners in special proceedings, improper or too few in fact, . . . . .	629
Section 626, continued—Petitioners in special proceedings, improper or too few as shown by the record, . . . . .	630
Partitioners, errors concerning, . . . . .	631
Poor persons, errors concerning, . . . . .	632
Privies in contract, errors concerning, . . . . .	633
Residence in attachment and garnishment proceedings, . . . . .	634
Residence in bankruptcy, insolvency and <i>capias</i> proceedings, . . . . .	635
Residence in criminal proceedings, . . . . .	636
Residence of decedent or ward—Principle involved, . . . . .	637
Residence of decedent or ward in Alabama, California and Colorado, . . . . .	638
Residence of decedent or ward in Connecticut and Georgia, . . . . .	639
Residence of decedent or ward in Illinois and Indiana, . . . . .	640
Residence of decedent or ward in Kentucky and Louisiana, . . . . .	641
Residence of decedent or ward in Maine, Maryland, Massachusetts, Mis- sissippi and Missouri, . . . . .	642
Residence of decedent or ward in New York, . . . . .	643
Residence of decedent or ward in North Carolina, Oregon and Rhode Island, . . . . .	644
Residence of decedent or ward in Tennessee and Texas, . . . . .	645
Residence of decedent or ward in Vermont, Virginia and Wisconsin, . . . . .	646
Residence of decedent or ward in United States courts and in England, . . . . .	647
Residence in divorce—Principle involved, . . . . .	648
Resident of a state procuring a divorce in another state, by default, upon constructive service, validity of, in state of residence, . . . . .	649
Resident of a state procuring a divorce in another state, by default, upon constructive service, validity of, in state where procured, . . . . .	650
Resident of a state procuring a divorce in another state after a contest, . . . . .	651
Residence in general civil proceedings in inferior courts—Judgments not void, . . . . .	652
Residence in general civil proceedings in inferior courts—Judgments void, . . . . .	653
Residence in general civil proceedings in superior courts, . . . . .	654
Residence in tax proceedings—Principle involved, and cases, . . . . .	655
Residence in United States courts, . . . . .	656
Revivor in name of wrong plaintiff—Servant or laborer—Slave or white man, . . . . .	657
Soldier or civilian, . . . . .	658
Widows, errors concerning, . . . . .	659

## CHAPTER XIV.

JURISDICTION LOST BY REASON OF A MISTAKE OF  
LAW OR FACT.

	Section.
SCOPE OF, AND PRINCIPLE INVOLVED IN CHAPTER XIV—ADMIN- ISTRATOR'S SALE—ALTERATION BY JUSTICE—IRREGULARITIES ALPHABETICALLY ARRANGED, . . . . .	660
PART I.—PROCEDURE WRONG—LOSS OF JURISDICTION BY, . . . . .	661-719
PART II.—RELIEF GRANTED, ERRONEOUS, . . . . .	720-761
PART III.—FINAL ENTRY, INFORMAL OR UNCERTAIN, . . . . .	762-780
PART IV.—CONFIRMATION, . . . . .	781-791
Part I.—Procedure, wrong—Loss of jurisdiction by, . . . . .	661-719
Advisory officers to aid the court, failure to appoint, . . . . .	661
Advisory officers to aid the court, improper persons, or their action improper—Time improper—Rejection of report, . . . . .	662
Advisory officers to aid the court, number appointed or acting, wrong, . . . . .	663
Appraisement by administrators and guardians, . . . . .	664
Appraisement in attachment proceedings, . . . . .	665
Appraisement in poor debtors' proceedings—Sheriff's and marshal's sales, . . . . .	666
Attorney for absent heirs, imprisoned defendant, non-resident creditors and unknown heirs—Not appointed, . . . . .	667
Clerk or stranger acting instead of judge or court, and <i>vice versa</i> , . . . . .	668
Confession, offers to make, . . . . .	669
Consent decrees and judgments—Consent misinterpreted, . . . . .	670
Default omitted or wrongfully taken, . . . . .	671
Discontinuance in inferior court—Adjournment by consent, . . . . .	672
Discontinuance in inferior court—Adjournment, indefinite, . . . . .	673
Discontinuance in inferior court—Adjournment, too long, . . . . .	674
Discontinuance in inferior court—Adjournment, omitted or unauthor- ized, . . . . .	675
Discontinuance in inferior court—Judgment delayed—Consent to delay, . . . . .	676
Discontinuance in inferior court—Justice absent, . . . . .	677
Discontinuance in inferior court—Plaintiff absent, . . . . .	678
Discontinuance in inferior court—Plaintiff tardy, . . . . .	679
Discontinuance in inferior court—Process delayed—Viewers absent, . . . . .	680
Discontinuance in superior court—Delay in criminal case, . . . . .	681
Discontinuance in superior court—Delay in filing pleadings—Delay in rendering judgment, . . . . .	682
Discontinuance in superior court—Delay in publication—Delay in revivor—Irregular revivor, . . . . .	683
Discontinuance in superior court—Removal to another court, . . . . .	684
Discontinuance in superior court—Removal from state to United States court, . . . . .	685
Docket or record, irregular—Appearance of plaintiff before justice in Michigan, . . . . .	686
Docket or record, irregular—Continuance—Costs—Deposit—Index, . . . . .	687
Docket or record, irregular—Papers used instead of docket, . . . . .	688
Docket or record, irregular— <i>Placita</i> —Process—Seal, . . . . .	689

**CHAPTER XIV. Part I—Continued.**

Section.

Docket or record, irregular—Signature of judge or justice, irregular or omitted, . . . . .	690
Docket or record, irregular—Verdict, . . . . .	691
Docket or record, irregular—Wanting—Wrong record, or wrong kind of record, . . . . .	692
Evidence, conclusive but disregarded—Judgment disregarded, . . . . .	693
Evidence, conclusive because undisputed, but disregarded, . . . . .	694
Evidence, illegal—(Oral instead of written evidence—Question illegal), . . . . .	695
Evidence, insufficient, . . . . .	696
Evidence, none heard—(Power of attorney), . . . . .	697
Final judgment, proceedings afterwards, upon notice, . . . . .	698
Final judgment, proceedings afterwards, without notice, . . . . .	699
Final judgment, proceedings afterwards—Reversal—Second judgment—Second sentence, . . . . .	700
Final judgment, proceedings afterwards—Setting aside judgment by inferior courts, . . . . .	701
Findings, defective or omitted, . . . . .	702
Guardian <i>ad litem</i> , failure to appoint—Irregular appointment, . . . . .	703
Interlocutory decree, omitted—Inventory wanting, . . . . .	704
Jury, incompetent or irregular—(Oath irregular—Refused or not used—Waiver of jury,) . . . . .	705
Notice, not original, wanting—(Administrator's sales—Administrator's settlement—Application for judgment—Benefits and damages assessed to land), . . . . .	706
Notice, not original, wanting—Dismissal and reinstatement, . . . . .	707
Notice, not original, wanting—(Final decree, notice of—Motions—Receiver—Reversal—Stay of proceedings), . . . . .	708
Officer appointed to execute order, improper, . . . . .	709
Premature judgments—(Administrator's sale—Appeal—Attachment), . . . . .	710
Premature judgments—(Contempt and criminal proceedings), . . . . .	711
Premature judgments—(Drainage assessment—Highways—Insolvents—Partition), . . . . .	712
Premature judgments—(Poor debtors—Receiver appointed—Return day, or time for answering), . . . . .	713
Prisoner, or person injured, absent—(Continuance—Verdict), . . . . .	714
Prisoner not arraigned—(Not interrogated), . . . . .	715
Substitution of parties, wrong—(Defendant—Plaintiff), . . . . .	716
Venue, change of, wrongfully made or refused, . . . . .	717
Verdict, amended in criminal case—Verdict, defective—Verdict directed in criminal case—Sentence on original verdict after reversal, . . . . .	718
Withdrawal of petitioners, wrongfully refused, . . . . .	719
Part II.—Relief granted, erroneous, . . . . .	720-761
Scope of, and principle involved in, Part II, . . . . .	720
Title A.—Errors, generally, . . . . .	721-729
Title B.—Relief exceeds the power of the court in any case of that species, or is wrong in kind, . . . . .	730-738
Title C.—Relief exceeds possible power of the court, . . . . .	739-761



## CHAPTER XIV. Part II—Continued.

	Section.
Title A.—Errors, generally, . . . . .	721-729
Administration proceedings, errors in relief—(Appointment—Final settlement—Petition to sell land—Order to sell land—Appraisal—disregarded—Mortgage ordered on petition to sell—Time or place, wrong—Revoking letters), . . . . .	721
Affidavit in criminal case, error in construing—Allowances, . . . . .	722
Alternative or conditional judgments—Amendment—Annexing—Assessment, . . . . .	723
Award—Bankrupt's discharge—Composition—Condemnation—Corporation—Costs—Damages—Dismissal—Ditch—Equity—Examining, . . . . .	724
Finding or report, wrongly construed—Forfeiture—Garnished, . . . . .	725
Highway—Homestead—Infants—Injunction—Interest—Legatee—Liens—Logical—Mandamus—Married women—Partition—Poor debtor—Prize court—Receiver—Replevin, . . . . .	726
Supreme court—Sureties—Tax—Temperance—Title bond—Trust, . . . . .	727
Will, construed, . . . . .	728
Will, disregarded—Will probated—Will rejected—Writing construed—Other state, . . . . .	729
Title B.—Relief exceeds the power of the court in any case of that species, or is wrong in kind, . . . . .	730-738
Principle involved in Title B, . . . . .	730
Sub-title I.—Civil cases, . . . . .	731-735
Sub-title II.—Criminal cases, . . . . .	736-738
Sub-title I.—Civil cases, . . . . .	731-735
Appellate court grants relief beyond power of inferior court, . . . . .	731
Attachment and garnishment, excessive relief—(Personal judgment against garnishee—Time uncertain), . . . . .	732
Divorce and alimony—Excessive relief—Dower—Highway, . . . . .	733
Personal judgment or execution instead of order of sale, and <i>vice versa</i> , . . . . .	734
Redemption barred, wrongfully, . . . . .	735
Sub-title II.—Criminal cases, . . . . .	736-738
Appellate court inflicts punishment beyond power of inferior court, . . . . .	736
Place of imprisonment, wrong, . . . . .	737
Punishment excessive, or wrong in kind, . . . . .	738
Title C.—Relief exceeds possible power of the court. See sections 514-525, <i>supra</i> , . . . . .	739-761
Principle involved in Title C—Civil cases—Criminal cases—(Fine excessive—Imprisonment instead of fine), . . . . .	739
Relief exceeds possible power of the court, excess void in civil cases—(Condemnation—Costs—Interest on judgment—Note too large—Land and goods—Partition—Sale and seizure), . . . . .	740
Section 740, continued—(Stay of execution—Tax judgments), . . . . .	741
Relief exceeds possible power of court, excess void in criminal cases—(Indefinite imprisonment—Time uncertain), . . . . .	742
Section 742, continued—Punishment too severe, . . . . .	743
Relief joint as to all where some are not served—Damages at law, . . . . .	744
Section 744, continued—Equitable or special relief, . . . . .	745

# TABLE OF CONTENTS.

xxxiii

CHAPTER XIV. Part II. Title C—Continued.	Section.
Relief outside of issues—Principle involved, . . . . .	746
Relief outside of issues—Award, . . . . .	747
Relief outside of issues—Criminal proceedings, . . . . .	748
Relief outside of issues—(Defendants, matters between—Divorce), . . . . .	749
Relief outside of issues—Equity causes, . . . . .	750
Relief outside of issues—Highways, . . . . .	751
Relief outside of issues—Land not described, . . . . .	752
Relief outside of issues—Prayer, . . . . .	753
Relief outside of issues—Questions to witness, . . . . .	754
Relief outside of issues—Reasons given for judgment, not within issues, . . . . .	755
Relief outside of issues—(Replevin—Revivor), . . . . .	756
Relief partial, incomplete, irregular or too limited—(Annexation to city—Appeal—Common recovery—Foreclosure, too limited), . . . . .	757
Section 757, continued—(Infants—Joint instead of several—Land-owners not all named—Partition), . . . . .	758
Section 757, continued—Replevin, relief too limited, . . . . .	759
Section 757, continued—Criminal sentence not alternative, . . . . .	760
Section 757, continued—Criminal sentence too light, . . . . .	761
Part III.—Final entry, informal or uncertain, . . . . .	762–780
Title A.—Informal entries of inferior courts, . . . . .	762–765
Title B.—Informal entries of probate courts—(Order to mortgage land—Will probated), . . . . .	766
Title C.—Informal entries of superior courts, . . . . .	767–770
Title D.—Uncertain entry, . . . . .	771–780
Title A.—Informal entries of inferior courts, . . . . .	762–765
Confessions—(Witnessing confession), . . . . .	762
Contempt entries—Costs, . . . . .	763
Criminal case, . . . . .	764
General informalities—Interlineations—Verdict—Want of formal judgment—Witnessing stay of execution, . . . . .	765
Title B and section 766.—Informal entries of probate courts—(Order to mortgage land—Will probated), . . . . .	766
Title C.—Informal entries in superior courts, . . . . .	767–770
Abbreviations—Attachment—Clerk or court—Contempt, . . . . .	767
Costs—Criminal case—Dismissal—Foreclosure decree, . . . . .	768
General informalities—Insolvency, . . . . .	769
Personal judgment—Settled, . . . . .	770
Title D.—Uncertain entry, . . . . .	771–780
Amount in blank, . . . . .	771
Amount in figures without dollar marks—(Tax judgments in figures, only), . . . . .	772
Amount of justice's judgment, uncertain—(Penalty—Reference to complaint for amount), . . . . .	773
Description of land by reference to map, paper, plan or survey, . . . . .	774
Description of land by reference to person named or described as owner, . . . . .	775
Description of land aided by extrinsic evidence, or true meaning obvious, . . . . .	776

<b>CHAPTER XIV. Part III. Title D—Continued.</b>	<b>Section—</b>
Description of land to be sold left to discretion of officer, . . . . .	777
Description of land as a “half,” or “part,” or omitted—(Width of highway), . . . . .	778
Person against whom judgment is rendered, uncertain, . . . . .	779
Person for whom judgment is rendered, uncertain—Names, . . . . .	780
<b>Part IV.—Confirmation, . . . . .</b>	<b>781-791</b>
Principle involved in Part IV, . . . . .	781
<b>Title A.—Effect of confirmation on errors made in or before the final judgment or order to sell, . . . . .</b>	<b>782-784</b>
<b>Title B.—Effect of confirmation on errors made after the final judgment or order to sell, . . . . .</b>	<b>785-789</b>
<b>Title C.—Necessity of confirmation—Confirmation, how shown—Confirmation wanting, . . . . .</b>	<b>790-791</b>
<b>Title A.—Effect of confirmation on errors made in or before the final judgment or order to sell, . . . . .</b>	<b>782-784</b>
General irregularities—(Legacy used by administrator—Limitation—Tax purchaser), . . . . .	782
Original notice, defective of wanting, . . . . .	783
Petition or order, wanting—Petition or order defective in description of land, . . . . .	784
<b>Title B.—Effect of confirmation on errors made after the final judgment or order to sell, . . . . .</b>	<b>785-789</b>
Administrators, one not acting—Deed irregular, . . . . .	785
Execution, irregular, . . . . .	786
Notice of sale, defective or wanting, . . . . .	787
Sale, errors in—(Administrator’s sale, public or private—Purchase price—Purchaser’s name), . . . . .	788
Second order to sell—Time of creditor’s election, . . . . .	789
<b>Title C.—Necessity of confirmation—Confirmation, how shown—Confirmation wanting, . . . . .</b>	<b>790-791</b>
Principle involved in Title C, . . . . .	790
Confirmation, how shown—What makes, . . . . .	791

## CHAPTER XV.

### STATUTES DECLARING THE EFFECT OF JUDICIAL PROCEEDINGS—COLLATERAL EFFECT OF, CONSIDERED.

<b>PART I.—PRINCIPLE INVOLVED IN CHAPTER XV—“JURISDICTION”—“VOID,” . . . . .</b>	<b>§ 792</b>
<b>PART II.—ADMINISTRATORS’ AND GUARDIANS’ PROCEEDINGS TO SELL LAND, . . . . .</b>	<b>793-798</b>
<b>Part I.—Principle involved in Chapter XV—“Jurisdiction”—“Void,” . . . . .</b>	<b>792</b>
<b>Part II.—Administrators’ and guardians’ proceedings to sell land, . . . . .</b>	<b>793-798</b>
Administrator’s appointment, wrongful, . . . . .	793
Bond, defective or wanting, . . . . .	794
“Court of competent jurisdiction,” . . . . .	795
“Made to appear,” . . . . .	796
Oath, defective or wanting, . . . . .	797
Petition, defective or wanting, . . . . .	798

## CHAPTER XVI.

### JUDICIAL ACTION.

	Section.
Principle involved in Chapter XVI, . . . . .	799
Action, what is or is not judicial—(Annexation to city—Appeal—Attachment writ—Auditing public accounts—Bail—Dismissal of an appeal—Fees and costs—Infant's disabilities removed—Replevin bond—Warrant for arrest), . . . . .	800
Officer's, when action of, is judicial—(Boards of commissioners—City council), . . . . .	801
Section 801, continued—(Clerk's entries for want of answer—Pennsylvania vacation entries), . . . . .	802
Section 801, continued—(Clerk's vacation entries—Replevin bail), . . . . .	803
Section 801, continued—(Fence viewers—Justice of the peace—Police board—School trustees—Selectmen—Surveyor—Tax assessors), . . . . .	804

## CHAPTER XVII.

### PRESUMPTIONS.

SCOPE OF, AND PRINCIPLE INVOLVED IN, CHAPTER XVII, . . . . .	§ 805
PART I.—INFERIOR DOMESTIC COURTS, . . . . .	806-810
PART II.—INFERIOR AND SUPERIOR COURTS, DISTINCTION BETWEEN, . . . . .	811-829
PART III.—SUPERIOR DOMESTIC COURTS, . . . . .	830-844
PART IV.—FOREIGN AND OTHER STATE COURTS, . . . . .	845-847
Part I.—Inferior domestic courts, . . . . .	806-810
Principle involved in Part I—Jurisdiction shown, . . . . .	806
Principle involved in Part I—Jurisdiction not shown, . . . . .	807
Adjournments—Appearance not shown—Attachment bond—Emergency, . . . . .	808
Highways, . . . . .	809
Interest of magistrate—Location of property—Personal judgment on publication—Place of holding court—Quorum of justices—Time of rendering judgment, . . . . .	810
Part II.—Inferior and superior courts, distinction between, . . . . .	811-829
Principle involved in Part II, . . . . .	811
County commissioners—County courts—Court-martial, . . . . .	812
Justices of the peace—Presumptions against, . . . . .	813
Justices of the peace—Presumptions in favor of, . . . . .	814
Probate courts in Alabama—(Appointment of administrator—Necessity for sale), . . . . .	815
Probate courts in Arkansas and California, . . . . .	816
Probate courts in Connecticut and Georgia, . . . . .	817
Probate courts in Idaho, Illinois, Indiana and Iowa, . . . . .	818
Probate courts in Kansas and Kentucky, . . . . .	819
Probate courts in Louisiana and Maine, . . . . .	820
Probate courts in Maryland, Massachusetts, Michigan and Minnesota, . . . . .	821
Probate courts in Mississippi—(Lapse of time), . . . . .	822

## CHAPTER XVII. Part II—Continued.

	Section.
Probate courts in Missouri—(Lapse of time), . . . . .	823
Probate courts in New York, Ohio and Tennessee, . . . . .	824
Probate courts in Texas—(Appointment of administrator—Adminis- trator removed), . . . . .	825
Probate courts in Vermont—(Lapse of time)—Virginia, . . . . .	826
Probate courts in Wisconsin—(Administrator removed), . . . . .	827
Quarter-sessions court in Tennessee, . . . . .	828
United States courts and vice-chancellor's court in New York, . . . . .	829
Part III.—Superior domestic courts, . . . . .	830-844
General proceedings—Presumption as to service when record is silent —(Ambiguous—Amendment—Appearance—Non-resident—Partition —Setting aside judgment—Unknown heirs), . . . . .	830
Service presumed conclusively when record is silent—(Infants—Insan- ity inquest—United States courts), . . . . .	831
Service appearing to be insufficient—(Presumption as to further), . . . . .	832
Subject-matter, silence of record concerning—(Order to sell), . . . . .	833
Special proceedings—(Presumptions concerning—Principle involved), . . . . .	834
Section 834, continued—(Constructive service, affidavit of non-residence not appearing in record—Date of filing—Proof of publication, defect- ive, presumptions as to other proof—Too short), . . . . .	835
Section 834, continued—(Constructive service, bond omitted—Mailing notice), . . . . .	836
Administrator's proceeding in equity to sell land—Admiralty proceed- ings, . . . . .	837
Attachment and garnishment proceedings, . . . . .	838
Bankruptcy proceedings—Condemnation proceedings—Confession— Confiscation—County warrants, . . . . .	839
Divorce proceedings, . . . . .	840
Guardianship proceedings—Highway proceedings—Infants—Insanity inquest . . . . .	841
Judge in chambers, . . . . .	842
Receivership—Summary proceedings—Supplementary proceedings, . . . . .	843
Tax foreclosure proceedings, . . . . .	844
Part IV.—Foreign and other state courts, . . . . .	845-847
Inferior courts—Superior courts, . . . . .	845
Person—Jurisdiction of court of another state, over, . . . . .	846
Subject-matter—Jurisdiction of court of another state, over, . . . . .	847

## CHAPTER XVIII.

## FOREIGN JUDGMENTS.

Principle involved in Chapter XVIII, . . . . .	848
Errors of law or fact in foreign judgments—The old cases, . . . . .	849
Errors of law or fact in foreign judgments—The new doctrine, . . . . .	850
Foreign divorces, . . . . .	851

## CHAPTER XIX.

## JUDICIAL OFFICERS, LIABILITY OF.

Principle involved in Chapter XIX—Judges of superior courts, . . . . .	852
--	-----

## TABLE OF CONTENTS.

xxxvii

### CHAPTER XIX—Continued.

	Section.
Judges of inferior courts—Liability of—(Construction of statute—Criminal responsibility—Practice erroneous—Service by private person—Unconstitutional law), . . . . .	853
Justice <i>de facto</i> —Liability of, . . . . .	854

## CHAPTER XX.

### PLEADING, PRACTICE AND EVIDENCE.

PART I.—PLEADING, . . . . .	§ 855
PART II.—PRACTICE AND EVIDENCE, . . . . .	856-859
Part I.—Pleading, . . . . .	855
Pleading in collateral actions—(Answer—Foreign and other state judgments—Special judge), . . . . .	855
Part II.—Practice and evidence, . . . . .	856-859
Proof of judgments of inferior courts—(Competency of extrinsic evidence—Restraining), . . . . .	856
Proof of judgments of superior courts—Pennsylvania confessions, . . . . .	857
Amendments and <i>nunc pro tunc</i> entries, . . . . .	858
Equitable aid and extrinsic evidence, competency of—Service—Service overturned by parol, . . . . .	859

## CHAPTER XXI.

### ESTOPPEL AGAINST CONTESTING VOID PROCEEDING.

Principle involved in Chapter XXI, . . . . .	860
Appeal from, and trial on merits, . . . . .	861
Attachment — Attorney—Costs—Estoppel against estoppel, . . . . .	862
Garnishee—Guardian—Injunction—Judge, . . . . .	863
Ratification, . . . . .	864
Replevin, . . . . .	865
Set-off—Stay of execution, . . . . .	866
Trustee—Unconstitutional law—Usury, . . . . .	867



## TABLE OF CASES CITED.

	Page		Page
Abbot v. Renaud, 64 N. H. 89....	800	Ah Sam, Ex parte, 83 Cal. 620....	765
Abbott v. Coburn, 28 Vt. 663....	685	Ah You, Ex parte, 82 Cal. 339....	515
v. Curran, 98 N. Y. 665.....	764	Ah You, In re, 88 Cal. 99 .....	224
v. Dutton, 44 Vt. 546.....	436	Aiken v. Richardson, 15 Vt. 500....	256
Abdil v. Abdil, 33 Ind. 460... 215,	889	Ailet v. Watless, Style 246.....	652
Abell v. Cross, 17 Iowa, 171.....	316	Ainge v. Corby, 70 Mo. 257.....	564
Abernathy v. O'Reilly, 90 Ala. 495	263	Alau v. Everett, 7 Hawaiian 82....	189
Abouloff v. Oppenheimer, L. R. 10		Albany and West Stockbridge R.	
Q. B. Div. 295. ....	587	R. Co. v. Canaan, 16 Barb. 244..	275
Ackerly v. Parkinson, 3 M. & S.		Alden v. Bogart, 2 Grant 400....	570
411 .....	336	Alderson v. Bell, 9 Cal. 315.....	431
Acklen v. Goodman, 77 Ala. 521....	879	v. Marshall, 7 Mont. 288.....	319
Ackley v. Dygert, 33 Barb. 176....	270	v. Newell, 67 Ga. 572.....	502
v. Tinker, 26 Kan. 485.....	749	Aldrich v. Kinney, 4 Conn. 380..	438
Acock, In re, 84 Cal. 50.....	285	v. Maitland, 4 Mich. 205.....	819
Acorn, The, 2 Abb. 434.....	596, 892	Alexander v. Alexander, 70 Ala.	
Adams, Ex parte, 25 Miss. 883....	824	212 .....	632
v. Adams, 154 Mass. 290.....	692	v. Card, 3 R. I. 145.....	291
v. Cowles, 95 Mo. 501.....	896	v. Gill, 30 N. E. R. 525 .....	220
v. Harrington, 114 Ind. 66... 85,	258	v. Hardin, 54 Ark. 480.....	620
v. Kellogg, 63 Mich. 105.....	279	v. Maverick, 18 Tex. 179.....	301
v. Larrimore, 51 Mo. 130.....	400	v. Pointer, 16 S. W. R. 264.....	620
v. Logan, 27 Gratt. 201. ....	566	Alexandria v. Fairfax, 95 U. S.	
v. Morrison, 4 N. H. 166.....	847	774 .....	462
v. Preston, 22 How. 473.....	775	Alford v. State 6 S. R. 857.....	529
v. Saratoga and Washington R.		v. Jacobson, 46 Wis. 574.....	226
R. Co., 10 N. Y. 328.....	471	v. State, 25 Fla. 852.....	...
v. Terrell, 4 Fed. R. 796.....	154	Allan v. Hoffman, 83 Va. 129....	639
v. Thomas, 44 Ark. 267.....	267	Allec v. Reece, 39 Fed. R. 341....	914
v. Whitcomb, 46 Vt. 708.....	648	Allen, Ex parte, 12 Nev. 87.....	560
v. Worden, 6 Lower Canada 237.	486	v. Blunt, 1 Blatchford 480.....	888
Addison on Torts, § 890.....	911	v. Brown, 4 Met. (Ky.) 342....	242
Aderhold v. Bluthenthal, — Ala.—		v. Carpenter, 15 Mich. 25	
(10 S. R. 230).....	663	239, 313,	870
Adkins v. Brewer, 3 Cow. 206		v. Corlew, 10 Kan. 70.....	832
236, 281,	303	v. Dicken, 63 Miss. 91.....	452
Ætna Life Ins. Co. v. McCormick,		v. Dundas, 3 T. R. 125.....	571, 644
20 Wis. 265.....	767	v. Gilliland, 74 Tenn. 521.....	483
Agan v. Shannon, 103 Mo. 661... 835,	850	v. Godfrey, 44 N. Y. 433.....	46
Agricultural Association v. Mad-		v. Gray, 11 Conn. 95.....	286
ison, 77 Tenn. (9 Lea) 407....	236	v. Hall, 8 Vt. 34 .....	308
Agricultural Ins. Co. v. Barnard,		v. Huntington, 2 Aiken 249. .306,	664
96 N. Y. 525.....	76	v. Jones, 1 Ind. App. 63.....	596
Agry v. Betts, 12 Me. 415.....	481	v. Kellam, 69 Ala. 442.....	622
Ah Bau, Ex parte, 10 Nev. 264....	747	v. McCabe, 93 Mo. 138.....	903
Ahern v. Fink, 64 Md. 161.....	661	v. Maclellan, 12 Pa. St. 328....	901
Ah Jow, In re, 29 Fed. R. 181....	109	v. Martin, 10 Wend. 300.... 471,	472
Ah Lee, In re, 5 Fed. R. 899....	36	v. Mills, 26 Mich. 123.....	334, 814
Ah Men, Ex parte, 77 Cal. 198		v. Morgan, Tappan 200.....	525
287, 310,	456	v. Norton, 6 Or. 344.....	900



	Page		Page
Allen v. Ray, 96 Mo. 542.....	607	Andrews v. State, 34 Tenn. 549...	768
v. Shannon, 74 Ind. 164.....	831	Angell v. Robbins, 4 R. I. 493... 72,	153
v. State, 54 Ind. 461.....	759	Ann, The, 8 Fed. R. 923.....	158
v. United States, Taney 112....	395	Anonymous, 1 Salk. 396.....	58
v. Utica, etc., Co., 15 Hun 80...	594	Ansonia Brass and Copper Co. v.	
v. Von Rosenberg, 16 S. W. R.		New Lamp Chimney Co., 64	
1096 .....	171	Barb. 435; 53 N. Y. 123.....	422
Allens v. Andrews, Cro. Eliz. 283.	542	Anthony v. Kasey, 83 Va. 338....	298
Allie v. Schmitz, 17 Wis. 169.....	805	Antrim's Case, 5 Phila. 278.....	703
Allis v. Billings, 6 Metc. 415.....	852	Apel v. Kelsey, 47 Ark. 413... 402,	716
Allison v. Chapman, 19 F. R. 488.	576	v. Kelsey, 52 Ark. 341.....	847
v. Taylor, 6 Dana 87.....	465	App v. Dreisbach, 2 Rawle 287...	545
v. Thomas, 72 Cal. 562.....	923	Appeal of Second N. B'k, 85 Pa.	
Allman v. Taylor, 101 Ill. 185....	173	St. 528; 96 id. 460.....	565
Allsmiller v. Freutchenicht, 86 Ky.		Applegate v. Edwards, 45 Ind. 329	
198 .....	415	180, 721	
Allyn v. Allyn, 108 Ind. 327.....	755	v. Lexington and Carter County	
Alston v. Emmerson, 18 S. W.		Mining Co., 117 U. S. 255....	896
R. 566.....	413	Appleton v. Lepper, 20 C. P. (U.	
Altemus, Matter of, 32 La. Ann.		C.) 138.....	303
364.....	620, 680	Archenbrowne, Re, 11 N. B. R. 149.	408
Alter v. Pickett, 24 La. Ann. 513.	698	Argo v. Barthand, 80 Ind. 63	
Alzheimer v. Davis, 37 Ark. 316...	567	668, 748, 869	
Ambler v. Leach, 15 W. Va. 677...	353	Arland, Suc. of, 42 La. Ann. 320...	778
American Flask and Cap Co. v.		Armfield v. Moore, Busb. L. 157 ..	633
Son, 7 Robt. 233.....	409	Armroyd v. William, 2 Wash. C.	
American Loan, etc., Co. v. E. &		Ct. 508.....	395
W. R. Co., 40 Fed. R. 182.....	131	Armstrong v. Cavitt, 78 Ind. 476..	180
Ames v. Slater, 27 Minn. 70....	742	v. Grant, 7 Kan. 285.....	502
Amidon, In re, 40 Mich. 628.....	799	v. Harshaw, 1 Dev. L. 187.....	388
Ammidon v. Smith, 1 Wheat. 447.	576	v. Middlestadt, 22 Neb. 7:1... 313,	450
Amory v. Amory, 3 Biss. 266		Arndt v. Griggs, 134 U. S. 316....	391
553, 566		Arnett v. Bailey, 60 Ala. 435... 270,	497
Amyx v. Smith, 1 Met. (Ky.) 529.	930	Arnold v. Arnold, 62 Ga. 627 ....	600
Amsbaugh v. Exch. Bk, 33 Kan.		v. Booth, 14 Wis. 180.....	99
100 .....	486	v. Mower, 49 Me. 561.....	545
Anderson v. Anderson, 8 O. 109..	586	v. Shields, 5 Dana 18.....	101
v. Binford, 61 Tenn. 310.....	512	Arnott v. Webb, 1 Dill. 362.....	487
v. Claman, 123 Ind. 471.....	44	Arras, Ex parte, 78 Cal. 304 .....	792
v. Coburn, 27 Wis. 558.....	312	Arrowsmith v. Gleason, 129 U. S.	
v. Comrs., 12 O. St. 635 .... 90,	666	86 .....	278
v. Endicutt, 101 Ind. 539 .....	208	v. Harmoning, 42 O. St. 254... 278,	281
v. Goff, 72 Cal. 65.....	329	Arthur v. Green, 3 Met. (Ky.) 67.	126
v. Gray, 134 Ill. 550.....	725	Asbury v. Odell, 83 Mo. 264.....	800
v. Haddon, 33 Hun 435 .....	510	Ashcroft v. Bourne, 3 B. & Ad. 684.	554
v. Hawhe, 115 Ill. 33.....	436	Asher v. Texas, 128 U. S. 129....	107
v. Kimbrough, 45 Tenn. 260....	819	Ashford v. Watkins, 70 Ala. 156...	133
v. Rider, 46 Cal. 134.....	814	Ashley v. Laird, 14 Ind. 222.....	921
v. Spence, 72 Ind. 315.....	889	Ashuelot Bank v. Pearson, 14 Gray	
v. State, 24 Tex. App. 705.....	286	521 .....	525
v. Wilson, 100 Ind. 402.....	217	Atcheson v. Smith, 3 B. Mon. 502	
Anderson County v. Houston, etc.,		8, 278, 718	
R. R. Co., 52 Tex. 228.....	566	Atchison v. Rosalip, 3 Pinney	
Andrew Jackson, Ex p., 45 Ark. 158.	103	288 .....	507
Andrews v. Andrews, 54 Tenn.		Atchison, Topeka and Santa Fé	
234 .....	652	R. Co. v. Rice, 36 Kan. 593... 42	
v. Ivory, 14 Gratt. 229 .... 73,	686	Atkins v. Atkins, 9 Neb. 191.....	315
v. Beck, 23 Tex. 455.....	54	v. Hinman, 7 Ill. 437.....	829
v. Bernhardt, 87 Ill. 365.....	483	v. Kinnan, 20 Wend. 241 ... 548,	611
v. Board of Sup., 70 Ill. 65.....	160	Atkinson v. Foxworth, 53 Miss.	
v. Goff, 21 Atl. R. 347.....	92	741.....	8, 279
v. Linton, 2 Ld. Raym. 884....	63	Attorney-General v. Continental	
v. Powell, 27 Ind. 303.....	497	Life Ins. Co., 53 How. Pr. 16.	128

	Page		Page
Attorney-General v. Lord Hotham, 1 T. & R. 209.....	555	Baldwin v. Kimmel, 1 Robt. 109 478, 657	
Atwood v. Frost, 51 Mich. 360.....	787	v. McArthur, 17 Barb. 414.....	58
Aucker v. McCoy, 56 Cal. 524.....	219	v. Merrill, 44 Me. 55.....	335
Austin v. Allen, 6 Wis. 134.....	338	v. Morgan, 50 Cal. 585.....	342
v. Austin, 50 Me. 74.....	882	Ball v. Ball, 15 La. 173.....	624
v. Charlestown, 8 Metc. 196 668, 756, 796		v. Collins, — Tex. — (5 S. W. R. 622).....	843
v. Lamar Ins. Co., 108 Mass. 338.....	354	v. State, 48 Ark. 94.....	285
v. Vrooman, 128 N. Y. 229.....	201	v. Trenholm, 45 Fed. R. 588.....	733
Avery v. Atkins, 74 Ind. 283.....	651	v. United States, 140 U. S. 118.....	53
v. Babcock, 35 Ill. 175.....	828	Ballard v. Thomas, 19 Gratt. 14.....	47, 867
Axman v. Dueker, 45 Kan. 179.....	309	Ballinger v. Tarbell, 16 Iowa 491.....	499
Ayers v. Harshman, 66 Ind. 291.....	889	Ballow v. Hudson, 13 Gratt. 672.....	743
Ayres, In re, 123 U. S. 443.....	108	Baltimore and Ohio R. R. Co. v. North, 103 Ind. 486.....	156, 918
v. Lawrence, 63 Barb. 454.....	665	Baltzell v. Nosler, 1 Iowa 588.....	438
Babb v. Bruere, 23 Mo. App. 604.....	72, 652	Bangs v. Duckinfield, 18 N. Y. 592, 668 v. Selden, 13 How. Pr. 374.....	763, 902
Babb v. Carver, 7 Wis. 124.....	338	Banister v. Higginson, 15 Me. 73.....	709
Babbitt v. Doe, 4 Ind. 355.....	493	Bank of Australasia v. Nias, 16 Ad. & El. (N. S.) 717, 419, 588, 908	
Babcock v. Cobb, 11 Minn. 347.....	854	Bank of Commonwealth v. May- or, 43 N. Y. 184.....	102
v. Wolf, 70 Iowa 676.....	53	Bank of Hamilton v. Dudley's Lessee, 2 Peters 492.....	533
Back v. Crussell, 2 Abb. Pr. 386.....	504	Bank of Lansingburg v. McKie, 7 How. Pr. 360.....	672
Bacon v. Chase, 50 N. W. R. 23 403, 429		Bank of Northern Liberties v. Munford, 3 Grant 232.....	434
Bacon's Abr., vol. 4, p. 46.....	539	Bank of Tenn. v. Patterson, 8 Humph. 363.....	592
Bacon's Abr., vol. 8, p. 691.....	914	Bank of U. S. v. Cockran, 9 Dana 395.....	413
Bagnall v. Ableman, 4 Wis. 163.....	532	Bank of Wooster v. Stevens, 1 O. St. 233.....	609
Bagott v. Mullen, 32 Ind. 332.....	438	Bank v. Partee, 99 U. S. 325.....	661
Bailey v. Beadles, 7 Bush. 383.....	242	Banks v. Johnson, 12 N. H. 445.....	563
v. Buell, 59 Barb. 158.....	699	v. Walker, 3 Barb. Ch. 438.....	596
v. Dilworth, 10 Sm. & M. 407.....	830	Bannon v. People, 1 Ill. App. 496.....	216
v. Martin, 119 Ind. 103.....	904	Banta v. Reynolds, 3 B. Mon. 80.....	852
v. McCain, 92 Ill. 277.....	710	v. Wood, 32 Iowa 469.....	311, 385
v. McGinniss, 57 Mo. 362.....	767	Barbee v. Perkins, 23 La. Ann. 331.....	708
v. Ross, 68 Ga. 735.....	546	Barber, In re, 39 Fed. R. 641.....	103
v. Scott, 13 Wis. 618.....	887	Barber v. Chandler, 17 Pa. St. 48.....	708
v. Wiggins, 5 Harr. (Del.) 462.....	913	v. Graves, 18 Vt. 290.....	433
Bain, Ex parte, 121 U. S. 1.....	119	v. Morris, 37 Minn. 194, 312, 407, 892 v. Smith, 41 Mich. 138.....	347
Baird v. Campbell, 4 W. & S. 191.....	470	Barclay v. Kinsey, 72 Ga. 725 278, 497, 881	
Balzer v. Lasch, 28 Wis. 268.....	810, 871	Barclift v. Freece, 77 Ala. 528.....	675, 879
Baker, In re, 2 H. & N. 219.....	561	Bardsley v. Hines, 33 Iowa 157.....	328
Baker, In re, 56 Vt. 14.....	286	Bardwell v. Collins, 44 Minn. 97.....	367
v. Barber, 16 Ill. App. 621.....	562	Barger v. Jackson, 9 O. 163.....	797
v. Brintnall, 52 Barb. 188.....	737	Bargis v. State, 4 Ind. 126.....	303
v. De Zavalla, Tex. Unreported Cases, 621.....	842	Barhyte v. Shepherd, 35 N. Y. 238 569, 867	
v. Everhart, 65 Cal. 27.....	239	Barkeloo v. Randall, 4 Blackf. 476.....	281
v. Holmes, 27 Me. 153.....	333, 474	Barker v. Hovey, Kan. 26 Pac. R. 585.....	589
v. Moffat, 7 Cush. 259.....	475	Barkman v. Hopkins, 11 Ark. 157.....	505
v. Palmer, 83 Ill. 568.....	908	Barnard v. Barnard, 119 Ill. 92.....	407
v. Runnels, 12 Me. 235.....	710		
v. State, 69 Wis. 32.....	50		
v. Stonebraker, 34 Mo. 172.....	439		
v. Thompson, 75 Ga. 164.....	306		
v. Wambaugh, 99 Ind. 312.....	50		
Balcom, In re, 12 Neb. 316.....	779		
Baldwin, Ex parte, 60 Cal. 432.....	795		
Baldwin v. Buford, 4 Yerg. 16.....	544		
v. Carleton, 11 Rob. (La.) 109.....	402		
v. Freydenhall, 10 Ill. App. 106.....	594		
v. Hale, 1 Wall. 223.....	384		
v. Hamilton, 3 Wis. 747.....	210, 287		

	Page		Page
Barnard v. Bryant, 21 Me. 206....	48	Beard v. Federy, 3 Wall. 478.....	662
v. Flanders, 12 Vt. 657.....	562	v. Roth, 35 Fed. R. 397.....	640
v. Haworth, 9 Ind. 103.....	837	Bearns v. Gould, 77 N. Y. 455....	884
Barnes v. Badger, 41 Barb. 98....	728	Beattie v. Wilkinson, 36 Fed. R.	
v. Chicago, etc., Ry., 122 U. S. 1.	831	646 .....	659
v. Harris, 4 N. Y. 374.....	78	Beatty, Ex parte, 12 Wend. 229...	159
v. Moore, 2 N. B. R. 573.....	408	Beaupre v. Keefe, 48 N. W. R. 596.	446
Barnett, Ex parte, 51 Ark. 215....	117	Beauregard v. City of New Or-	
v. Bull, 81 Ky. 127.....	168	leans, 18 How. 497.....	402
v. Juday, 38 Ind. 86.....	424	Becker, Matter of, 28 Hun. 207....	756
v. Reed, 51 Pa. St. 190.....	596, 597	Beckett v. Selover, 7 Cal. 215....	676
v. Wolf, 70 Ill. 76.....	875, 897	v. Sheriff, 21 Fed. R. 32.....	143
Barney v. DeKraft, 6 D. C. 361....	383	Becquet v. MacCarthy, 2 B. & Ad.	
v. Patterson, 6 Har. & J. 821....	909	951 .....	419
v. White, 46 Mo. 137.....	418	Bedard, In re, 106 Mo. 616 .....	771
Barnhart v. Davis, 30 Kan. 520....	770	Beddinger v. Smith, 13 S. W. R.	
Barnum v. Kennedy, 21 Kan. 181....	708	734 .....	891
Barr v. Gratz, 4 Wheaton 213....	922	Bedell v. Bailey, 58 N. H. 62.....	58
Barrett v. Carney, 33 Cal. 530....	878	Beebe v. Pyle, 1 Abb. N. Cas. 412.	549
v. Churchill, 18 B. Mon. 387....	715	v. Scheidt, 13 O. St. 406... 573, 760,	872
v. Crane, 16 Vt. 246.....	703	v. Steel, 2 Vt. 314.....	457
v. Garragan, 16 Iowa 47.....	819	Beech v. Rich, 13 Vt. 595.....	537
v. Oppenheimer, 59 Tenn. 298		Beemis v. Wylie, 19 Wis. 318....	815
	487, 494	Begein v. Brehm, 123 Ind. 160....	20
Barron v. Dent, 17 S. C. 75.....	495	Beguhl v. Swan, 39 Cal. 411.....	123
v. South Brooklyn Saw Mill Co.,		Beidler v. Friedler, 44 Ark. 411....	846
18 Abb. New Cases, 352.....	639	Beine, In re, 42 Fed. R. 545.....	108
Barthe v. Larquie, 42 La. Ann. 131.	557	Belcher v. Chambers, 53 Cal. 635.	479
Bartlett v. Cocke, 15 Tex. 471....	617	Bell v. Chapell, 2 Monroe 151....	764
v. Holmes, 12 Hun 398.....	385	v. Clark, 2 Met. (Ky.) 573.....	714
v. Russell, 41 Ga. 196.....	260	v. Green, 38 Ark. 78.....	716
v. Spicer, 75 N. Y. 528.....	385	v. Love, 72 Ga. 125.....	623
Barton, In re, 21 Pac. R. 998.....	765	v. McKinney, 63 Miss. 187.....	915
Barton v. Sanders, 16 Or. 51... 255,	319	v. Pierce, 48 Barb. 51.....	699
Bascom v. Smith, 31 N. Y. 595....	249	v. Pierce, 51 N. Y. 12.....	699
Basom v. Taylor, 39 Mich. 682....	126	v. State, 4 Gill 301.....	742
Bassett v. Bratton, 86 Ill. 152....	253	v. State, 44 Ala. 393.....	759
v. Crafts, 129 Mass. 513.... 399,	930	v. Tombigbee, 12 Miss. 549.....	509
v. Mitchell, 40 Kan. 549.....	476	v. Williams, 36 Tenn. 196.....	819
Basten v. Carew, 3 B. & C. 649....	88	Bellamy v. Guhl, 62 How. Pr. 460..	464
Batchelder v. Currier, 45 N. H. 460	529	Belleville Nail Co. v. People, 98	
v. Low, 43 Vt. 662 .....	408	Ill. 399.....	606
Bateman v. Miller, 118 Ind. 345....	721	Belmont v. Cornen, 82 N. Y. 256..	320
Bates v. Delavan, 5 Paige Ch. 299.	507	Benaway v. Bond, 2 Pinney 449....	740
v. Gage, 40 Cal. 183.....	45	Bender v. Askew, 3 Dev. L. 149 ..	565
v. McConnel, 32 Kan. 1.....	719	Benedict v. Smith, 48 Mich. 593..	408
v. Spooner, 45 Ind. 489.....	591	Benefield v. Albert, 132 Ill. 665 ..	776
v. Thompson, 2 D. Chip. 96....	58	Bennett v. Child, 19 Wis. 362.....	347
v. Williams, 43 Ill. 494.....	929	v. Couchman, 48 Barb. 73 .....	823
Battell v. Torrey, 65 N. Y. 294....	848	v. Denny, 33 Minn. 530.....	553
Battles v. Holley, 6 Me. 145.....	883	v. Fenton, 41 Fed. R. 283.....	391
Baxter v. New England Marine		v. Hamill, 2 Sch. & Lef. 566 ....	813
Ins. Co., 6 Mass. 277.....	395	v. His Creditors, 22 Cal. 38 ....	262
v. People, 8 Ill. 368.....	46	v. Owen, 13 Ark. 177.....	402
Bay v. Cook, 31 Ill. 336.....	779	Benningfield v. Reed, 8 B. Mon.	
Beach v. Atkinson, 87 Ga. 288 .. 525,	852	102 .....	327, 413
v. Beach, 6 Dak. 371.....	320	Benninghoof v. Finney, 22 Ind.	
v. Botsford, 1 Doug. 199.....	818	101 .....	459
Beal v. Harmon, 38 Mo. 435.....	273	Benson v. Carrier, 28 S. C. 119. 354,	499
Beale v. Walden, 11 Rob. 67.....	547	v. Cilley, 8 O. St. 604.....	403
Bean v. Chapman, 73 Ala. 140....	622	v. Rice, 2 Nott & McC. 577.....	571
Beard v. Beard, 21 Ind. 321.... 368,	385	Bentley v. Brown, 123 Ind. 552....	565
v. Cameron, 3 Murphy, 181.....	50	Benton v. Burgot, 10 S. & R. 240 .	586

	Page		Page
Bergman, Ex parte 26 Pac. R. 914.	537	Blackburn v. Bolan, 88 Mo. 80.	273
Berks v. Hendel, 11 Serg. & R.		v. State, 3 Head 689	37, 60
123	605	Blackham's Case, 1 Salkeld 290	24
Bernal v. Lynch, 36 Cal. 135	662	Blacklock v. Stewart, 2 Bay 363	811
Berney v. Drexel, 12 Fed. R.		Blackman v. Bauman, 22 Wis. 611	856
393	619	Blackmar v. Van Inwager, 5 How.	
Bernstein v. Hobelman, 70 Md.		Pr. 367	533
29	796	Blackmore v. Bank, 3 Ark. 309	69
Berrian v. Rogers, 43 Fed. R. 467	501	Blackwell v. Townsend, 16 S. W.	
Berry, Matter of, 7 Mich. 467	526	R. 587	265
v. King, 15 Or. 165	214	v. Willard, 65 N. C. 555	365
v. Makepeace, 3 Ind. 154	525, 796	Blaikie v. Griswold, 10 Wis. 293	865
v. Young, 15 Tex. 369	847	Blair, In re, 4 Wis. 522	108
Berryman v. Mullins, 8 B. Mon.		v. Cisneros, 10 Tex. 35	593
152	503	v. Cummings, 39 Cal. 667	928
Bersch v. Schneider, 27 Mo.		v. West Point, 7 Neb. 146	734
101	870	v. Wolf, 72 Iowa 246	336
Bessell v. Wilson, 1 E. & B. 489	188	Blaisdell v. Pray, 66 Me. 269	479
Betancourt v. Eberlin, 71 Ala.		Blake v. Douglass, 27 Ind. 416	755
461	229, 343, 388	Blakeley v. Calder, 15 N. Y. 617	665
Bethea v. M'Lennon, 1 Ired. L.		Blanchard v. Bissell, 11 O. St. 96	859
523	415	v. De Graff, 60 Mich. 107	857
Bethel v. Bethel, 6 Bush 65	848	v. Goss, 2 N. H. 491	917
Betts v. Bagley, 12 Pick. 572	76, 665	v. Webster, 62 N. H. 467	580
v. Baxter, 58 Miss. 329	767	v. Young, 11 Cush. 341	59, 749
v. Dimon, 3 Conn. 107	858	Bland v. Bowie, 53 Ala. 152	746
Bevard v. Hoffman, 18 Md. 479	913	v. Muncaster, 24 Miss. 62	759
Bevier v. Kahn, 111 Ind. 200	507	Blanton v. Carroll, 86 Va. 539	344
Bewley v. Graves, 17 Or. 274	869, 878	Bleidorn v. Pilot Mountain Coal	
Bibb, Ex parte, 44 Ala. 140	31	and Mining Co., 89 Tenn. 166	327
v. Bishop, 61 Ala. 326	241	Blight v. Banks, 6 T. B. Mon. 192	330
Bienvenu v. Parker, 30 La. Ann.		Blimm v. Com., 7 Bush 320	44
160	505	Blinn v. Chessman, 51 N. W. R.	
Bigalow v. Barre, 30 Mich. 1	549, 929	666	346
Bigelow, Ex parte, 113 U. S. 328	114	Bliss v. Heasty, 61 Ill. 338	373
v. Bigelow, 4 O. 138	632	Block v. Henderson, 82 Ga. 23	42
v. Stearns, 19 Johns. 39	453	Blodgett v. Hitt, 29 Wis. 169	404, 846
Bigelow on Estoppel (4th ed.), 221	23	v. Race, 18 Hun 132	291
Biggs v. Blue, 5 McLean, 148	501, 899	v. Schaffer, 94 Mo. 652	341
Bigham v. State, 59 Miss. 529	303	Blood v. Bates, 31 Vt. 147	46
Billard v. Erhart, 35 Kan. 616	780	v. Hayman, 13 Metc. 231	581
Billings v. Pickert, 1 N. Y. St.		Bloom v. Burdick, 1 Hill 130	
Rep'r 70	447	262, 280	836
Billings v. Russell, 23 Pa. St.		Bloomer v. Merrill, 1 Daly 485	726
189	277, 279, 280	Bloomfield R. R. Co. v. Burrese,	
Bimeler v. Dawson, 5 Ill. 536	418	82 Ind. 83	342, 889
Bion, In re, 59 Conn. 372	746	Bloom's Case, 53 Mich. 597	798
Bird v. Norquist, 46 Minn. 318	360	Blythe v. Richards, 10 Serg. &	
Birdsall v. Fuller, 11 Hun 204	62	Rawle 261	485
Birmingham v. Shaw, 10 Ad. & El.		Board of Comrs. v. Bradley, 53 Ind.	
N. S. 868	569	422	135
Bischoff v. Wethered, 9 Wall. 812	386	v. Fahlor, 114 Ind. 176	508
Bishop v. Freeman, 42 Mich. 533	525	v. Gregory, 42 Ind. 32	777
v. Hampton, 15 Ala. 761	273	v. Hall, 70 Ind. 469	77
Bissell, Matter of, 40 Mich. 63	556	v. Markle, 46 Ind. 96	665, 869
Bissell v. Brigga, 9 Mass. 462	486	Board of Comrs. v. Montgomery,	
v. Wheelock, 11 Cush. 277	904	106 Ind. 517	215
Bixby v. Smith, 3 Hun 60	316	v. State, 61 Ind. 75	527
Black v. Black, 4 Bradf. 174	487	Board of Public Works v. Colum-	
v. Blazo, 117 Mass. 17	408	bia College, 17 Wall. 521	386
v. Dressell's Heirs, 20 Kan. 153	175	Board of Supervisors v. Min-	
v. Ross, 37 Mo. App. 250	572	eral Point R. R. Co., 24 Wis.	
Black on Judgments	23, 612, 920	93	801, 806

	Page		Page
Board of Supervisors v. Budlong, 51 Barb. 493.....	415	Bowen, In re, 15 Jurist 1196 .....	153
Boatman v. Macy, 82 Ind. 490....	836	v. Bond, 80 Ill. 351.....	483, 546
Bobb v. Graham, 4 Mo. 222 .....	361	Bower v. Tallman, 5 W. & S. 556..	781
Bocock v. Cochran, 32 Hun 521 ..	294	Bowers v. Chaney, 21 Tex. 363....	234
Bodkin v. Merit, 102 Ind. 293....	780	Bowle v. Jones, 1 Gill 208 .....	605
Boeninghausen, Ex p., 91 Mo. 301..	99	Bowker v. Porter, 39 Me. 504.....	724
Bogan v. Hamilton, 90 Ala. 454....	904	Bowlby v. Thunder, 105 Pa. St. 173 .....	225
Bogardus v. Clark, 4 Paige 623....	418	Bowler v. Huston, 30 Gratt. 266....	439
Boker v. Chapline, 12 Iowa 204....	448	Bowman v. Kaufman, 30 La. Ann. 1021 .....	657
Boland, Ex p., 11 Tex. App. 159....	137	Bowne v. Mellor, 6 Hill 496.....	928
Bolgiano v. Cooke, 19 Md. 375....	78	Boyd, In re, 49 Fed. R. 48.....	605
Bolina, The, 1 Gallison, 75.....	396	v. Blankman, 29 Cal. 19.....	580, 775
Boller v. Mayor, etc., of New York, 40 N.Y. Super. 523.....	655, 725	v. Ellis, 18 S. W. R. 29.....	607
Bollinger v. Chouteau, 20 Mo. 89..	638	v. Gentry, 12 Heisk. 625 .....	248
Bollong v. Schuyler National Bank, 26 Neb. 281.....	930	v. Glass, 34 Ga. 253 .....	677
v. Smith, 79 Ala. 535.....	269	v. Olvey, 82 Ind. 294.....	20, 778
Bolton v. Brewster, 32 Barb. 389..	682	v. Roane, 49 Ark. 397.....	749, 891
v. Jacks, 6 Robt. 166.....	683	v. Swing, 38 Miss. 182.....	543
Bond, Ex parte, 9 S. C. 80.....	790	Boyer v. Berryman, 123 Ind. 451 654, 713	
v. Pacheco, 30 Cal. 530.....	810	v. Schofield, 2 Keyes 628.....	92
Bonesteel v. Bonesteel, 28 Wis. 245 .....	132	Boylan v. Whitney, 3 Ind. 140....	438
v. Todd, 9 Mich. 371.....	420	Boyles v. Boyles, 37 Iowa 592....	853
Bonham v. Weymouth, 39 Minn. 92 .....	337	Boynton v. Ball, 121 U. S. 457....	605
Bonnell v. Beighton, 5 T. R. 182..	276	v. Fly, 12 Me. 17.....	308
Bonner v. Tier, 3 Dev. L. 533....	345	v. Foster, 7 Metc. 415 .....	734
Bonsall v. Isett, 14 Iowa 309.....	452	v. State, 77 Ala. 29.....	66
Boody v. Emerson, 17 N. H. 577..	621	Brackenridge v. Dawson, 7 Ind. 383 .....	902
v. Watson, 64 N. H. 162.....	915	Bracket v. Eastman, 17 Wend. 32..	673
Book of Assize, 27 Edw. 3, pl. 18.	913	Braddee v. Brownfield, 4 Watts 474.	597
Boon v. Bowers, 30 Miss. 246....	280	Bradford v. Abend, 89 Ill. 78.....	442
Booth v. Ableman, 20 Wis. 602....	511	Bradish v. Grant, 119 Ill. 606....	608
v. Rees, 26 Ill. 45.....	229, 240, 244	Bradley v. Com., 31 Pa. St. 522....	280
Boothe v. Estes, 16 Ark. 104.....	244	v. Fisher, 13 Wall. 335.....	192, 913
Borden v. State, 11 Ark. 519.....	400	v. Fraser, 52 Iowa 289.....	697
Borders v. Murphy, 78 Ill. 81.....	388	v. Jamison, 46 Iowa 68.....	325, 896
Borland v. Kingsbury, 65 Mich. 59.	303	v. Love, 60 Tex. 472.....	178
Borland's Appeal, 66 Pa. St. 470..	565	Bradner, Matter of, 87 N. Y. 171..	528
Bornschein v. Finck, 13 Mo. App. 120 .....	696	Bradshaw v. Heath, 13 Wend. 407.	382
Borzeman v. Singer, 70 Ga. 685....	42	Bradstreet v. Neptune Ins. Co., 3 Sumner 600.....	398, 908
Bostic v. Love, 16 Cal. 69.....	215	Brady v. Taber, 29 Mich. 199....	726
Boston v. Murray, 94 Mo. 175....	174	Bragg v. Thompson, 19 S. C. 572..	638
v. Robbins, 126 Mass. 384.....	566	Brainard v. Fowler, 119 Mass. 262.	783
Boston, etc., R. R. Co. v. Sparhawk 1 Allen 448.....	594	Brainerd v. Austin, 17 Vt. 650....	526
Bostwick v. Atkins, 3 N. Y. 53....	581	Braly v. Seaman, 30 Cal. 610.....	318
v. Skinner, 80 Ill. 147... 342, 678,	875	Bramwell v. Penneck, 7 B. & C. 536 88, 131	
Boswell v. Otis, 9 How. 336.....	385	Brandon, Ex parte, 49 Ark. 143....	758
v. Sharp, 15 Ohio 447 .....	371, 389	Branham v. Mayor, 24 Cal. 585....	134
Botsford v. O'Conner, 57 Ill. 72 448, 801, 925		Branson v. Caruthers, 49 Cal. 374.	483
Botts v. Crenshaw, Chase 224....	365	Brantingham v. Brantingham, 12 N. J. Eq. 160.....	565
Bouchier's Case, 2 Strange 993....	254	Braswell v. Downs, 11 Fla. 62 ...	433
Bouldin v. Ewart, 63 Mo. 330....	40	Brawford v. Wolfe, 103 Mo. 391....	540
Bouler, Ex parte, 16 Mo. App. 14..	99	Brawley v. Ranney, 67 Mo. 280....	800
Bourigette v. Hubinger, 30 Ind. 296 .....	177	Bray v. McClury, 55 Mo. 128. 245,	407
Bowen, Ex parte, 25 Fla. 214.....	560	Breeze v. Doyle, 19 Cal. 101.....	755
		Brengle v. Richardson, 78 Va. 406.	566
		Bresee v. Stiles, 22 Wis. 120.....	401



# CASES CITED.

xlv

	Page		Page		
Brevoort v. Brooklyn, 89 N. Y.	128	276	Brown v. Compton, 8 T. R.	424	139
Brewer v. Boston, etc., R. R. Co.	113		v. Corbin, 40 Minn.	508	329
Mass. 52.....	589		v. Covenant Mutual Life Ins.		
v. State, 6 Lea 198.....	44		Co., 86 Mo. 51.....	408	
Brewster v. Ludekins, 19 Cal.	162		v. Davis, 59 Iowa 641.....	150	
228, 237, 355, 591			v. Eaton, 98 Ind. 591.....	486, 920	
Brickhouse v. Sutton, 99 N. C.	103	457	v. Fleming, 3 Ark. 284.....	54	
Brickley v. Heilbruner, 7 Ind.	488	696	v. Foster, 6 R. I. 564.....	475	
Bridge v. Ford, 4 Mass. 641..	870, 879		v. Goble, 97 Ind. 86.....	392	
Bridgeport Savings Bank v. El-			v. Guthrie, 39 Hun 29.....	244	
dredge, 28 Conn. 556.....	471		v. Hogle, 30 Ill. 119.....	234	
Bridges, Ex parte, 2 Woods 428..	524		v. Landon, 30 Hun 57.....	541	
v. Layman, 31 Ind. 384.....	838		v. Langlois, 70 Mo. 226.....	467	
v. Nicholson, 20 Ga. 90.....	774		v. Lanman, 1 Conn. 467.....	881	
Brien v. Hart, 26 Tenn. 131.....	885		v. Lawson, 51 Cal. 615.....	445	
Briggs v. Briggs, L. R., 5 Prob.			v. Neale, 3 Allen 74.....	356	
Div. 163.....	690		v. Nichols, 42 N. Y. 26.....	436	
v. Tye, 16 Kan. 285.....	499		v. O'Connell, 36 Conn. 432.....	35	
Brigham v. Fayerweather, 140			v. Rebb, 1 Rich. L. 374.....	408	
Mass. 411.....	22		v. Rice, 57 Me. 55.....	754	
Brimmer v. Boston, 102 Mass. 19..	813		v. Smith, 24 Barb. 419.....	698	
Brinkman v. Shaffer, 23 Kan. 528.	438		v. St. Paul, etc., 38 Minn. 506...	312	
Brisbane Oyster Fishery Co. v.			v. Tucker, 7 Colo. 30.....	388	
Emerson, Knox 80.....	386		v. Wadsworth, 15 Vt. 170.....	709	
Britain v. Cowen, 24 Tenn. 314....	782		v. Walker, 11 Mo. App. 226....	903	
Brittain, In matter of, 93 N. C. 587.	754		v. Watson, 19 Me. 452.....	870	
v. Kinnaid, 1 Br. & B. 432....	88, 559		v. Wheelock, 75 Tex. 385.....	861	
v. Mull, 99 N. C. 483.....	421, 654		v. Woody, 22 Mo. App. 253....	582	
Britton v. Larson, 23 Neb. 806....	317		Browne v. Hale, 127 Mass. 158....	252	
Broadhead v. McConnell, 3 Barb.			Brownfield v. Dyer, 7 Bush 505...	360	
175.....	231		Brubaker v. Jones, 23 Kan. 411		
Brokaw v. Board, 73 Ind. 543.....	603		541, 618, 846		
Brockenborough v. Melton, 55 Tex.			Bruce v. Cloutman, 45 N. H. 37..	467	
493.....	886		v. Keogh, 7 Cush. 536.....	314	
Brock v. Frank, 51 Ala. 85.....	543		v. Strickland, 47 Ala. 192.....	449	
Brodie v. Rutledge, 2 Bay 69....	912		Bruckman v. Taussig, 7 Colo.		
Bronzan v. Drobaz, Cal., 29 Pac.			561.....	919	
R. 254.....	590		Brumley v. State, 20 Ark. 77.....	44	
Brooke v. Filer, 35 Ind. 402.....	365		Brunner v. Downs, 17 N. Y. Supp.		
Brooklin v. State, 26 Tex. App.			633.....	913	
121.....	362		Brunner's Appeal, 47 Pa. St. 67....	657	
Brooklyn v. Insurance Co., 99 U.			Bryan v. Bauder, 23 Kan. 95.....	265	
S. 362.....	386		v. Kennett, 113 U. S. 179.....	775	
Brooks' Estate, 8 Pa. Co. C. 514 ...	249		v. Mundy, 14 Mo. 459.....	681	
Brooks v. Adams, 11 Pick. 441....	47		Bryant, In re, Deady 118.....	557	
v. Duckworth, 59 Mo. 49.....	681		v. Bank, 8 Pac. R. 644.....	507	
v. Mangan, 86 Mich. 576.....	914		v. Ballance, 66 Ill. 188.....	770	
v. Mayor, 10 N. Y. Supp. 773....	597		Buchanan v. Bilger, 64 Tex. 589..	4	
Brosemer v. Kelsey, 106 Ind. 504..	411		v. Mallalieu, 25 Neb. 201.....	629	
Broughton v. Bradley, 34 Ala. 694			v. Roy's Lessee, 2 O. St. 252. 215,	343	
543, 544			v. Thomason, 70 Ala. 401.....	632	
Brown, Ex parte, 63 Ala. 187.....	791		Buckingham v. Bailey, 12 Miss.		
Brown, Ex parte, 40 Fed. R. 81 ...	561		538.....	511	
Brown, In re, 4 Colo. 438.....	824		v. Hallett, 24 Ark. 519.....	842	
v. Board of Levee Commission-			Buckmaster v. Carlin, 4 Ill. 104..	100	
ers, 50 Miss. 468.....	367		v. Rider, 12 Ill. 207.....	604	
v. Brown, 50 N. H. 538.....	778		Buckner v. Archer, 1 McMull. 85.	385	
v. Cady, 19 Wend. 477.....	870		Budd v. Long, 13 Fla. 288.....	236	
v. Carroll, 16 R. I. 604.....	496, 913		Buehler v. Buffington, 43 Pa. St.		
v. Causey, 56 Tex. 340.....	408		278.....	222, 628	
v. Christie, 27 Tex. 73.....	847		Buell v. Cross, 4 O. St. 327.....	708	
v. Cocking, L. R., 3 Q. B. 672. 550,	611		v. Lockport, 11 Barb. 602....	551, 708	
v. Com., 4 Rawle 259.....	798		v. Lockport, 8 N. Y. 55.....	757	

	Page		Page
Buell v. Van Camp, 119 N. Y. 160.	230	Burton v. Miller, 14 Tex. 299	511
Buffalo v. Sup'rs, 48 N. Y. 93. 528,	698	Bush v. Geisey, 16 Or. 355	755
Buffum v. Ramsdell, 55 Me. 252	800	v. Hanson, 70 Ill. 480	749
Buford v. Hickman, Hemp. 232	888	v. Sheldon, 1 Day 170	580
Buice v. Lowman, 64 Ga. 769	810	Bushell's Case, Vaughn 135	195, 911
Bulger, Ex parte, 60 Cal. 438	798	Bussey v. Briggs, 2 Metc. 132	307
v. Rosa, 47 Hun 435	720	Bustard v. Gates, 4 Dana 429	413
Bulkley v. Andrews, 39 Conn.		Busteed v. Parsons, 54 Ala. 393	912
523	777	Butcher v. Bank, 2 Kan. 70	905
v. Stewart, 1 Day 130	575	Butler v. Mayor, 7 Hill 329	803
Buller v. Woods, 43 Mo. App. 494	416	v. Potter, 17 Johns. 145	795
Bulymore v. Cooper, 2 Lans. 71	239	v. Williams, 48 Ark. 227	45
v. Cooper, 46 N. Y. 236	251	v. Wilson, 10 Ark. 313	226
Bulow v. Buckner, Rich. Eq. 401	414	Butterfield's Appeal, 77 Pa. St. 197	659
v. Witte, 3 S. C. 318	414	Buttrick v. Allen, 8 Mass. 273	
Bumb v. Gard, 107 Ind. 575	649		486, 505, 907
Bump v. Betts, 19 Wend. 421	373	Byars v. Justin, 2 Tex. A. C. C. 688	509
Bumpass v. Webb, 4 Porter 65	778	Byers v. Fowler, 12 Ark. 218	467
Bumpus v. Fisher, 21 Tex. 561	777	Byram v. McDowell, 15 Lea 581	537
Bumstead v. Read, 31 Barb. 661	682	Byrd v. Clendenin, 11 Ark. 572	750
Bunbury v. Fuller, 9 Exch. 111	90	Cadmus v. Jackson, 52 Pa. St. 295	597
Bunce v. Bunce, 59 Iowa 533	278, 451	Cadwallader v. Evans, 1 Disney	
Bunn v. Gardiner, 18 Ill. App. 94	427	585	229, 846
v. Thomas, 2 Johns. 190	359	Cadwell v. Colgate, 7 Barb. 253	230
Bunnell v. Ranney, 2 Dem. 327	928	Cady v. Smith, 12 Neb. 628	347
Burcham v. Terry, 18 S. W. R. 458	607	Caffrey v. Dudgeon, 38 Ind. 512	525
Burchett v. Casady, 18 Iowa 342	727	Cahill v. Bassett, 66 Mich. 407	776
Burckle v. Eckart, 3 Denio 279	888	Cahoon v. Morgan, 38 Vt. 234	432
Burdett v. Silsbee, 15 Tex. 604	685	Cailleteau v. Ingouf, 14 La. Ann.	
v. State, 9 Tex. 43	605	623	616
Burford v. Rosenfield, 37 Tex. 42	772	Cain v. Goda, 84 Ind. 209	110
Burgess v. Cooper, 6 Haw'n 88	745	v. Rockwell, 132 Mass. 193	347
v. Kirby, 94 N. C. 575	755	Cairo v. Campbell, 116 Ill. 305	594
Burghardt v. Van Deusen, 4		Caldwell v. Walters, 18 Pa. St. 79	658
Allen 374	780	Calhoun v. Delhi & M. R. R. Co.,	
Burk, In re, 76 Wis. 357	50	64 How. Pr. 291	665, 666
v. Hill, 55 Ind. 419	657	Calkins v. Chamberlain, 15 N. Y.	
Burke v. Elliott, 4 Ired. Law 355	459	St. Rep'r 576	554
v. Mutch, 66 Ala. 568	880	v. Johnston, 20 O. St. 539	764
Burks v. Bennett, 62 Tex. 277	58	v. Packer, 21 Barb. 275	713
Burlen v. Shannon, 99 Mass. 200	20	Call v. Barker, 27 Me. 97	767
v. Shannon, 115 Mass. 438	380	v. Mitchell, 39 Me. 465	729
Burlington & M. R. Ry. Co. v.		Callan v. Wilson, 127 U. S. 540	120
Hall, 37 Iowa 620	552	Callicot, In re, 8 Blatchf. 89	516
Burnett, Ex parte, 30 Ala. 461	138	Calloway v. Byram, 95 Ind. 423	216
v. McClury, 92 Mo. 230	245	v. Nichols, 47 Tex. 327	850
v. Meadows, 7 B. Mon. 277	679	Camberford v. Hall, 3 McCord 345	852
Burnham v. City, 15 Wis. 193	208	Camden v. Mulford, 26 N. J. L. 49	665
v. Howe, 23 Me. 489	749	v. Plain, 91 Mo. 117	273, 849, 884
v. Stevens, 33 N. H. 247	709	Cameron v. Cameron, 15 Wis. 1	279
Burnley v. Duke, 2 Rob. 102. 624,	686	Camman v. Executor of Trapha-	
v. Stevenson, 24 O. St. 478	530	gen, 1 N. J. Eq. 230	710
Burns v. Van Loan, 29 La. Ann.		Camp v. Wood, 10 Watts 118	871
560	645	Campau v. Gillett, 1 Mich. 416. 138,	546
Burnside v. Brigham, 8 Metc. 75		Campbell v. Adams, 50 Cal. 203	342
252, 408		v. Chandler, 37 Tex. 32	45
Burr v. Seymour, 43 Minn. 401	925	v. Com., 96 Pa. St. 344	37, 66, 67
Burrell v. Chicago, M. & St. P.		v. Ewalt, 7 How. Pr. 399	285
Ry. Co., 43 Minn. 363	617, 841	v. Harmon, 43 Ill. 18	404
Burt v. Winona, 31 Minn. 472	33	v. Hays, 41 Miss. 561	447
Burton v. Burton, 45 Hun 68	142	v. Laclede Gas Co., 84 Mo. 352	
v. Burton, 58 Vt. 414	574		433, 465
v. McGregor, 4 Ind. 550	726	v. McCahan, 41 Ill. 45	313

	Page		Page
Cancemi v. People, 18 N. Y. 128..	759	Case v. Woolley, 6 Dana 17.....	898
Candy v. Hanmore, 76 Ind. 125..	23	Casey, Ex parte, 71 Cal. 269.....	300
Cannon v. Cooper, 39 Miss. 784..	604	Cash v. Tozer, 1 W. & S. 519.....	846
v. McDaniels, 46 Tex. 303.....	238	Caskey v. Greensburgh, 78 Ind. 233.	63
v. Seveno, 78 Me. 307.....	552	Cason v. Cason, 31 Miss. 578	
v. Wright, 23 Atl. R. 285.....	596		311, 329, 331
Cantelou v. Whitley, 85 Ala. 247..	402	Cassady v. Miller, 106 Ind. 69.....	918
Capper v. Sibley, 65 Iowa 754....	41	Cassel v. Scott, 17 Ind. 514.....	101
Capt v. Stubbs, 68 Tex. 222.....	581	Cassidy v. Leitch, 2 Abb. N. Cas.	
Carder v. Culbertson, 100 Mo. 269.	776		315..... 418
Cardesa v. Humes, 5 Serg. & R. 65.	604	v. Woodward, 77 Iowa 354.....	385
Carey v. Osgood, 18 Me. 152. 333,	486	Castellanos v. Jones, 5 N. Y. 164..	247
v. Reeves, 32 Kan. 718.....	319, 896	Castetter v. State, 112 Ind. 445...	901
v. Reeves, 46 Kan. 571.....	325	Castle v. Mathews, Hill & D. 438.	339
Carite v. Trotot, 105 U. S. 751....	762	Castleman v. Relfe, 50 Mo. 583	
Carleton v. Bickford, 13 Gray 591..	486		235, 237, 764
v. Carleton, 85 N. Y. 313.....	317	Castner v. Styer, 23 N. J. L. 236. 139,	485
v. People, 10 Mich. 250.....	51	Caswell v. Caswell, 28 Me. 232	
v. Washington, 35 N. H. 162....	385		11, 576, 583
Carli v. Rhener, 27 Minn. 292....	52	Caudle v. Sevmour, 1 Ad. & El.	
Carlin v. Taylor, 75 Tenn. 666....	427	(N. S.) 889.....	303
Carlisle v. Gunn, 68 Miss. 243....	236	Caughran v. Gilman, 72 Iowa 570.	539
Carlton v. State, 8 Blackf. 208....	837	Caujolle v. Ferrie, 13 Wall. 465....	19
Carnes v. Mitchell, 48 N. W. R. 941.	316	Cauldwell v. Curry, 93 Ind. 363	
Carolan v. Carolan, 47 Ark. 511....	365		713, 714, 869
Carothers v. Click, Morris 54... 246,	364	Caulfield v. Sullivan, 85 N. Y. 153.	609
Carpenter v. Cameron, 7 Watts.		Cauly v. Blue, 62 Ala. 77.....	297
51.....	782	Cavanaugh v. Smith, 84 Ind. 380..	441
v. Doe, 2 Ind. 465.....	222	Cave v. Mountain, 1 M. & G. 257.	285
v. Sherfy, 71 Ill. 427.....	828	Central Iowa Ry. Co. v. Piersol, 65	
v. Strange, 141 U. S. 87.....	530, 539	Iowa 498.....	729
v. Strother, 16 B. Mon. 289....	715	Central Law Journal, vol. 3, p. 169.	24
Carpentier v. Oakland, 30 Cal.		Central Trust Co. v. Seasingood,	
439.....	441	130 U. S. 482.....	780
Carr v. Anderson, 24 Miss. 188....	828	Chaffee v. Hooper, 54 Vt. 513....	810
v. Hunt, 14 Iowa 206.....	595	Chamberlain v. Blodgett, 96 Mo.	
v. Miner, 42 Ill. 179.....	578	482.....	346
v. Spannagel, 4 Mo. App. 284....	627	v. Faris, 1 Mo. 517.....	385
v. Townsend, 63 Pa. St. 202....	637	Chambers v. Bridge, 16 Kan. 270..	463
v. Van Hoesen, 26 Hun 316. 244,	245	v. Clearwater, 1 Keyes 310....	61, 62
Carratt v. Morley, 1 Ad. & El. 18.	697	v. Hodges, 23 Tex. 104.....	14, 58
Carrico v. Tarwater, 103 Ind. 86....	315	v. Jones, 72 Ill. 275.....	415, 714
Carroll v. Langan, 18 N. Y. Supp.		v. McKee, 1 Hill (S. C.) L. 229..	281
290.....	107	v. Patton, 1 Bailey 130.....	596
Carr v. Carr, 18 S. W. R. 453. 323,	502	v. Thomas, 3 A. K. Marsh. 536..	794
Carshore v. Huyck, 6 Barb. 583....	737	Chandler v. McKinney, 6 Mich.	
Carson v. Sheldon, 51 Mo. 436....	355	217.....	660
Carter v. Carringer, 11 Tenn. 411.	640	v. Nash, 5 Mich. 409.....	870
v. Clohecy, 100 Mass. 299.....	353	Chaney v. Bryan, 83 Tenn. 589...	690
v. Dow, 16 Wis. 298.....	285	Chapin v. Broder, 16 Cal. 403....	572
v. Roland, 53 Tex. 540.....	758	v. Thompson, 20 Cal. 681.....	238
v. Spencer, 7 Ired. 14.....	800	v. Waters, 110 Mass. 195.....	580
Caruthers v. Hartsfield, 3 Yerg.		Chaplin v. Holmes, 27 Ark. 414..	44
366.....	509	Chapman v. Brewer, 114 U. S. 158.	552
Carver v. Lewis, 104 Ind. 438....	775	v. Brooklyn, 40 N. Y. 372.....	411
Cary v. Dixon, 51 Miss. 593.....	661	v. Floyd, 68 Ga. 455.....	505
Case v. Bartholow, 21 Kan. 300....	345	v. Morgan, 2 G. Greene 374....	697
v. Hannahs, 2 Kan. 490.....	870	v. Phoenix N. B'k, 85 N. Y. 437	27
v. Humphrey, 6 Conn. 130.....	314	v. State, 5 Blackf. 111.....	46
v. Mitzenburg, 19 S. W. R. 40....	707	v. Swan, 65 Barb. 210.....	716
v. Plato, 54 Iowa 64.....	828	Chappee v. Thomas, 5 Mich. 53..	510
v. Ribelin, 1 J. J. Marsh. 29....	641	Chardavoyne v. Lynch, 82 Ala.	
v. State, 5 Ind. 1.....	35, 591	376.....	546



	Page		Page
Charles v. Davis, 62 N. H. 375....	609	Christy v. Vest, 36 Iowa 285.....	600
v. Morrow, 99 Mo. 638.....	325	Chunn v. Gray, 51 Tex. 112.....	487
v. Waugh, 35 Ill. 315.....	336	Church v. Holcomb, 45 Mich. 29.	537
Charless v. Marney, 1 Mo. 537....	355	Church on Habeas Corpus, § 367..	558
Chase v. Chase, 6 Gray 157.....	690	Churchill v. Grundy, 5 Dana 99	
v. Christianson, 41 Cal. 253..	72, 810		411, 662
v. Dana, 44 Ill. 262.....	428	Cicero v. Picken, 122 Ind. 260....	7
v. Flagg, 48 Me. 182.....	385	Cincinnati, etc., Ry. Co. v. Village	
v. Hathaway, 14 Mass. 222.....	415	of Bell C., 27 N. E. R. 464 ...	325
v. Kaynor, 78 Iowa 449.....	316	Cissell v. Pulaski, 3 McCrary 446.	453
v. Ross, 36 Wis. 267.....	544	Citizens' Bank v. Brooks, 23 Fed.	
Chaudet v. Stone, 4 Bush 210....	270	R. 21.....	439
Chauncey v. Wass, 35 Minn. 1....	597	Citizens' National Bank v. Shaw,	
Chavannes v. Priestly, 80 Iowa 316	369	46 Hun 589.....	720
Cheatham, Ex parte, 6 Ark. 531....	348	City of Boston v. Robbins, 126	
v. Brien, 3 Head 552.....	40	Mass. 384.....	566
v. Whitman, 86 Ky. 614.....	464	City of Camden v. Mulford, 26 N.	
Cheek v. Merchants' N. B'k, 9		J. L. 49.....	665
Heisk. 489.....	44	City of Fort Wayne v. Cody, 43	
v. Pugh, 19 Ark. 574.....	800	Ind. 197.....	14, 862
Cheely v. Clayton, 110 U. S. 701..	321	City of Logansport v. La Rose, 99	
Cheever v. Wilson, 9 Wall. 108....	692	Ind. 117.....	778
Cheney v. Harding, 21 Neb. 65		City of Ottumwa v. Schwab, 52	
	325, 370	Iowa 515.....	770
Chesnut v. Marsh, 12 Ill. 173....	827	City of Peru v. Bearss, 55 Ind.	
Chew v. Randolph, Walk. 1.....	388	576.....	812, 859
Chicago v. Franks, 55 Mo. 327....	866	City of Philadelphia v. Wetherby,	
Chicago & A. R. R. Co. v. Wig-		15 Phila. 403.....	383
gins' Ferry Co., 108 U. S. 18..	144	City Ins. Co. v. Commercial Bank,	
Chicago and Atlantic Ry. Co. v.		68 Ill. 348.....	531
Summers, 113 Ind. 10.....	57	Clafin v. Dunne, 129 Ill. 241....	639
Chicago and Atlantic Ry. Co. v.		Clague v. Hodgson, 16 Minn. 329.	869
Sutton, 30 N. E. R. 291.....	209	Clancy v. Stephens, 92 Ala. 577....	616
Chicago, Burlington and Q. R. R.		Clapp v. Beardsley, 1 Aiken 168..	887
Co. v. Chamberlain, 84 Ill. 333	869	v. Beardsley, 1 Vt. 151.....	686
Chicago Driving Park v. West, 35		v. Graves, 26 N. Y. 418....	364
Ill. App. 496.....	589	Clarion, etc., R. R. Co. v. Ham-	
Chicago Dock and Canal Co. v.		ilton, 127 Pa. St. 1.....	722
Kinzie, 93 Ill. 415.....	334	Clark, Matter of, 2 Ad. & El. N.	
Chicago and North-Western Ry.		S. 619.....	601
Co. v. Galt, 133 Ill. 657.....	157	Clark v. Barham, 4 Mart. 208....	823
Chicago. K. and N. Ry. Co. v.		v. Bryan, 16 Md. 71.....	407
Cook, 43 Kan. 83.....	404	v. Com., 29 Pa. St. 129.....	36, 51
Chicago Theological Seminary v.		v. Deutsch, 101 Ind. 491.....	705
Gage, 12 Fed. R. 398.....	607	v. Fredenburg, 43 Mich. 263....	781
Chickering v. Failes, 26 Ill. 507		v. Hammett, 27 Fed. R. 339....	390
	326, 369	v. Holdridge, 58 Barb. 61.....	794
v. Robinson, 3 Cush. 543.....	859	v. Holmes, 1 Doug. 390....	476, 870
Childs v. McChesney, 20 Iowa 431	739	v. Lamb, 2 Allen 396.....	59
v. Shannon, 16 Mo. 331.....	401	v. Little, 41 Iowa 497.....	452
Chinn v. Taylor, 64 Tex. 385....	704	v. M'Comman, 7 W. & S. 469	
Chisholm v. Coleman, 43 Ala. 204	31		437, 573
Chitty's Pl., vol. 1, p. 512.....	536	v. Platt, 30 Conn. 282.....	653
Chitty's Pl. vol. 1, p. 486.....	441	v. Shelton, 16 Ark. 480.....	545
Chivers v. Savage, 5 El. & Bl. 697.	779	v. Spicer, 6 Kan. 440.....	916
Chouteau v. Nuckolls, 20 Mo. 442.	721	v. Superior Court, 55 Cal. 199..	750
Christian v. O'Neal, 46 Miss. 669..	447	v. Thompson, 47 Ill. 25....	433, 892
Christie v. Unwin, 3 P. & D. 204..	86	v. Wolf, 29 Iowa 197.....	590
Christmas v. Russell, 5 Wall. 290.	586	Clarke v. May, 2 Gray 410.....	191
Christner v. Hochstetler, 109 Pa.		Clarke's Case, 12 Cush. 320.....	191
St. 27.....	658	Clary v. Hoagland, 6 Cal. 685	
Christopher v. Van Liew, 57 Barb.			83, 99, 105
17.....	916	Clay, Ex parte, 98 Mo. 578....	561, 590

	Page		Page
Claypoole v. Houston, 12 Kan. 324	315	Coltart v. Allen, 40 Ala. 155	675, 876
Clayton v. Clayton, 4 Colo. 410	320	Colton v. Beardsley, 38 Barb. 29	81, 866
Cleere v. Cleere, 82 Ala. 581	632	v. Rupert, 60 Mich. 318	347, 749
Clemens v. Clemens, 60 Barb. 366	755	Colusa v. De Jarnett, 55 Cal. 373	777
v. Comfort, 26 La. Ann. 269	680	Colvin v. Luther, 9 Cow. 61	481
Clement v. Burns, 43 N. H. 609		v. Reed, 55 Pa. St. 375	383
	303, 779, 809	v. Six, 79 Mo. 198	770
v. Ramsey (Ky.), 4 S. W. R. 311	581	v. State, 127 Ind. 403	623
v. Wyman, 31 Me. 50	926	Combs v. Goff, 127 Ill. 431	275
Cleveland v. Boerum, 27 Barb. 252	585	Comer v. Bray, 83 Ala. 217	219
Clifford v. Plumer, 45 N. H. 269	769	v. Jackson, 50 Ala. 384	504
Cline v. Catron, 22 Gratt. 378	853	Comfort v. Fulton, 39 Barb. 56	204
Cloud v. Eldorado, 12 Cal. 128	215	Commissioners v. Aspinwall, 21	
v. Inhabitants, 86 Mo. 357	462, 484	How. 539	665
Cloutier v. Lernee, 33 La. A.		v. Barker, 25 Kan. 258	41
	305	v. Espen, 12 Kan. 531	760
Coal & Min. Co. v. Edwards, 103 Ill.	540	v. Welch, 40 Kan. 767	391
	472	Commonwealth v. Blood, 97 Mass.	
Coan v. Clow, 83 Ind. 417	484	538	901
Cobb v. Haynes, 8 B. Mon. 137	385	v. Crotty, 10 Allen 403	285, 342
Cobbossee v. Rich, 81 Me. 164	257, 665	v. Deacon, 8 S. & R. 72	113
Cochran v. Loring, 17 O. 409	407	v. Downey, 9 Mass. 520	870
v. Young, 104 Pa. St. 333	610	v. Harkins, 128 Mass. 79	18
Cocke v. Halsey, 16 Peters 71	51	v. Kirby, 2 Cush. 577	50
Cockey v. Cole, 28 Md. 276	847	v. Kirkbride, 7 Phila. 8	416
Cocks v. Simmons, 57 Miss. 183		v. Loud, 3 Metc. 328	291
	464, 478	v. McCombs, 56 Pa. St. 436	51
Cody v. Hough, 20 Ill. 43	215	v. Steacy, 100 Pa. St. 613	647
Coe v. Ritter, 86 Mo. 277	657	v. Sumner, 5 Pick. 360	519
Coffee v. Neely, 49 Tenn. 304	586	v. Taber, 123 Mass. 253	50
Coffey v. U. S., 116 U. S. 436	18	v. Trout, 76 Pa. St. 379	585
Coffield v. McLean, 4 Jon. L. 15	263	v. Weiher, 3 Metc. 445	795
Coffin v. Cook, 106 N. C. 376	465	Comparet v. Hanna, 34 Ind. 74	222, 430
v. Cottle, 9 Pick. 287	59	Compton v. Pruitt, 88 Ind. 171	705
v. Estes, 32 Minn. 367	607	Comstock v. Crawford, 3 Wall.	
Cogburn v. Spence, 15 Ala. 549	552	396	548, 869
Cohen, Ex parte, 6 Cal. 318	234	v. Tracey, 46 Fed. R. 162	33
v. Barrett, 5 Cal. 195	631	Condry v. Cheshire, 88 N. C. 375	505
v. Wollner, 72 Ala. 233	660	Conery v. Rotchford, 30 La. Ann.	
Coit v. Haven, 30 Conn. 190	479, 896	692; 34 La. Ann. 520	436
Coke's Inst., vol. 1, p. 260	536	Conkey v. Kingman, 24 Pick. 115	
Colby v. Moody, 19 Me. 111	870		339, 415
Cole v. Butler, 43 Me. 401	460	Conklin v. Dutcher, 5 How. Pr.	
v. Hall, 2 Hill 625	390	386	672
v. Hindson, 6 T. R. 234	340	Conkling v. Ridgely, 1 N. E. R.	
v. Mitchell, 77 Wis. 131	502	261	864
Coleman v. Coleman, 19 Pa. St.		Connell v. Stelson, 33 Iowa 147	770
100	576	Connelly v. Edgerton, 22 Neb. 82	755
v. McAnulty, 16 Mo. 173	641	v. Woods, 31 Kan. 359	
Collamer v. Page, 35 Vt. 387	696		216, 246, 595, 859
Colley v. Latimer, 5 S. & R. 211	485	Connitt v. Reformed Protestant	
Collins v. Frasier, 27 Ind. 477	590	Dutch Church, 54 N. Y. 551	716
v. Miller, 64 Tex. 118	497	Connolly v. Miller, 34 N. W. R. 76	755
v. Mitchell, 5 Fla. 364	639	Connors v. Darling, 23 Q. B. 541	748
v. Powell, Ky. 19 S. W. R. 578	679	Conrad v. Cole, 15 Wis. 545	226
v. Ryan, 32 Barb. 647	320	v. McGee, 9 Yerger 428	244
v. Turner, N. C. Term R. 105	683	Converse v. McArthur, 17 Barb.	
v. Welch, 38 Minn. 62	835	410	58
Colliss v. Hector, L. R., 19 Eq. 334	909	Conway v. Ellison, 14 Ark. 360	758
Colonial Bank of Australasia v.		v. John, 23 Pac. R. 170	468
Willan, 5 L. R. P. C. 417	90	Conwell v. Kuykendall, 29 Kan.	
Colt v. Colt, 48 Fed. R. 385	471	707	726
v. Colt, 111 U. S. 566	433	Cook v. Allen, 2 Mass. 461	391

	Page		Page
Cook v. Citizens' N. B'k, 73 Ind.		Cox v. Story, 80 Ky. 64.....	464
256.....	780	v. Thomas, 9 Gratt. 323.....	211
v. Cook, 56 Wis. 195.....	380	Coy, In re, 127 U. S. 731.....	199
v. Darling, 18 Pick. 393.....	479	Coyle v. Com., 104 Pa. St. 117....	33
v. Farren, 34 Barb. 95.....	316	Crafts v. Clark, 38 Iowa 237.....	862
v. Jenkins, 30 Iowa 452.....	924	Craig v. Fraser, 73 Ga. 246.....	407
v. Stevenson, 30 Mich. 242.....	541	v. Herring, 80 Ga. 709.....	511
Cooke v. Bangs, 31 Fed. R. 640...	913	v. Town of Andes, 93 N. Y. 405...	667
Cooley on Torts 420.....	914	Craighead v. Dalton, 105 Ind. 72...	650
Coolidge v. Allen, 82 Me. 23.....	416	Crain v. Cavana, 62 Barb. 109. 129.	786
v. Brigham, 1 Allen 333.....	53	Crandall, Petition of, 34 Wis. 177...	790
Coolman v. Fleming, 82 Ind. 117...	272	v. Bacon, 20 Wis. 639.....	724
Cooman v. Board, 37 Hun 96.....	233	Crane v. Blum, 56 Tex. 325... 100,	335
Coon v. Cook, 6 Ind. 268.....	617	v. Kimmer, 77 Ind. 215.....	889
v. Fry, 6 Mich. 506.....	857	Cravens v. Moore, 61 Mo. 178....	385
Cooper, In re, 3 Hawaiian 17....	816	Crawford v. Com'rs, 32 Kan. 555...	508
Cooper, In re, 143 U. S. 472.....	603	v. Howard, 30 Me. 422.....	878
v. Anniston, 85 Ala. 106.....	778	Crawley v. Isaacs, 16 L. T. N. S.	
v. Ball, 14 How. Pr. 295.....	697	529.....	419
v. Cooper, 7 Ohio (Part 2) 238...	382	Creath v. Brent, 3 Dana 129.....	627
v. Reynolds, 10 Wall. 308		Creighton v. Piper, 14 Ind. 182...	34
229, 243, 247, 407, 891, 899		Crepps v. Durden, 2 Cowper 640...	113
v. Sunderland, 3 Iowa 114... 856,	869	Crews v. Mooney, 74 Mo. 26....	786
Cope v. Collins, 37 Ark. 649.....	596	Crippen v. Culver, 13 Barb. 424...	465
Copin v. Adamson, L. R., 1 Exch.		Crizer v. Gorren, 41 Miss. 563....	447
Div. 17.....	418	Crocker v. Stone, 7 Cush. 341....	726
Cordway v. State, 25 Tex. App.		Croghan v. Livingston, 17 N. Y.	
405.....	443	218.....	756
Cornett v. Williams, 20 Wall. 226.	886	Cromer v. Boinest, 27 S. C. 436....	49
Cornwell v. Hungate, 1 Ind. 156		Cromwell v. County of Sac, 94	
248, 595		U. S. 351.....	18
Corrigan v. Jones, 14 Colo. 311....	676	v. Hull, 97 N. Y. 209.....	665
v. Morris, 43 Mo. App. 456....	873	Cronise v. Carper, 80 Va. 678....	505
Corryell, Matter of, 22 Cal. 179...	203	Crooke v. Andrews, 40 N. Y. 547...	186
Corwin v. Merritt, 3 Barb. 341. 302,	404	Cropper v. Com., 2 Rob. 842.....	527
Corwithe v. Griffing, 21 Barb. 9		Crosby v. Hawthorn, 25 Ala. 221...	295
796, 809		v. Leavitt, 4 Allen 410.....	600
Cory v. King, 49 Iowa 365.....	563	Cross v. Armstrong, 44 O. St. 613...	375
Cossitt v. Biscoe, 12 Ark. 95.....	753	v. Cross, 108 N. Y. 628....	375, 380
Cottle v. American, 13 R. I. 627...	744	v. Knox, 32 Kan. 725.....	846
v. Cole, 20 Iowa 481.....	575	v. Parent, 26 La. Ann. 591.....	526
Cotton v. Wolf, 14 Bush 238.....	627	v. Wilson, 52 Ark. 312.....	358, 489
Coulson v. Wing, 42 Kan. 507....	649	Crouch v. Eveleth, 12 Mass. 503...	764
Counselman, In re, 44 Fed. R.		Croudson v. Leonard, 4 Cranch	
268.....	111	434.....	378, 909
v. Hitchcock, 142 U. S. 547.....	111	Crouter v. Crouter, 30 N. E. R.	
County of Cumberland v. Boyd,		726.....	755
113 Pa. St. 52.....	818	Crowell v. Johnson, 2 Neb. 146	
County of Chisago v. St. Paul &		234, 407, 823	
D. R. Co. 27 Minn. 109.....	569	v. Meconkey, 5 Pa. St. 168.....	718
Courser v. Powers, 34 Vt. 517....	916	Crowley v. Wallace, 12 Mo. 143...	468
Covey v. Noggle, 13 Barb. 330....	525	Croxton v. Renner, 103 Ind. 223...	542
Cowan v. Lowry, 75 Tenn. 620...	820	Cuddy, Petitioner, 131 U. S. 280...	888
Cowdin v. Perry, 11 Pick. 503....	527	Culver v. Hardenburgh, 37 Minn.	
Cowell v. Gray, 85 Mo. 161.....	411	225.....	261, 621
Cowins v. Tool, 36 Iowa 82.....	882	Culver's Appeal, 48 Conn. 165....	676
Cox v. Austin, 11 Cush. 32.....	236	Cumberland v. Hoffman, 39 Barb.	
v. Bird, 88 Ind. 142.....	779	16.....	928
v. Coleridge, 1 B. & C. 37.....	860	Cummings v. Hodgdon, 147 Mass.	
v. Cox, 19 O. St. 502.....	380	21.....	681
v. Crippen, 13 Mich. 502, 506...	822	v. Tabor, 61 Wis. 185.....	407
v. Davis, 17 Ala. 714.....	880	Cummins v. Denton, Tex. Unrep.	
v. Matthews, 17 Ind. 367.....	353	Cas. 181.....	568

# CASES CITED.

li

	Page
Cunningham v. Jacobs, 120 Ind.	306
v. Thomas, 59 Ala.	158
v. Turner, 20 Me.	435
Curley, Suc. of, 18 La. Ann.	728
Curran v. Board, 50 N. W. R.	237
v. Kuby, 37 Minn.	330
v. Shattuck, 24 Cal.	427
Currie v. Franklin, 51 Ark.	338
v. Stewart, 26 Miss.	646; 27 Miss. 52
Curry v. Miller, 42 Ind.	320
Curtiss v. Brown, 29 Ill.	201
Cushing v. Briggs, 2 R. I.	139
Cutright v. Stanford, 81 Ill.	240
Cutter v. Butler, 25 N. H.	343
Cutts v. Haskins, 9 Mass.	543
Cuyler v. Ferrill, 1 Abb.	169
v. Rochester, 12 Wend.	165
v. Wayne, 64 Ga.	78
Cyphert v. McClune, 22 Pa. St.	195
Dabney v. Hudson, 8 S. R.	545
v. Manning, 3 Ohio	321
Dady v. Brown, 76 Iowa	528
Dahms v. Alston, 72 Iowa	411
Daily v. Doe, 3 Fed. R.	903
Dale v. Medcalf, 9 Pa. St.	108
Daley, Ex parte, 27 N. B.	129
Dalt. Sh.	107
Dalton, In re, 46 Kan.	253
v. Laughlin, 4 Abb. N. Cas.	187
v. State, 43 O. St.	652
Dan. Ch. Pr., vol. 1, p.	205
Dan. Ch. Pr., vol. 2, p.	1370
Dancy v. Stricklinge, 15 Tex.	557
Daniels v. Hinkston, 5 How. Pr.	322
v. People, 6 Mich.	381
v. Stevens' Lessee, 19 O.	222
v. Towers, 79 Ga.	785
Dansby v. Beard, 39 Ark.	254
D'Arcy v. Ketchum, 11 How.	165
Darling v. Conklin, 42 Wis.	478
Darrah v. Watson, 36 Iowa	116
v. Westerlage, 44 Tex.	388
Darst v. People, 62 Ill.	306
D'Arusement v. Jones, 4 Lea	251
Dauchy v. Brown, 41 Barb.	555
Davenport v. Young, 16 Ill.	548
v. Schmidt, 15 Iowa	213
Davidsburgh v. Knickerbocker Life Ins. Co., 90 N. Y.	526
Davidson v. Bates, 111 Ind.	391
v. Thornton, 7 Pa. St.	128
Davie v. McDaniel, 47 Ga.	195
Davies v. Coryell, 37 Ill. App.	505
Davis, Ex parte, 21 Fed. R.	396
Davis, Ex parte, 17 Neb.	436
v. Baker, 88 Cal.	106
v. Crandall, 101 N. Y.	311
v. Davis, 61 Me.	395

	Page
Davis v. Eppinger, 18 Cal.	378
v. Greve, 32 La. Ann.	420
v. Hagler, 40 Kan.	187
v. Helbig, 27 Md.	452
v. Hudson, 29 Minn.	27
v. Kline, 76 Mo.	310
v. Lanier, 2 Jones L.	307
v. Lennen, 125 Ind.	185
v. Livingston, 6 O.	225
v. Marshall, 14 Barb.	96
v. Port, 3 Brevard	197
v. Rankin, 50 Tex.	279
v. Reaves, 75 Tenn.	585
v. Robinson, 70 Tex.	394
v. Simma, 14 Iowa	154
v. Smith, 75 Mo.	219
v. Touchstone, 45 Tex.	490
v. Wells, 37 Tex.	606
v. Wood, 7 Mo.	162
Davison, In re, 21 Fed. R.	618
v. Gill, 1 East	64
Davol v. Davol, 13 Mass.	264
Dawes v. Shed, 15 Mass.	6
Dawson v. Litsey, 10 Bush	408
v. Wells, 3 Ind.	398
Day v. Kerr, 7 Mo.	426
Dayton v. Borst, 7 Bosw.	115
Dean v. Nelson, 10 Wall.	158
v. Thatcher, 32 N. J. L.	470
Deans v. Wilcoxson, 25 Fla.	980
Dearing v. Bank, 5 Ga.	497
DeBardelaban v. Stoudenmire, 48 Ala.	643
De Bebian v. Gola, 64 Md.	262
Decker v. Bryant, 7 Barb.	182
De Cosse Brissac v. Rathbone, 6 H. & N.	301
Deegan v. State, 108 Ind.	155
Degener, Ex parte, 17 S. W. R.	1111
De Graw v. De Graw, 7 Mo. App.	121
De Haven v. Covalt, 83 Ind.	344
v. State, 2 Ind. App.	376
Deitrich v. Lang, 11 Kan.	636
Dejan, Suc. of, 40 La. Ann.	437
Delafield v. Brady, 108 N. Y.	524
Delaney v. Gault, 30 Pa. St.	63
Delano v. Jopling, 1 Litt.	117
Delgado, In re, 140 U. S.	586
De Meli v. De Meli, 120 N. Y.	485
Demeritt v. Lyford, 27 N. H.	541
Den v. Albertson, 3 Dev. L.	241
v. Gaston, 24 N. J. L.	818
v. Gaston, 25 N. J. L.	615
v. Hammel, 3 Harr.	74
v. McKnight, 11 N. J. L.	386
v. O'Hanlon, 21 N. J. L.	582

	Page		Page
Den v. Turner, 9 Wheaton 541...	878	Dodd v. Templeman, 76 Tex. 57	581, 847
v. Wright, 8 N. J. L. 175.....	581	v. Una, 40 N. J. Eq. 672.....	148
v. Zellers, 7 N. J. L. 153, 214, 738,	743	Dodd's Case, 2 De G. & J. 510	257, 524
Denman v. McGuire, 101 N. Y.			
161.....	307	Dodge and Stevenson Mfg. Co.,	
Denn v. Harnden, 1 Paine 55.....	514	Matter of, 14 Hun 440.....	63
Denni v. Elliott, 60 Tex. 337.....	654	Dodge v. Bird, 19 Mich. 518.....	475
Denning v. Corwin, 11 Wend.		v. Cole, 97 Ill. 338.....	173, 415
647.....	896	v. Kellock, 13 Me. 136.....	870
v. Norris, 2 Lev. 243.....	63	Doe v. Allen, 12 Ad. & El. 472...	499
Dennis v. Crittenden, 42 N. Y. 542.	551	v. Anderson, 5 Ind. 33.....	404
Dennison v. Hyde, 6 Conn. 508		v. Bowen, 8 Ind. 197.....	404
	363, 434, 505	v. Hardy, 52 Ala. 291.....	240, 265
Denton v. Roddy, 34 Ark. 642....	436	v. Harter, 1 Ind. 427.....	442
v. Sanford, 103 N. Y. 607.....	84	v. Harvey, 5 Blackf. 487.....	403
Dequindre v. Williams, 31 Ind.		v. Harvey, 3 Ind. 104.....	881
444.....	125, 278, 621, 624, 679	v. Henderson, 4 Ga. 148.....	832, 881
Derome v. Vose, 140 Mass. 575...	681	v. Jackson, 51 Ala. 514.....	265, 360
Derr v. Wilson, 84 Ky. 14.....	813	v. Litherberry, 4 McL. 442.....	686
Des Moines Nav. Co. v. Iowa		v. Rue, 4 Blackf. 263.....	233, 899
Homestead Co., 123 U. S. 552.	701	v. Smith, 1 Ind. 451.....	84, 801, 810, 890
De Tar v. Boone, 34 Iowa 488....	358	v. State Bank, 4 Mc. L. 339...	307, 471
Devaughn v. Devaughn, 19 Gratt.		v. Tupper, 4 Sm. & M. 261.....	434
556.....	878	v. Whitaker, 5 B. & Ad. 409....	41
Devlin v. Com., 101 Pa. St. 273...	645	v. Wise, 5 Blackf. 402.....	618
v. Cooper, 20 Hun 188.....	251	Doepner v. State, 36 Ind. 111.....	190
v. Cooper, 84 N. Y. 410.....	251	Dogan v. Brown, 44 Miss. 235	463, 484
Devoe, Re, 1 Low. 251.....	558		
Dewing v. Perdicaries, 96 U. S.		Dohms v. Mann, 76 Iowa 723.....	494
193.....	31	Dolan, Matter of, 88 N. Y. 309 and	
De Wolf v. Mallett, 3 Dana 214		26 Hun 46.....	8, 775
	460, 462	Dolan v. Mayor, 62 N. Y. 472....	227
Dexter v. Cranston, 41 Mich. 448		Dole v. Lusk, 2 Barb. 639.....	652
	468, 490	Doles v. Hilton, 48 Ark. 305.....	654
Deyton v. Bell, 81 Ga. 370.....	546	Dollarhide v. Parks, 92 Mo. 178...	240
Dial v. Harris, 8 Md. 40.....	742	Dolloff v. Hartwell, 38 Me. 54....	553
Dibble v. Dibble, 8 Ind. 307.....	623	Dolph v. Barney, 5 Or. 191.....	758
Dickens v. Crane, 33 Kan. 344....	828	Dolphin v. Robins, 7 H. L. Cas.	
Dickenson v. Cowley, 15 Kan. 269.	249	390.....	690
Dickerson, Ex p., 17 S. W. R. 1076.	816	Domingues v. Domingues, 4 Cal.	
Dickey v. Reed, 78 Ill. 261.....	524	186.....	45
v. Vann, 81 Ala. 425.....	417, 610	Dominick v. Eacker, 3 Barb. 17...	335
Dickinson, App. 2 Mich. 337...	765, 859	Donahue, Matter of, 1 Abb. New	
v. City, 33 N. J. Eq. 63.....	436	Cas. 1.....	99
Diehl v. Friester, 37 O. St. 473....	281	Donaldson v. Stone, 11 S. W. R.	
v. Page, 3 N. J. Eq. 143.....	483, 899	462.....	464
Dietrich's Appeal, 107 Pa. St. 174.	220	Donalson v. Lawson, 126 Ind. 169.	710
v. Shaw, 43 Ind. 175.....	459	Donlin v. Hettinger, 57 Ill. 348...	898
Dill, In re, 32 Kan. 668.....	193	Donnell v. Williams, 21 Hun 216..	246
v. Vincent, 78 Ind. 321.....	659	Donnelly v. West, 66 How. Pr.	
Dillard v. Central, 82 Va. 734....	469	428.....	240
Dillon v. Porter, 36 Minn. 341..	800, 862	Doody v. Vaughn, 7 Neb. 28.....	449
Dilworth v. Rice, 48 Mo. 124.....	609	Dooley v. Bell, 87 Ga. 74.....	623
Dimes v. Grand Junction Canal		v. Dooley, 14 Ark. 122....	402, 545
Co., 16 Eng. L. & Eq. 63.....	56	Doolittle v. Holton, 28 Vt. 819.	548, 886
District Township v. Independent		Dorn v. Backer, 61 Barb. 597.....	699
District, 63 Iowa 188.....	638, 929	v. Backer, 61 N. Y. 261.....	699
Diven v. Lee, 34 How. Pr. 197....	779	Dorr v. Gibboney, 3 Hughes 382..	365
Divine, Matter of, 21 How. Pr. 80.	68	v. Rohr, 82 Va. 359.....	365
Dixcy v. Lanning, 49 Pa. St. 143..	278	Dorrance v. Scott, 3 Wharton 309.	658
Dixon, Ex parte, 1 Utah 192.....	359	Dorris v. Erwin, 101 Pa. St. 239...	659
v. Sinclair, 4 Vt. 354.....	825	Dorsey v. Kendall, 8 Bush 294....	844
v. Wells, 25 Q. B. Div. 249.....	302		



# CASES CITED.

liii

	Page		Page
Dorsey v. Thompson, 37 Md. 25...	365	Duncan v. Stewart, 25 Ala. 408...	645
Dorwin v. Strickland, 57 N. Y. 492...	699	v. Veal, 49 Tex. 603...	273
Doty v. Sumner, 12 Neb. 378...	755	Dunham v. Wilfong, 69 Mo. 355...	922
Dougart, Suc. of, 30 La. Ann. 268...	540	Dunklin v. Wilson, 64 Ala. 162...	575
Dougherty v. McManus, 36 Iowa 657...	332	Dunlap v. Cody, 31 Iowa 260...	443
Doughty v. Doughty, 27 N. J. Eq. 315...	380	v. Glidden, 31 Me. 435...	598
v. Doughty, 28 N. J. Eq. 581...	380	v. Southerlin, 63 Tex. 38...	840
Douglas v. Cooper, 3 Myl. & K. 378...	610	Dunn v. Brogden, 68 Ga. 63...	222
v. Forrest, 4 Bingh. 701...	398	v. Crocker, 22 Ind. 324...	364
v. Massie, 16 O. 271...	800	v. German, 3 S. W. R. 425...	276
Dow's Case, 18 Pa. St. 37...	362	v. Shearer, 14 Bush 574...	501
Dowell v. Lahr, 97 Ind. 146...	315	v. State, 2 Ark. 229...	44
Downard v. Sluder, 5 Blackf. 559...	840	Dunstan v. Higgins, 17 N. Y. Supp. 887...	908
Downer v. Dana, 22 Vt. 22...	754	Durant v. Lawrence, 1 Allen 125...	589
v. Hollister, 14 N. H. 122...	500, 767	Durham v. Brown, 24 Ill. 93...	864
v. Lent, 6 Cal. 94...	860	Durrant v. Boys, 6 T. R. 580...	794
v. Shaw, 22 N. H. 277...	385	Durrett v. Davis, 24 Gratt. 302...	545
v. Smith, 24 Cal. 114...	140	Duson v. Dupre, 32 La. Ann. 896...	680
Downing v. Ford, 9 Dana 391...	413, 801	Dutcher v. Hill, 29 Mo. 271...	415
Downs v. Allen, 22 Fed. R. 805...	838	Dutton v. Hobson, 7 Kan. 196...	502
v. Downs, 17 Ind. 95...	552	Duvall v. McLoskey, 1 Ala. 708...	402
v. Fuller, 2 Metc. 135...	11, 479	Dwiggins v. Cook, 71 Ind. 579...	801, 889
Doyle v. Com., 107 Pa. St. 20...	193	Dwight v. Blackmar, 2 Mich. 330...	581
v. Martin, Ark. 17 S. W. R. 346...	607	v. Springfield, 4 Gray 107...	862
Drake on Attach., § 692...	243	Dyckman v. Mayor, 5 N. Y. 434...	93
Drake v. Duvenick, 45 Cal. 455		Dyer v. Smith, 12 Conn. 384...	58, 729
	446, 462, 722, 903	Dygert v. Pletts, 25 Wend. 402...	833
v. Granger, 22 Fla. 348...	904	Dyke v. Bank, 90 Cal. 397...	821
v. Hanshaw, 47 Iowa 291...	432	Dyott, Estate of, 2 Watts & S. 557...	549
v. Ogden, 128 Ill. 603...	607	Eames v. Northumberland, 44 N. H. 67...	303, 809
v. State, 68 Ala. 510...	303	Earle v. Crum, 42 Miss. 165...	662
v. Vaughan, 6 J. J. M. 143...	679	v. Earle, 91 Ind. 27...	537
Draper v. Bryson, 17 Mo. 71...	431	v. Earle, 33 S. C. 498...	548
Drexel's Appeal, 6 Pa. St. 272...	431	v. McVeigh, 91 U. S. 503...	398, 482
Drexel v. Berney, 122 U. S. 241		Earls v. Earls, 27 Kan. 538...	44
	688, 701	Earthman v. Jones, 2 Yerger 483...	388
Driggers v. Cassady, 71 Ala. 529...	607	Eason v. Witcofskey, 29 S. C. 239...	454
Driggs v. Abbott, 27 Vt. 580...	685	Easterling v. State, 35 Miss. 210...	752
Drinkard v. Ingram, 21 Tex. 650...	587	Easterly v. Goodwin, 35 Conn. 273...	385, 388
Driscoll v. Damp, 17 Wis. 419...	743	Eastman v. Harteau, 12 Wis. 267...	739
Drysdale v. Biloxi, 67 Miss. 534...	323	v. Linn, 26 Minn. 215...	329
Dublin v. Chadbourn, 16 Mass. 433...	224	v. Wadleigh, 65 Me. 251...	388
Duchess of Kingston's Case, 11 How. St. Tr. 261...	18	v. Waterman, 26 Vt. 494...	470
Dudley v. Cilley, 5 N. H. 558...	778	Easton v. Calendar, 11 Wend. 90...	910
v. McCord, 65 Iowa 671...	188	East Tennessee V. & G. Ry. Co. v. Mahoney, 89 Tenn. 311...	685
Duer v. Dowdney, 11 N. Y. St. Rep'r 301...	714	Eastwood v. Buel, 1 Ind. 434...	61
Duffin v. Abbott, 48 Ill. 17...	621	v. Schroeder, 5 R. I. 388...	153
Dufour v. Camfranc, 11 Mart. 607...	775	Eatman v. Eatman, 82 Ala. 223	
Dugan v. Mayor, 70 Md. 1...	162		632, 756
Dugger v. Tayloe, 60 Ala. 504...	400	Eaton v. Badger, 33 N. H. 228...	506
Duke v. State, 57 Miss. 229...	681	v. Hasty, 9 Neb. 419...	439
Dukes v. Rowley, 24 Ill. 210		v. Youngs, 36 Wis. 171...	595
	65, 738, 829, 925	Eberstein v. Oswalt, 47 Mich. 254...	176
Dumestre, Suc. of, 40 La. Ann. 571...	8	Ecker v. Bank, 64 Md. 292...	46
Dumoss v. Francis, 15 Ill. 543...	876	Edgington, Ex parte, 10 Nev. 215...	674
Dunbar v. Hallowell, 34 Ill. 168...	904	Edmonds v. Buel, 23 Conn. 242...	496
		Edmonson v. Nichols, 22 Pa. St. 74...	223

	Page		Page
Edrington v. Allsbrooks, 21 Tex. 186.....	501	English v. Smock, 34 Ind. 115.....	87
Edwards, In re, 35 Kan. 99.....	731	v. Woodman, 40 Kan. 412... 752, 755	
v. Halbert, 64 Tex. 667.....	541	Engstrom v. Sherburne, 137 Mass. 153.....	586
v. Levisohn, 80 Ala. 447.....	507	Entreken v. Howard, 16 Kan. 551.	314
v. Moore, 99 N. C. 1.....	436	Entrekin v. Chambers, 11 Kan. 368.	345
v. Toomer, 22 Miss. 75.....	407	Epping v. Robinson, 21 Fla. 36...	541
v. Whited, 29 La. Ann. 648.....	640	Eppinger v. Kirby, 23 Ill. 469.....	829
v. Williamson, 70 Ala. 145.....	186	Erdmann, Ex p., 88 Cal. 579.....	791
Egan v. Sengpiel, 46 Wis. 703... 711,	759	Erie Railway Co. v. Ramsey. 45 N. Y. 637.....	781
Egerton v. Hart, 8 Vt. 207.....	721	Erwin v. Fulk, 94 Ind. 235.....	837
Eitel v. Foote, 39 Cal. 439.... 215,	471	v. Lowry, 7 How. 172.....	76, 700
Elasser v. Haines, 52 N. J. L. 10...	512	Eslava v. Lepretre, 21 Ala. 504...	415
Eldred, In re, 46 Wis. 530.....	295	Essig v. Lower, 120 Ind. 239... 315,	501
Eldridge v. McMackin, 37 Miss. 72	547	Estes v. Mitchell, 14 Allen 156....	46
Electoral College of South Caro- lina, 1 Hughes 571.....	524	Ethell v. Nichols, 1 Idaho 741....	881
Eliot v. McCormick, 144 Mass. 10.	385	Etter v. Curtis, 7 Watts & S. 170.	14
Eller v. Evans, 128 Ind. 156.....	786	Evans v. Ashby, 22 Ind. 15.....	755
v. Richardson, 89 Tenn. 575....	685	v. Bouton, 85 Ill. 579.....	303
Elliott v. Elliott, 5 Binney 1.....	756	v. Clermont, 51 Ind. 160.....	549
v. Frakes, 71 Ind. 412.....	705	v. Haefner, 29 Mo. 141.....	211
v. Holbrook, 33 Ala. 659.....	434	v. Perciful, 5 Ark. 424.....	142
v. Peirsol, 1 Peters 328.....	527	v. Pierce, 3 Ill. 468.....	431
v. Treadway, 10 B. Mon. 22.....	878	v. Spurgin, 6 Gratt. 107.....	639
v. Wohlfrom, 55 Cal. 384.....	440	Evansville, etc., R. R. Co. v. City of Evansville, 15 Ind. 395....	665
Ellis, In re, 79 Mich. 322.....	362	Everett v. Warner, 58 N. H. 340...	436
v. Clarke, 16 Ark. 420.....	660	Everston v. Sanders, 6 J. J. Marsh. 142.....	411, 662
v. Connecticut, 8 Fed. R. 81....	141	Everts, Ex parte, 2 Disney 33.....	443
v. Jones, 51 Mo. 180.....	840	Ewer v. Coffin, 1 Cush. 23.....	385
v. Pacific, 51 Mo. 200.....	259	Ewing v. Higby, 7 O. 198.....	413
v. White, 61 Iowa 644.....	693	v. Sanford, 19 Ala. 605... 293,	294
Ellison v. Martin, 53 Mo. 575.....	385	v. Sneed, 5 J. J. Marsh. 459.....	544
Elsner v. Shrigley, 80 Iowa 30		Exchange B'k v. Ault, 102 Ind. 322.	918
	752, 797, 798	Executor of Bigelow v. Adminis- trators of Bigelow, 4 O. 138...	632
Elston v. Chicago, 40 Ill. 514.....	774	Exendine v. Morris, 76 Mo. 416...	717
Ellsworth v. Hall, 48 Mich. 407...	236	Facey v. Fuller, 13 Mich. 527....	470
v. Larned, 21 Vt. 535.....	737	Factors' & Traders' Ins. Co. v. De Blanc, 31 La. Ann. 100.....	604
Eltling v. Gould, 96 Mo. 535.....	325	Fagg v. Clements, 16 Cal. 389....	695
Eltzroth v. Voris, 74 Ind. 459.....	822	Fahey v. Mottu, 67 Md. 250.....	870
Elvira, a slave, 16 Gratt. 561.....	67	Fahnestock v. Gilham, 77 Ill. 637.	929
Elwood v. Northrup, 106 N. Y. 172.	713	Fahs v. Darling, 82 Ill. 142.....	371
Ely v. Board, etc., 112 Ind. 361...	665	Fairchild v. Keith, 29 O. St. 156...	819
v. Cooke, 28 N. Y. 365.....	312	Fairfax v. City of Alexandria, 28 Gratt. 16.....	462
v. Tallman, 14 Wis. 28.....	890	Fales v. Goodhue, 25 Me. 423....	725
v. Thompson, 3 A. K. Marsh. 70.	106	Falkner v. Guild, 10 Wis. 563....	757
Embry v. Millar, 1 A. K. M. 300...	172	Fallon v. Chidester, 46 Iowa, 588.	571
Emeric v. Alvarado, 64 Cal. 529...	824	Fall River v. Riley, 140 Mass. 488.	461
Emerson v. Ross, 17 Fla. 122.....	301	Falls v. Hawthorn, 30 Ind. 444...	334
Emery v. Hildreth, 2 Gray 228		v. Wright, 55 Ark. 562.....	809
	399, 618	Fancher v. Stearns, 61 Vt. 616....	60
v. Nelson, 9 Serg. & R. 12.....	526	Fanning v. Krapfl, 61 Iowa 417.. 343,	489
v. Royal, 117 Ind. 299.....	743	v. Krapfl, 68 Iowa 244... 343, 350,	489
v. Vroman, 19 Wis. 689.... 279,	846	Faris v. Reynolds, 70 Ind. 359....	77
Emma, Ex parte, 48 Fed. R. 211...	124	Farley, Ex parte, 40 Fed. R. 66...	203
Emmert v. Stouffer, 64 Md. 543...	20	v. McConnell, 7 Lans. 428.....	226
Empire v. Darlington, 101 U. S.		Farmers' Ins. Co. v. Highsmith, 44 Iowa 330.....	460, 463
87.....	386		
Emrick v. Dickson, 92 Pa. St. 78...	344		
Endel v. Leibrock, 33 O. St. 254			
	247, 303		
England v. Garner, 90 N. C. 197...	421		
English v. McNair, 34 Ala. 40....	635		

# CASES CITED.

lv

	Page
Farnham, Ex parte, 3 Colo. 545...	768
v. Hildreth, 32 Barb. 277.....	339
Farr v. Ladd, 37 Vt. 156.....	475
Farrar v. Dean, 24 Mo. 16.....	171
v. Carmichael, 1 Brev. 392.....	217
v. Olmstead, 24 Vt. 123.....	541
Farrell v. Hennesy, 21 Wis. 632...	847
Farrington v. Bullard, 40 Barb.	
512.....	598
v. Wilson, 29 Wis. 383.....	904
Farwell, Petition of, 2 N. H. 123...	715
v. Raddin, 129 Mass. 7.....	582
Faulkner, Matter of, 4 Hill 598...	247
Fawcett v. Fowles, 7 B. & C. 394...	560
v. State, 71 Ind. 590.....	286
Featherston v. Small, 77 Ind. 143...	410
Fechheimer v. Washington, 77	
Ind. 366.....	55
Fee v. Moore, 74 Ind. 319.....	552
Feeley's Case, 12 Cush. 598.....	788
Feillett v. Engler, 8 Cal. 76.....	525
Felch v. Bugbee, 48 Me. 9.....	385
Fell v. Young, 63 Ill. 106.....	404
Feller v. Clark, 36 Minn. 338.....	352
Felter v. Mulliner, 2 Johns. 181...	821
Fender v. Powers, 67 Mich. 433...	263
Fenelon v. Butts, 49 Wis. 342.....	38
Fenlon v. Lonergan, 29 Pa. St. 471...	608
Fenstermacher v. Xander, 116 Pa.	
St. 41.....	661
Fenton v. Harred, 17 Pa. St. 158...	930
Ferguson v. Crawford, 70 N. Y.	
253; 86 N. Y. 609.....	471, 472
v. Crittenden Co., 6 Ark. 479.....	66
v. Mahon, 11 Ad. & El. 179.....	486
v. Millender, 32 W. Va. 30.....	26, 222
v. Quinn, 123 Pa. St. 337.....	450
v. Teel, 82 Va. 690.....	889
Fermor's Case, 2 Coke 77.....	574
Fernald v. Noyes, 30 N. H. 39.....	233
Ferrier v. Deutchman, 111 Ind. 330...	928
Ferris v. Ward, 9 Ill. 499.....	876
Fessenden v. Chesley, 29 Me. 368...	767
Field, In re, 30 N. E. R. 48.....	330
v. Dortch, 34 Ark. 399.....	747
v. Goldsby, 28 Ala. 218.....	214, 402
v. Ireland, 21 Ala. 240.....	293
v. M'Vickar, 9 Johns. 130.....	683
v. Sanderson, 34 Mo. 542.....	586
Fields v. Walker, 23 Ala. 155.....	416
Fil Ki, Ex parte, 79 Cal. 584.....	228
Finch v. Edmondson, 9 Tex. 504	
302, 402	
v. Hollinger, 47 Iowa 173.....	784
v. Sink, 46 Ill. 169.....	305, 361
Finley v. Robertson, 17 S. C. 435...	431
v. State, 61 Ala. 201.....	284
Finneran v. Leonard, 7 Allen 54...	421
Finney v. Ferguson, 3 W. & S.	
413.....	641
Firebaugh v. Hall, 63 Ill. 81.....	326
First National Bank v. Balcom,	
35 Conn. 351.....	676

	Page
First National Bank v. Cunning-	
ham, 48 Fed. R. 510.....	588
v. Dry Goods Co., 45 Kan. 510...	436
v. Hughes, 10 Mo. App. 7.....	810
v. Jagers, 31 Md. 38.....	340
v. United States Encaustic Tile	
Co., 105 Ind. 227.....	182, 902
First Presbyterian Church v. New	
Orleans, 30 La. Ann. 259.....	212
Fischer v. Langbein, 103 N. Y. 84...	194
v. Raab, 81 N. Y. 235.....	194
Fischli v. Fischli, 1 Blackf. 360...28,	750
Fish v. Emerson, 44 N. Y. 376....	737
Fisher, Ex parte, 6 Neb. 309.....	98
v. Bassett, 9 Leigh 119.....	686
v. Lane, 2 W. Bl. 834.....	398
v. Longnecker, 8 Pa. St. 410....	730
v. March, 26 Gratt. 765.....	439
v. McGirr, 1 Gray 1.....	109
v. Williams, 56 Vt. 586.....	663
Fisk, Ex parte, 113 U. S. 713.....	146
v. Norvel, 9 Tex. 13.....	542
Fiske v. Anderson, 33 Barb. 71....	385
v. Kellogg, 3 Or. 503.....	404
Fisschesser v. Thompson, 45 Ga.	
459.....	881
Fitch v. Boyer, 51 Tex. 336.....	891
v. Miller, 20 Cal. 352.....	241, 549
Fitchburg, etc. v. Grand Junction,	
etc., 1 Allen 552.....	49
Fithian v. Monks, 43 Mo. 502.....	670
Fitts v. Fitts, 21 Tex. 511.....	541
Fitzgerald v. Salentine, 10 Metc.	
436.....	467
Fitzgibbon v. Lake, 29 Ill. 165. 81,	624
Fitzhugh v. Custer, 4 Tex. 391....	66
Fitzpatrick v. Beal, 62 Miss. 244...	465
v. Pine, 13 Irish C. L. 32.....	872
Fitzsimmons v. Marks, 66 Barb.	
333.....	388
Flack v. Harrington, Breese 213...	861
Fladland v. Delaplaine, 19 Wis.	
459.....	501
Flanders v. Thompson, 2 N. H.	
421.....	481
Fleming v. Bale, 23 Kan. 88	
360, 719, 777	
v. Johnson, 26 Ark. 421.....	841
v. Nunn, 61 Miss. 603.....	447
v. Potter, 14 Ind. 486.....	177
v. Seeligson, 57 Tex. 524....576,	639
v. Tourgee, 16 N. Y. Supp. 2...	233
Flenner v. Travellers, 89 Ind. 164...	651
Fletcher v. Holmes, 25 Ind. 458....	803
Flinn v. Chase, 4 Denio 85.....	628
Florentine v. Barton, 2 Wall. 210...	84
Flournoy v. City, 17 Ind. 169....	858
v. State, 16 Tex. 30.....	529
Flower v. Flower, 42 N. J. Eq.	
152.....	380
Flowers v. Foreman, 23 How. 132...	385
Floyd and Barker's Case, 12 Re-	
port 23.....	913



	Page			
Floyd v. Cheney, 57 Iowa	160..	55, 56	Frazier v. Steenrod, 7 Iowa	339
Fobes v. Adams, 17 Phila.	222....	434		352,
Foglesong v. Somerville, 6 Serg.			v. Turner, 76 Wis.	562.....
& Rawle	267.....	668	Fredrick v. Pacquette, 19 Wis.	541.
Folger v. Columbian Ins. Co.,			Freeman v. Alderson, 119 U. S.	
99 Mass.	267.....	128	185.....	
Follansbee v. Scottish Am. M.			v. Cornwall, 10 Johns.	470.....
Co., 7 Ill. App.	486.....	216	v. Gaither, 76 Ga.	741.....
Fonville v. Monroe, 74 Ill.	126....	345	v. Hawkins, 77 Tex.	498.....
Foot v. Morgan, 1 Hill	654.....	62	v. Thompson, 53 Mo.	183... 407,
Foot v. In re, 76 Cal.	543.....	506	Freeman on Judgments, §§	251,
v. Newell, 29 Mo.	400.....	865	260, 267, 318.....	
v. Richmond, 42 Cal.	439.....	469	Freeman on Judgments, 450-461..	
Footman v. Stetson, 32 Me.	17....	609	Freeman on Judgments, §	523.....
Forbes v. Halsey, 26 N. Y.	53....	853	French, In re, 51 N. W. R.	960 ..
v. Hyde, 31 Cal.	342. ....	316, 319	French, The J. W., 13 Fed. R.	916. .
Forbes' Case, 11 Abb. Pr.	52.....	205	v. Edwards, 5 Sawy.	266.....
Force v. Gower, 23 How. Pr.	294..	385	v. Frazier, 7 J. J. Marsh.	425.....
Ford v. Doyle, 37 Cal.	346.....	340	v. Hoyt, 6 N. H.	370.....
Foreman v. Carter, 9 Kan.	674....	365	Frevert v. Swift, 19 Nev.	363.....
v. Hunter, 59 Iowa	550.....	56, 757	Fridge v. State, 3 Gill & J.	103
Fortune v. Buck, 23 Conn.	1.....	745		57, 627, 8
Fort Wayne v. Cody, 43 Ind.	197. 14,	862	Friedlander v. Loucks, 34 Cal.	18.
Foss v. Edwards, 47 Me.	145.....	563	Friend v. Green, 43 Kan.	167.....
Foster v. Alden, 21 Mich.	507....	574	Frierson v. Travis, 39 Ala.	150... 4
v. Birch, 14 Ind.	445.....	854	Frisby v. Harrison, 30 Miss.	452.. 4
v. Glazener, 27 Ala.	391.....	508	v. Withers, 61 Tex.	134.....
v. Hazen, 12 Barb.	547.....	448	Fritsch v. Klausing 13 S. W. R.	
v. Jones, 23 Ga.	168.....	654	241. ....	1
v. Jones, 1 McCord	116.....	236	Fritts v. Doe, 22 Pa. St.	335.....
v. McAdams, 9 Tex.	542.....	64	Fritz v. State, 40 Ind.	18.....
v. Wood, 30 How. Pr.	284.....	446	Fromlet v. Poor, 3 Ind. App.	425
Fowler v. Brooks, 64 N. H.	423... 56,	61		28, 8
v. Jenkins, 28 Pa. St.	176.....	869	Fudge v. Fudge, 23 Kan.	416.... 5
v. Lewis, W. Va., 14 S. E. R.	447..	385	Fulkerson v. Davenport, 70 Mo.	
v. Simpson, 79 Tex.	611.....	501	541.....	6
v. Watson, 4 Mo.	27.....	355	Fuller v. Indianapolis and Cincin-	
v. Whiteman, 2 O. St.	270.....	479	nati R. R. Co., 18 Ind.	91.... 3
v. Williams, 62 Mo.	403.....	840	v. Pease, 144 Mass.	390.....
Fox v. Cottage, 81 Va.	677.....	775	v. Riggs, 66 Iowa	328.....
v. Hoyt, 12 Conn.	491.....	871	Furgeson v. Jones, 17 Or.	204.... 4
v. Minor, 32 Cal.	111.....	929	Furnish v. Austin, 7 S. W. R.	399. 2
v. Turtle, 55 Ill.	377.....	491	Gage v. Bailey, 102 Ill.	11.....
France v. Evans, 90 Mo.	74.....	499	v. Busse, 114 Ill.	589.....
Francis v. Hall, 13 Tex.	189..	540, 593	v. Clark, 22 Ind.	163.....
v. Washburn, 5 Haywood	294... 227		v. Downey, 79 Cal.	140.....
Francisco v. Chicago, M. & St. P.			v. Gates, 62 Mo.	412.....
Ry. Co., 35 Fed. R.	647.....	619	v. Hill, 43 Barb.	44.....
Frank. Ex parte, 52 Cal.	606.....	138	v. Lyons, Ill. 28 N. E. R.	832... 6
Frankel v. Satterfield, Del., 19 Atl.			v. Maschmeyer, 72 Iowa	696.... 59
R. 898.....	222, 385		v. Parker, 103 Ill.	528.....
Frankfurter v. Bryan, 12 Ill. App.			v. Schroder, 73 Ill.	44.....
549.....	803		v. Vail, 73 Mo.	454.....
Frankfurth v. Anderson, 61 Wis.			Gager v. Henry, 5 Sawyer	237. 404, 84
107.....	83, 757, 862		Gaines v. Betts, 2 Doug. (Mich.)	99. 82
Franks v. Groff, 14 S. & R.	181... 545		v. Johnson, Ky. 15 S. W. R.	246.. 57
Franse v. Owens, 25 Mo.	329.....	817	Gaither v. Watkins, 66 Md.	576... 71
Frary v. Dakin, 7 Johns.	75.....	250	Galbraith v. Littlech, 73 Ill.	209.. 87
Fray v. Blackburn, 3 B. & S.	576..	913	v. Sidener, 28 Ind.	142.....
Frazee, In re, 63 Mich.	396.....	109	Galena & Chicago Union R. R.	
Frazier v. Miles, 10 Neb.	109		Co. v. Pound, 22 Ill.	399... 81, 90
	331, 505, 595		v. Ennor, 9 Ill. App.	159.....
v. Pankey, 31 Tenn.	74.....	404	Gall v. Fryberger, 75 Ind.	98.. 216, 65

# CASES CITED.

lvii

	Page
Gallagher v. Holland, 20 Nev. 164.	236
v. O'Neil, 3 N. Y. Supp. 126.	557
Gallup v. Smith, 59 Conn. 354.	749
Galpin v. Page, 18 Wall. 350.	895, 896
Galusha v. Butterfield, 3 Ill. 227.	44
Galveston v. Wave, 74 Tex. 47.	462
Gambette v. Brock, 41 Cal. 78.	656
Gammon v. Chandler, 30 Me. 152.	539
v. Lafayette Ins. Co., 79 Mo. 225.	860
Gandy v. State, 86 Ala. 20.	803
Ganey's Case, 7 Colo. 384.	773
Gann v. Gregory, 3 De G. M. & G. 777.	610
Ganong v. Fawcett, 15 N. B. 129.	294
Gardner v. Bain, 5 Lans. 256.	290
v. Bunn, 132 Ill. 403.	749
v. Kraft, 52 How. Pr. 499.	340
v. Maroney, 95 Ill. 552.	548
v. Nute, 2 Cush. 333.	744, 766
v. Tyler, 25 How. Pr. 215.	511
Garfield v. Douglass, 22 Ill. 100.	573
Garner v. State, 28 Kan. 790.	755
v. Strode, 5 Litt. 314.	565
v. Tucker, 61 Mo. 427.	750
Garrison, Suc. of, 15 La. Ann. 27.	680
v. Cobb, 106 Ind. 245.	556
v. Cox, 95 N. C. 353.	618
v. Marshall, 44 How. Pr. 193.	248
Garvey, In re, 7 Colo. 502.	731
Garvin v. Hatcher, 39 Iowa 685.	705
Gates v. Tusten, 89 Mo. 13.	432
Gaskin v. Anderson, 7 Abb. Pr. N. S. 1.	763
Gatchell v. Foster, 10 S. R. 434.	744
Gavin v. Board, etc., 104 Ind. 201.	752
v. Graydon, 41 Ind. 559.	177, 180, 775
Gaw v. Rawley, 40 Tenn. 716.	327
Gay v. Bradstreet, 49 Me. 580.	862
v. Minot, 3 Cush. 352.	59
v. Smith, 38 N. H. 171.	14
Gaylord v. Scarff, 6 Iowa 179.	595, 810
Gear v. Smith, 9 N. H. 63.	62
Gebhard v. Garnier, 12 Bush 321.	905
Gees v. Shannon, 2 Watts 71.	221
Geier's Appeal, 101 Pa. St. 412.	617
Geisreiter v. Sevier, 33 Ark. 522.	752
Geller v. Hoyt, 7 How. Pr. 265.	533
Gelzenleuchter v. Niemeyer, 64 Wis. 316.	289
Genesee v. Superv., 53 Barb. 223.	551
Gentile v. Foley, 3 La. Ann. 146.	882
Gentzer v. Thayer, 10 Colo. 63.	499
George v. Norris, 23 Ark. 121.	880
v. Watson, 19 Tex. 369.	402
Georgia Railroad and Banking Co. v. Pendleton, 87 Ga. 751.	758
Gerault v. Anderson, Walker 30.	640
Germon v. Swartwout, 3 Wend. 282.	262
Gerrard v. Johnson, 12 Ind. 636.	492
Gerrish v. Seaton, 73 Iowa 15.	505
Gerry v. Post, 13 How. Pr. 118.	641
Gettys v. Gettys, 71 Tenn. 260.	690

	Page
Gibbs v. Shaw, 17 Wis. 197.	404, 492
v. Queen Ins. Co., 63 N. Y. 114.	419
Gibney v. Crawford, 51 Ark. 34.	901
Gibson, Ex parte, 89 Ala. 174.	103, 107
Gibson, Ex p., 31 Cal. 619.	769, 825
v. Beckham, 16 Gratt. 321.	782
v. Chouteau's Heirs, 39 Mo. 536.	433
v. Foster, 2 La. Ann. 503.	335, 718
v. Manufacturers, 144 Mass. 81.	419, 486
v. Roll, 27 Ill., 88.	342, 404
v. Roll, 30 Ill. 172.	360
Giddings v. Smith, 15 Vt. 344.	887
v. Steele, 28 Tex. 733.	546, 639, 685
Gifford v. Morrison, 37 O. St. 502.	355
Gilbert v. Cooksey, 69 Mo. 42.	924
v. Hoffman, 2 Watts 66.	581
Gilchrist v. West Virginia, O. and O. L. Co., 21 W. Va. 115.	904
v. Williams, 1 B. Mon. 133.	600
Giles v. Hicks, 45 Ark. 271.	785
Gilfillan v. Hobart, 34 Minn. 67.	903
Gilkeson v. Knight, 71 Mo. 403.	237
Gill, Ex parte, 7 East 376.	560
v. Read, 5 R. I. 343.	26
Gillenwater v. Scott, 62 Tex. 670.	271
Gillespie v. Day, 14 La. 289.	402
v. Nabors, 59 Ala. 441.	173
v. Splahn, 1 Wilson 228.	722
Gillett v. Camp, 23 Mo. 375.	389
v. Needham, 37 Mich. 143.	399, 490
v. Thiebold, 9 Kan. 427.	254
Gilliam v. McJunkin, 2 S. C. 442.	777
Gillies v. Crawford, 2 Hilton 338.	251
Gillilan v. Gray, 14 Ill. 416.	698
Gillingham v. Jenkins, 40 Hun 594.	726
Gillitt v. Truax, 27 Minn. 528.	810
Gilman v. Donovan, 53 Iowa 362.	641
v. Gilman, 126 Mass. 26.	388, 438
v. Hovey, 26 Mo. 280.	865
v. Perkins, 7 Fed. R. 887.	143
Gilmore v. Ham, 10 N. Y. Supp. 48.	720
v. Rodgers, 41 Pa. St. 120.	591
Gilson v. State, 73 Tenn. 161.	555
Gip Ah Chan, In re, 6 Haw'n 25.	576
Girardey v. Bessman, 77 Ga. 483.	522
Givens' Appeal, 121 Pa. St. 260.	576
Glackin v. Zeller, 52 Barb. 147.	747
Glasgow v. State, 9 Baxter, 485.	47
Glass v. Blackwell, 48 Ark. 50.	783
v. Sloop Betsey, 3 Dallas, 6.	41
v. Smith, 66 Tex. 548.	437
Gleason v. Dodd, 4 Metc. 333.	422
Glidden v. Packard, 28 Cal. 649.	865
Glover v. Holman, 50 Tenn. 519.	499
v. Ruffin, 6 Ohio 255.	214
Goad v. Norly, 28 Iowa 188.	853
Goar v. Maranda, 57 Ind. 339.	891
Godard v. Gray, L. R., 6 Q. B. 139.	908
Goddard v. Stockman, 74 Ind. 400.	665
Goebel v. Iffla, 48 Hun 21.	84

	Page		Page
Goforth v. Longworth, 4 O. 129....	893	Grand Tower, etc., Co. v. Schir-	
Goheen v. Myers, 18 B. Mon. 423.	860	mer, 64 Ill. 106.....	451
Golahar v. Gates, 20 Mo. 236.....	412	Grande v. Herrera, 15 Tex. 533	
Gold v. Bissell, 1 Wend. 210.....	731		624, 775
Golding's Petition, 57 N. H. 146....	60	Granger v. Clark, 22 Me. 128. 479,	576
Goldsmith v. Gilliland, 23 F. R. 645	854	v. Judge, 44 Mich. 384 . . . 360, 372,	502
Goldtree v. McAlister, 86 Cal.		Granite Bank v. Treat, 18 Me. 340.	563
93.....	776, 782	Grant v. Clapp, 106 Mass. 453....	252
Goodell v. Starr, 127 Ind. 198. . .	371	v. Holmes, 75 Mo. 109.....	63
Goodgion v. Gilreath, 32 S. C. 388.	342	v. McKinney, 36 Tex. 62.....	477
Goodin, Ex parte, 67 Mo. 637.....	197	v. Spann, 34 Miss. 294 . . . . .	782
Goodman v. Winter, 64 Ala. 410....	131	Grass v. Hess, 37 Ind. 193.....	696
Goodnow v. Burrows, 74 Iowa		Grattan v. Matteson, 54 Iowa 229..	238
251.....	219, 701	Gratz v. Lancaster, 17 S. & R. 278.	648
Goodrich v. Hunton, 31 La. Ann.		Gravett v. Malone, 54 Ala. 19.....	622
582.....	698	Gray v. Bowles, 74 Mo. 419.....	814
v. Sullivan, 1 T. & C. 532....	830	v. Cookson, 16 East 13.....	88
v. Thomson, 4 Day 215.....	777	v. Cruise, 36 Ala. 559.....	626, 876
Goodwin v. Inhabitants, 12 Me. 271		v. Douglas, 81 Me. 427.....	335
	609, 710, 713	v. Fox 1 N. J. Eq. 259.....	167
v. Sims, 86 Ala. 102.....	402, 776	v. Gardner, 3 Mass. 399.....	883
Goodyear v. Knapp, 61 Wis. 103..	245	v. Hawes, 8 Cal. 562.....	438
Gookin v. Sanborn, 3 N. H. 491....	269	v. Larrimore, 2 Abb. 542 . . . 325,	491
Gordan, Ex parte, 92 Cal. 478....	188	v. McCarty, 22 Q. B. (U. C.)	
Gordon v. Gordon, 55 N. H. 399..	580	568.....	303
v. Mayor, 5 Gill 231.....	373	v. Stuart, 33 Gratt. 351.....	800
Gorman's Case, 124 Mass. 190....	477	Graysbrook v. Fox, Plow. 275....	610
Gorrill v. Whittier, 3 N. H. 265....	59	Grayson v. Weddle, 63 Mo. 523	
Gorton v. Frizzell, 20 Ill. 291.....	256		268, 581, 849
Gossom v. Donaldson, 18 B. Mon.		Grazebrook v. M'Creedle, 9	
185.....	715	Wend. 437.....	590
Gotendorf v. Goldschmidt, 83 N.		Green v. Baptist Church, 27 La.	
Y. 110.....	367	Ann. 563.....	610
Goudy v. Hall, 30 Ill. 109.....	471	v. Beeson, 31 Ind. 7.....	635
v. Hall, 36 Ill. 313.....	229, 307, 893	v. Branton, 1 Dev. Eq. 500.....	657
Gould v. Crow, 57 Mo. 200.....	380	v. Breckenbridge, 4 Mon. 541 . .	361
v. Jacobson, 58 Mich. 288.....	898	v. Clawson, 5 Houston 159.. 138,	527
v. Loughran, 19 Neb. 392.....	724	v. Kindy, 43 Mich. 279.....	485
v. McFall, 111 Pa. St. 66.....	661	v. Scarborough, 49 Ala. 137....	622
Goulding v. Clark, 34 N. H. 148..	870	v. Wilson, Ky., 2 S. W. R. 564..	390
Gower v. Shelton, 84 Tenn. 652....	721	Greene v. Briggs, 1 Curtiss 311... 109	
Grace, Ex parte, 12 Iowa 208.....	106	v. Greene, 2 Gray 361.....	575
v. Mitchell, 31 Wis. 533.... 724,	725	v. James, 2 Curtiss 187.....	109
v. Teague, 81 Me. 559.....	916	Greenlaw v. Kernahan, 36 Tenn.	
Graceland Cemetery Co. v. People,		370.....	756
92 Ill. 619.....	606	Greenleaf's Ev., vol. 1, p. 538.....	922
Gradnigo v. Moore, 10 La. Ann.		Greenough v. Whittemore, 8 Gray	
670.....	456	193.....	724
Graduates, Matter of, 11 Abb. Pr.		Greenvault v. Farmers' and M.	
301.....	858	Bank, 2 Doug. 498.....	236
Graham, In re, 74 Wis. 450.....	790	Greenwood v. Murray, 28 Minn.	
v. Culver, Wyo., 29 Pac. R.		120.....	345
270.....	589	Gregg v. Thompson, 17 Iowa 107	
v. Flynn, 21 Neb. 229.....	364		361, 454
v. Hall, 68 Ga. 354.....	696	Gregory v. Allison, Cal., 19 Pac.	
v. Hawkins, 38 Tex. 628.....	836	R. 233.....	40
v. Houghtalin, 30 N. J. L. 552 . .	179	v. Bartlett, 55 Ark. 30.....	328
v. M'Arthur, 25 Q. B. (U. C.)		v. Bovier, 77 Cal. 121.....	40, 743
478.....	130	v. Brown, 4 Bibb 28 . . . . .	913
v. Spencer, 14 Fed. R. 603.....	439	v. Gregory, 78 Me. 187.....	690
Grand v. Chaves, 15 Tex. 550.....	625	v. Haynes, 13 Cal. 591; 21 Cal.	
Grand Rapids Chair Co. v. Run-		443.....	769
nels, 77 Mich. 104.....	500	v. McPherson, 13 Cal. 562.. 262,	624

	Page		Page
Gregory v. Taber, 19 Cal. 397....	262	Guthrie v. Guthrie, 71 Iowa 744...	53
Gregson v. Tuson, 153 Mass. 325...	855	v. Lowry, 84 Pa. St. 533... 487,	507
Gresham v. Ewell, 84 Va. 784....	48	Guterman v. Schroeder, 40 Kan.	
Gresley v. State, 123 Ind. 72.....	425	507.....	539
Grevemburg v. Bradford, 44 La.		Gutzwiller v. Crowe, 32 Minn. 70.	829
Ann.....	545	Guy v. Pierson, 21 Ind. 18.....	493
Gribbon v. Freel, 93 N. Y. 93....	360	Guynn v. McCauley, 32 Ark. 97.	618
Grider, In re, 81 Cal. 571.....	476	Haacke v. Adamson, 14 C. P. 201..	739
Grier's Appeal, 101 Pa. St. 412....	654	Hackett, In re, 53 Vt. 354.....	757
Griffin, Matter of, 25 Tex. 623....	37	v. State, 113 Ind. 532.....	308
v. Bixby, 12 N. H. 454.....	829	Haddock v. Wright, 25 Fla. 202 ..	436
v. Cox, 30 Ind. 242.....	220	Hafner v. Irwin, 4 Ired. L. 529 ...	333
v. Johnson, 37 Mich. 87.....	545	Hagar v. Recl. Dist., 111 U. S. 701.	867
v. Ragan, 52 Miss. 78.....	661	Hagerman v. Sutton, 91 Mo. 519..	670
v. State, 5 Tex. App. 457.....	114	Haggerty v. Juday, 58 Ind. 154...	424
Griffin's Case, Chase's Dec. 364..	37	Hahn v. Kelly, 34 Cal. 391... 371, 484,	491
Griffith, Estate of, 84 Cal. 107. 541,	676	Haidee, The, 10 L. C. 108.....	595
v. Clark, 18 Md. 457.....	657, 659	Hain v. Smith, 1 Ind. 451... 84, 801,	890
v. Fowler, 18 Vt. 390.....	416	Hale v. Holland, 92 Ill. 494.....	400
v. Frazier, 8 Cranch 9.....	627, 644	v. McComas, 59 Tex. 484.....	476
v. Phillips, 77 Tenn. 417.....	775	v. Sweet, 40 N. Y. 97.....	245
v. Wright, 18 Ga. 173.....	677	Hall, Matter of, 10 Mich. 210.....	290
Grignon v. Astor, 2 How. 319.....	14	v. Com., 8 Bush 378.....	135
Grigsby v. Barr, 14 Bush 330 ....	135	v. Durham, 109 Ind. 434.... 573,	719
Griman v. Edwards, 21 W. Va. 247.	365	v. Grogan, 78 Ky. 11.....	225
Grimley, In re, 38 Fed. R. 84; 137		v. Heffly, 25 Tenn. 444.....	819
U. S. 147.....	629, 630	v. Hudson, 20 Ala. 284.....	738
Grimmett v. Askew, 48 Ark. 151..	45	v. Lanning, 91 U. S. 160.....	435
Grimwood v. Macke, 79 Ind. 100...	715	v. Law, 102 U. S. 461.....	301
Griswold, Matter of, 13 Barb. 412.	244	v. Littleton, 13 N. Y. Supp. 323.	439
v. Hazard, 141 U. S. 260.....	220	v. Munger, 5 Lans. 100.... 232,	917
v. Sedgwick, 6 Cowen 456.....	709	v. Robbins, 61 Barb. 33.....	409
v. Sheldon, 4 N. Y. 581.... 525,	793	v. Rogers, 2 Blackf. 429.....	291
Grocers' National Bank v. Clark,		v. Shank, 57 Mich. 36.....	697
31 How. Pr. 115.....	156	v. Thayer, 105 Mass. 219 .... 61,	63
Groenvelt v. Burwell, 1 Ld. Raym.		v. Williams, 10 Me. 278.....	751
467.....	560, 911	v. Williams, 6 Pick. 232.....	438
Groome v. Forrester, 5 M. & S.		v. Woodman, 49 N. H. 295 ....	546
314.....	803	v. Young, 3 Pick. 80.....	444
v. Lewis, 23 Md. 137.....	765	Halleck v. Moss, 22 Cal. 266.....	811
Grove v. Van Duyn, 44 N. J. L. 654.	204	Hallett v. Righters, 13 How. Pr.	
Grover and Baker S. M. Co. v.		43.....	446, 501
Radcliffe, 66 Md. 511.....	428	Hallock v. Dominy, 7 Hun 52....	137
Grover v. Buck, 34 Mich. 519. 245,	717	v. Dominy, 69 N. Y. 238....	82, 137
Groves v. Williams, 68 Ga. 598...	632	Halloran v. State, 80 Ind. 586....	426
Gruble v. Wood, 27 Kan. 535.....	338	Hallum v. Dickinson, 47 Ark. 120.	921
Grumon v. Raymond, 1 Conn. 40.	294	v. Dickinson, 54 Ark. 311.....	905
Guernsey v. Edwards, 26 N. H. 224.	13	Hamblin v. Warnecke, 31 Tex. 91	
v. Wood, 130 Mass. 503.....	384	568, 581	
Guilford v. Delaney, 57 Me. 589..	726	Hamiel v. Donnelly, 75 Iowa 93..	278
v. Love, 49 Tex. 715.....	889	Hamill v. Bosworth, 12 R. I. 124..	755
Guinard v. Heysinger, 15 Ill. 288.	339	Hamilton v. Burum, 11 Tenn. 354.	745
Guise v. Early, 72 Iowa 283.....	327	v. Lockhart, 41 Miss. 460 ... 281,	801
Gulf, Colorado & Santa Fé Ry.		v. Millhouse, 46 Iowa 74.....	697
Co. v. Rawlings, 80 Tex. 579.	332	v. Wright, 4 Hawks 283.....	601
Gunn v. Howell, 27 Ala. 663.....	227	Hamlin v. Kassafer, 15 Or. 456 ...	52
v. Howell, 35 Ala. 144.....	708	Hammann v. Mink, 99 Ind. 279	
v. Peakes, 36 Minn. 177.....	919	738. 845, 846	
v. Plant, 94 U. S. 664.....	739	Hammond v. Davenport, 16 O. St.	
v. Tackett, 67 Ga. 725.....	737	177.....	325, 392
Gurney v. Tufts, 37 Me. 130.....	798	v. Howell, 1 Mod. 184; 2 Mod.	
Gusman v. Hearsey, 28 La. Ann.		218.....	196, 911
709.....	598	v. People, 32 Ill. 446.....	838

	Page		Page
Hammond v. Wilder, 25 Vt. 342		Harris v. Graves, 26 Tex. 577.....	704
	499, 504	v. Hardeman, 14 How. 334.....	495
Hampson v. Weare, 4 Iowa 13..	774, 778	v. Lester, 80 Ill. 307	
Hampton v. Warren, 51 Ind. 288..	696		311, 508, 536, 633, 801
Hancock's Will, Matter of, 27 Hun		v. McClanahan, 79 Tenn. 181...	471
78; 91 N. Y. 284.....	58	v. Ross, 112 Ind. 314.....	308
Hanifan v. Needles, 108 Ill. 403...	405	v. State, 54 Ind. 2.....	748
Hanna v. Morrow, 43 Ark. 107...	525	v. Townsend, 52 Ark. 411.....	758
Hanson v. Dyer, 17 Me. 96.....	451	Harrison v. Beard, 30 Kan. 532....	313
Hankins v. Calloway, 88 Ill. 155		v. Bulcock, 1 H. Bl. 68.....	186
	757, 779	v. Clark, 4 Hun 685.....	256
Hanks v. Neal, 44 Miss. 212.....	759	v. Clark, 87 N. Y. 572.....	628
Hanley v. Donoghue, 59 Md. 239:		v. Hargrove, 109 N. C. 346.....	483
116 U. S. 1.....	800	v. Harrison, 19 Ala. 449....	344, 566
Hanlon v. Waterbury, 31 Ind. 168.	705	v. Harrison, 20 Ala. 629.....	695
Hanna v. Spotts, 5 B. Mon. 362...	780	v. Harrison, 106 N. C. 282.....	405
Hannum v. Day, 105 Mass. 33....	174	v. Lamar, 33 Ark. 824.....	397, 416
Hanover v. Turner, 14 Mass. 227..	690	v. Pender, Busb. L. 78.....	552
Hans Nielsen, Pet., 131 U. S. 176		v. Sager, 27 Mich. 476.....	726
	104, 112	v. Simmons, Busb. L. 80.....	596
Hanscom v. Tower, 17 Cal. 518...	718	Harrod v. Barretto, 1 Hall 155....	486
Hansford v. Hansford, 34 Mo. App.		v. Barretto, 2 Hall 302.....	486
262.....	355	v. Dismore, 127 Ind. 338.....	816
Hanson v. Hanson, 20 Pac. R. 736.	9	Harryman v. Schryver, 52 Md. 64.	418
v. Manley, 72 Iowa 48.....	596	Harshey v. Blackmarr, 20 Iowa 161.	437
Harbaugh v. Albertson, 102 Ind.		Hart v. Bostwick, 14 Fla. 162.....	628
69.....	929	v. Cummins, 1 Iowa 564....	352, 448
Hard v. Shipman. 6 Barb. 621....	725	v. Gray, 3 Sumner 339.....	451
Hardigan, In re, 57 Vt. 100.....	748	v. Grigsby, 14 Bush 542 ...	488, 501
Hardin v. Lee, 51 Mo. 241. 82, 207,	407	v. McNamara, 4 Price, 154#....	23
v. Strader, 1 B. Mon. 286.....	490	v. Sansom, 110 U. S. 151.....	390
Harding, Ex parte, 120 U. S. 782..	120	v. Waitt, 3 Allen 532.....	218
v. Butler, 21 Me. 191.....	717, 767	Hartle v. Long, 5 Pa. St. 491.....	207
Hardy, Ex parte, 68 Ala. 303.....	106	Hartley v. Boynton, 17 Fed. R. 873.	392
v. Broadbuss, 35 Tex. 668.....	574	Hartman v. Ogborn, 54 Pa. St. 120.	659
v. Gholson, 26 Miss. 70.....	483	Hartshorne v. Johnson, 7 N. J. L.	
v. Smith, 136 Mass. 328.....	690	108.....	56, 715
Hare's Am. Const. Law 934.....	703	Harvard Coll. v. Amory, 9 Pick. 446.	777
Hare v. Holloman, 94 N. C. 14....	403	Harvey, In re, 16 Ill. 127.....	848
Hargadine v. Van Horn, 72 Mo.		Harvey, Matter of, 3 Redf. 214...	683
370.....	236	v. Drew, 82 Ill. 606.....	486
Hargis v. Morse, 7 Kan. 415.....	921	v. Farnie, L. R., 6 Prob. Div. 35..	692
Harlan, Ex parte, 27 Pac. R. 920		v. Foster, 64 Cal. 296.....	364
	205, 287, 770	v. Huggins, 2 Bailey 252.....	158
Harlin v. Stevenson, 30 Iowa 371.	775	v. Tyler, 2 Wall. 328.....	878
Harman v. Brotherson, 1 Denio		Harwood v. Wylie, 70 Tex. 538	
537.....	232, 860		547, 593, 839
v. Moore, 112 Ind. 221... 4, 7, 8,	480	Haskell v. Haven, 3 Pick. 404.....	333
Harmon v. Birchard, 8 Blackf. 418.	625	Hassall v. Wilcox, 130 U. S. 493...	399
v. Moore, 59 Me. 428.....	207	Hassell v. Hamilton, 33 Ala. 280..	774
Harnish v. Bramer, 71 Cal. 155...	471	Hastings v. Farmer, 4 N. Y. 293..	652
Harpending v. Wylie, 13 Bush 158.	223	v. Partridge, 124 Mass. 401.....	252
Harrell v. State, 22 Tex. A. 692...	283	Haswell v. Lincks, 87 N. Y. 637..	475
Harrington v. Brown, 5 Pick. 519.	581	Hatch v. Garza, 22 Tex. 176.....	576
v. Com'rs, 2 McCord 400.....	910	Hathaway v. Clark, 5 Pick. 490...	415
v. Loomis, 10 Minn. 366.....	318	v. Hemingway, 20 Conn. 191....	596
v. People, 6 Barb. 607.....	303	Hauer's Appeal, 5 Watts & S. 473.	427
v. Wofford, 46 Miss. 41.....	309	Hauser v. State, 33 Wis. 678... 158,	204
Harriott v. New Jersey R. R. & T.		Haus v. Kohlar, 25 Kan. 640.....	254
Co., 2 Hilton 262.....	73	Hauswirth v. Sullivan, 6 Mont. 203.	486
v. Van Cott, 5 Hill 285.....	334	Havelock v. Rockwoods, 8 T. R. 268.	41
Harris, Matter of, 47 Mo. 164.....	99	Havens v. Drake, 43 Kan. 484.	415, 501
v. Claflin, 36 Kan. 543... 315, 319,	323	v. Sherman, 42 Barb. 636... 497,	756



	Page		Page
Hawes v. Hathaway, 14 Mass.	233. 725	Heister v. Fortner, 2 Binney	40. 450
v. Pritchard, 71 Ind.	166. 797	Helms v. Chadbourne, 45 Wis.	60. 464
Hawkins v. Hawkins, 28 Ind.	66. 484	v. Love, 41 Ind.	210. 428
v. McDougal, 126 Ind.	539. 309	Helphenstine v. Vincennes N.	
v. Ragan, 20 Ind.	193. 846	Bank, 65 Ind.	582. 502
v. Taylor, 128 Ind.	431. 650	Hemmens v. Bentley, 32 Mich.	89. 46
Hawley, In re, 104 N. Y.	330. 177	Hemmer v. Wolfer, 124 Ill.	435. 466
v. Hunt, 27 Iowa	303. 384	Hemphill v. Hemphill, 34 Miss.	
v. Simons, Ill., 14 N. E. R.	7. 547	68. 430	
v. White, 18 N. H.	67. 155	Hempstead v. Drummond, 1 Pin-	
Haws v. Clark, 37 Iowa	355. 46	ney 534. 865	
Hayden v. Sheriff, 43 La. Ann.	385. 604	v. Watkins, 6 Ark.	317. 779
Hayes v. Collier, 47 Ala.	726. 61	Henderson v. Henderson, 6 Ad. &	
Haymond, Ex parte, 91 Cal.	545. 283	El. N. S.	288. 663
v. Camden, 22 W. Va.	180. 365	v. Staniford, 105 Mass.	504. 368
Haynes v. Meeks, 10 Cal.	110. 626	Hendrick v. Cleaveland, 2 Vt.	329. 181
v. Meeks, 20 Cal.	288. 264, 267, 626	v. Whittemore, 105 Mass.	23
Hays, Ex parte, 25 Fla.	279. 256	357, 599, 870	
v. Cockrell, 41 Ala.	75. 632	Hendrickson v. St. Louis, etc., R.	
v. Ford, 55 Ind.	52. 900	R. Co., 34 Mo.	185. 746, 747
v. McNealy, 16 Fla.	409. 267	Henke v. McCord, 55 Iowa	378. 137
Haywood v. Charlestown, 34 N. H.		Henline v. People, 81 Ill.	269. 714, 876
23. 303		Henning v. Planters' Ins. Co., 28	
v. Collins, 60 Ill.	328. 491, 900	Fed. R.	440. 461
Hazard v. Martin, 2 Vt.	77, 84. 125, 887	Henrie v. Sweasey, 5 Blackf.	335. 388
Hazelett v. Ford, 10 Watts	101. 863	Henry v. Allen, 82 Tex.	35. 654
Hazelip v. Lindsey, 18 S. W. R.		v. Brothers, 48 Pa. St.	70. 920
832. 412		v. Carson, 96 Ind.	412. 365
Head v. Daniels, 38 Kan.	1. 81, 217	v. Estes, 127 Mass.	474. 429
Heagle v. Wheeland, 64 Ill.	423. 59	v. Hamilton, 7 Blackf.	506. 290
Heagy v. Black, 90 Ind.	534. 76	v. McKerlie, 78 Mo.	416. 764
Healey v. Butler, 66 Wis.	9. 467	Henshaw, Ex parte, 73 Cal.	486. 521
v. Mayor, 17 L. C.	409. 562	v. Savil, 114 Mass.	74. 456
Heard v. Arnold, 56 Ga.	570. 408	Herbert v. Smith, 6 Lans.	493. 8
v. Harris, 68 Ala.	43. 289	Hering v. Chambers, 103 Pa. St.	
v. Sack, 8 Mo.	610. 654	172. 501	
Hearn v. Camp, 18 Tex.	545. 685	Hernandez v. Drake, 81 Ill.	34. 663
Heath v. Frackleton, 20 Wis.	338. 609	Herr v. Herr, 5 Pa. St.	428. 163
v. Layne, 62 Tex.	686. 402, 582	Herrick v. Morrill, 37 Minn.	250. 353
v. Missouri, 83 Mo.	617. 461	v. Racine, etc., Co., 43 Wis.	93. 73
v. Wells, 5 Pick.	140. 269, 545, 546	Herriman v. Janney, 31 La. Ann.	
Hebel v. Amazon, 33 Mich.	400. 432	276. 229, 402, 544, 718	
Hebrard, Suc. of, 18 La. Ann.	485. 545	Herrington v. McCullum, 73 Ill.	
Heck v. Martin, 75 Tex.	469. 470, 821	482. 564	
Hecker v. Haak, 88 Pa. St.	238. 661	Hersch v. Groff, 2 Watts & S.	449. 302
Heckman v. Swartz, 64 Wis.	48. 291	Hersey v. Walsh, 38 Minn.	521. 6
Hedge v. Sims, 29 Ind.	574. 834	Hersom's Case, 39 Me.	476. 529
Hedges v. Mace, 72 Ill.	472. 780	Hess v. Cole, 23 N. J. L.	116. 417, 708
Heffner v. Gunz, 29 Minn.	108. 483	v. Rader, 26 Gratt.	746. 846
Heggie v. Building and Loan As-		Hessey v. Heitkamp, 9 Mo. App.	
sociation, 107 N. C.	581. 608	36. 873	
Heighway v. Pendleton, 15 Ohio		Hester v. State, 15 Tex. App.	
735. 335		418. 287	
Heinlen v. Phillips, 88 Cal.	557. 726	Hewitt v. Durant, 78 Mich.	186. 176
Heirmann v. Stricklin, 60 Miss.	234. 447	v. Weatherby, 57 Mo.	276. 467
Heirs of Bishop v. Hampton, 15		Heydenfeldt v. Towns, 27 Ala.	423. 55
Ala.	761. 273	Hiatt v. Simpson, 13 Ired. L.	72. 879
Heirs of Herriman v. Janney, 31		Hickey v. Forristal, 49 Ill.	255. 456
La. Ann.	276. 229, 402, 544, 718	v. Hinsdale, 8 Mich.	267. 737
Heirs of Ludlow v. Johnson, 3 O.		v. Stewart, 3 How.	750. 524
553. 533		Hickman v. Jones, 9 Wall.	197. 31
Heirs of Langworthy v. Baker, 23		Higby v. Ayres, 14 Kan.	331. 52, 65
Ill.	484. 881	Higdon v. Heard, 14 Ga.	255. 111

	Page		Page
Higginbotham v. Thomas, 9 Kan.		Holden v. Barrows, 39 Me. 135...	539
328 .....	882	v. Lathrop, 65 Mich. 652.....	780
Higgins v. Peltzer, 49 Mo. 152....	659	v. Ranney, 45 Mich. 399.....	445
Higginson v. Sherif, 1 Comyn 153.	599	Holderman v. Thompson, 105 Ind.	
High on Injunction, §1416.....	780	112 .....	786
Hightower v. Williams, 38 Ga.		Holland v. Adair, 55 Mo. 40.....	337
597 .....	438	Holliday v. Spencer, 7 Ind. 632...	177
Highway, Mat. of, 18 N. J. L. 291.	747	v. Ward, 19 Pa. St. 485 .....	609
Hildreth v. Harney, 62 Iowa 420..	732	Hollingsworth v. Bagley, 35 Tex.	
v. M'Intire, 1 J. J. Marsh. 206...	32	345 .....	701
Hill v. Burges, 10 How. Pr. 264...	571	v. Barbour, 4 Peters 466 ....	130, 306
v. City Cab Co., 79 Cal. 188....	926	v. State, 111 Ind. 289.....	351
v. Fiernam, 4 Mo. 316.....	862	Hollis, Ex parte, 59 Cal. 405.....	299
v. Gordon, 45 Fed. R. 276.....	457	v. Dashiell, 52 Tex. 187.....	744, 800
v. Sherwood, 96 Mo. 125 .....	597	Hollister v. Abbott, 31 N. H. 442	
v. Taylor, 50 Mich. 549.....	107	552, 775	
v. Wait, 5 Vt. 124.....	61	v. Giddings, 24 Mich. 501.....	739
v. Woodward, 78 Va. 765.....	891	Holloway v. Freeman, 22 Ill. 197:	698
Hilliard v. Cox, 1 L'd Raym. 562 .	688	Holman, Ex parte, 28 Iowa 88....	742
Hillsborough v. Nichols, 46 N. H.		v. Mayor, 34 Tex. 668.....	811
379 .....	576	Holmes v. Eason, 8 Lea 754.....	38, 61
Hilton v. Guyott, 42 Fed. R. 249..	908	v. Holmes, 57 Barb. 305.....	380
v. Mason, 92 Ind. 157 .....	554	v. Holmes, 4 Lans. 388... 380, 530,	690
Hilton's Appeal, 116 Pa. St. 351..	171	v. Oregon, etc., Co., 9 F. R. 229.	687
Hindman v. Mackall, 3 G. Gr. 170.	439	Holt v. Thacher, 52 Vt. 592.....	641
Hinds v. Willis, 13 S. & R. 213...	784	Holton v. Towner, 81 Mo. 360. 657,	800
Hine v. Hussey, 45 Ala. 496.....	61	Holyoke v. Haskins, 5 Pick. 20....	681
Hinkle, In re, 31 Kan. 712.....	42, 54	v. Haskins, 9 Pick. 259.....	681
Hinsey v. Feeley, 62 Ind. 85.....	658	Homan v. Brinckerhoff, 1 Den. 184.	279
Hinson v. Wall, 20 Ala. 298.....	826	Home National Bank v. Carpen-	
Hisler v. Carr, 34 Cal. 641 ....	248, 280	ter, 129 Mass. 1.....	722
Hoagland v. Creed, 81 Ill. 506....	54	Homer v. Fish, 1 Pick. 435.....	575
Hobart 277 .....	3	Hood, Matter of, 90 N. Y. 512...	775
Hobbs v. Board of Com'rs, 103 Ind.		v. Hood, 11 Allen 196.....	391
575.....	731, 760	v. Hood, 110 Mass. 463.....	391
v. Board of Com'rs, 116 Ind. 376.	665	v. Parker, 63 Ga. 510.....	584
v. Fogg, 6 Gray 251.....	500	v. State, 56 Ind. 263.....	690
v. Henning, 17 C. B. N. S. 791..	906	Hooks v. Moses, 8 Ired. L. 88....	719
Hobson v. Ewan, 62 Ill. 146		Hooper v. Scarborough, 57 Ala. 510.	622
264, 274, 336, 342, 344, 619		Hoose v. Sherrill, 16 Wend. 33. 335,	359
v. Peake, 44 La. Ann .....	505	Hoover v. Sellers, 5 La. Ann. 180.	616
Hochgraef v. Hendrie, 66 Mich. 556	639	Hope v. Blair, 105 Mo. 85.....	73, 655
Hodgdon v. Southern Pac. R. Co.,		Hopkins v. Com., 3 Metc. 460....	72
75 Cal. 642.....	553	v. Howard, 12 Tex. 7.....	236
Hodge v. Fabian, 31 S. C. 212....	775	v. Meir, 19 Atl. R. 264.....	532
Hodges v. Bauchman, 16 Tenn.		Hopper v. Fisher, 2 Head 253....	889
185. ....	418	v. Lucas, 86 Ind. 43	
v. Ware, 1 Tex. 244.....	44	434, 737, 738, 740, 819. 828,	838
Hodgin v. Barton, 23 Kan. 740...	217	Hopwood, Ex parte, 15 Q. B. 121.	746
Hodson v. Tibbetts, 16 Iowa 97....	447	Horan v. Wahrensberger, 9 Tex.	
Hoffman v. Beard, 32 Mich. 218..	269	313 .....	105
v. Coster, 2 Wharton, 453.....	576	Hord v. Elliott, 33 Ind. 220.....	773
v. Harrington, 28 Mich. 90.....	853	Horn v. Lockhart, 17 Wall. 570...	31
v. Hoffman, 55 Barb. 269... 380,	690	v. New Lots, 83 N. Y. 100.....	110
v. Hoffman, 15 Ind. 278.....	691	Hornaday v. State, 43 Ind. 306...	454
v. Hoffman, 46 N. Y. 30.....	690	Horner v. Doe, 1 Ind. 130.....	902
v. Strohecker, 7 Watts 86.....	581	v. United States, 143 U. S. 570...	132
Hogan v. Thompson, 2 La. A. 538	540	Horton v. Critchfield, 18 Ill. 133..	904
Hogg v. Link, 90 Ind. 346.....	585	v. Elliott, 90 Ala. 480.....	872
Holbert v. Montgomery, 5 Dana		v. Howard, 79 Mich. 642....	62, 642
11 .....	435	Hosford v. Wynn, 26 S. C. 130...	141
Holcomb v. Cornish, 8 Conn.		Hoshaw v. Hoshaw, 8 Blackf. 258.	373
375.....	114, 295, 476	Hosley, In re, 22 Vt. 363.....	747

	Page		Page
Hotchkiss v. Cutting, 14 Minn. 537.	309	Hume v. Conduitt, 76 Ind. 598.	448, 470
Houghton, Ex parte, 7 Fed. R. 657;		v. Little Flat Rock Drainage	
8 Fed. R. 897.	516	Association, 72 Ind. 499.	665
Houlden v. Smith, 14 Ad. & El. N.		Humes v. Cox, 1 Pinney 551.	404, 406
S. 841.	150	Humphrey v. Persons, 23 Barb.	
Houser, In re, 14 N. Y. Supp. 275.	690	313.	737
v. McKennon, 60 Tenn. 287.	525, 793	Humphreys v. Mayor, 48. N. J. L.	
Houston v. Clark, 36 Kan. 412.	825	588.	901
v. Killough, 80 Tex. 296.	168	Hunger v. Barlow, 39 Iowa 539.	903
v. Walcott, 1 Iowa 86.	738	Hungerford v. Cushing, 8 Wis.	
Hovey v. Barker, 26 Pac. R. 591.	666	324.	124
v. Hamilton, 24 Me. 451.	67	Hunt v. Hapgood, 4 Mass. 117.	163
Howard v. Bennett, 13 Tex. 309.	268	v. Hunt, 9 Hun 622.	391
v. Clark, 43 Mo. 344.	499	v. Hunt, 72 N. Y. 217	
v. Hutchinson, 10 Me. 335.	412	73, 213, 744, 746	
v. Jenkins, 73 Tenn. 176.	483	v. Wickwire, 10 Wend. 102.	723
v. McKenzie, 54 Tex. 171.	639	Hunter, Ex. parte, 16 Fla. 575.	799
v. McLaughlin, 98 Pa. St. 440.	779	v. Burnsville, 56 Ind. 213.	575
v. Moore, 2 Mich. 226.	857	v. Ferguson, 13 Kan. 462.	52
v. North, 5 Tex. 290.	657	v. Hatton, 4 Gill 115.	713, 714
v. Smith, 42 How. Pr. 300.	439	v. Lester, 18 How. Pr. 347.	457
v. State, 47 Ark. 431.	760, 779	v. Stoneburner, 92 Ill. 75.	554, 585
v. Whitman, 29 Ind. 557.	778	Hunter's Estate, 51 N. W. R. 20.	404
Howbert v. Heyle, 47 Kan. 58.	265, 281	Huntley v. Baker, 33 Hun. 578.	418, 486
Howe v. Blanden, 21 Vt. 315.	162	Huntress v. Effingham, 17 N. H.	
v. Mason, 14 Iowa 510.	861	584.	76
v. McGiven, 25 Wis. 525.	568	Hurd, Matter of, 9 Wend. 465.	151
Howe Machine Co. v. Pettibone,		Hurlbut v. Thomas, 55 Conn. 181.	481
74 N. Y. 68.	317	Hurley v. Barnard, 48 Tex. 83	
Howell v. Budd, 91 Cal. 342.	545	832, 886	
v. City of Buffalo, 15 N. Y. 512.	716	v. Hamilton, 37 Minn. 160.	211
v. Gilt Edge, 49 N. W. R. 704.	432	Hurt v. Horton, 12 Tex. 285.	542
v. Gordon, 40 Ga. 302.	438	v. Hurt, 6 Rich. Eq. 114.	376
v. Hale, 73 Tenn. 405.	657	Hush v. Sherman, 2 Allen 596.	59
Howerton v. Sexton, 104 N. C. 75	278	Hutcheson v. Priddy, 12 Gratt. 85.	593
Howlett v. Tarte, 10 C. B., N. S., 813	17	Hutchinson v. Lemcke, 107 Ind.	
Hoxie v. Payne, 41 Conn. 539.	358	121.	705
Hoyles v. Blore, 14 M. & W. 387.	409	Hutts v. Hutts, 62 Ind. 214.	902
Hubbard v. Dubois, 37 Vt. 94.	436, 890	Huyck v. Graham, 82 Mich. 353.	813
v. Spencer, 15 Johns. 244.	437	Huyghe v. Brinkman, 34 La. Ann.	
Hubbell v. Cramp, 11 Paige 310		831.	655
408, 709		Huxley v. Harrold, 62 Mo. 516.	900
Huddleston v. Asbugg, Finch 204.	596	Hyatt v. Bates, 35 Barb. 308.	14
Hudeburgh v. State, 38 Tex. 535.	799	Hyllis v. State, 45 Ark. 478.	54
Hudson v. Bingham, 8 N. B. R. 494.	582	Hynds v. Imboden, 5 Ark. 385.	65
v. Guestier, 6 Cranch 281.	378	Hynes v. Oldham, 3 Mon. 266.	327
v. Jurnigan, 39 Tex. 579.	164	Ikelheimer v. Chapman, 32 Ala.	
Huff v. Lafayette, 108 Ind. 14.	306	676.	271, 876
Huffer v. Allen, L. R., 2 Ex. 15		Iles v. Elledge, 18 Kan. 296.	374
597, 598		v. Watson, 76 Ind. 359.	889
Huffsmith v. Levering, 3 Whart.		Illinois Central R. Co. v. Brooks,	
110.	604	90 Tenn. 161.	458
Hughes v. Cornelius, 2 Show. 232.	378	Ilseley v. Harris, 10 Wis. 95.	355
v. Cummings, 7 Colo. 203.	537	Imbert v. Hallock, 23 How. Pr.	
v. Hardesty, 13 Bush 364.	100	456.	655
v. McCoy, 11 Colo. 591.	912	Indiana, B. & W. Ry. Co. v. Brit-	
Hugus v. Dithridge-Glass Co., 96		tingham, 98 Ind. 294.	266
Pa. St. 160.	657	Indiana Oolitic Limestone Co. v.	
Hull v. Chicago, B. & Q. R. Co.,		Louisville, etc., Ry. Co., 107	
21 Neb. 371.	501	Ind. 301.	900
v. Mallory, 56 Wis. 355.	727	Indiana R. S. 1843.	458, 856
Humboldt v. Dinsmore, 75 Cal.		Indianapolis and St. Louis Ry. Co.	
604.	85, 744	v. Harmless, 124 Ind. 25.	918



	Page		Page
Indianapolis, etc., G. R. Co. v. State, 105 Ind. 37.....	893	Jarret v. Higbee, 5 Mon. 546.....	560
Ingersoll v. Mangam, 84 N. Y. 622.	402	Jarvis v. Barrett, 14 Wis. 591.....	390
Ingle v. Curry, 48 Tenn. 26.....	407	v. Robinson, 21 Wis. 523....	904, 919
Insurance Co. v. Bangs, 103 U. S. 435.....	386	Jasper v. Wadlow, 82 Mo. 172....	357
Iowa Homestead Co. v. Des Moines Navigation Co., 63 Iowa 285.	701	Jeannet v. Ricker, 10 La. Ann. 66.	623
Iowa Union Tel. Co. v. Boylan (Iowa), 48 N. W. R. 730.....	437	Jefferson Co. v. Reitz, 56 Pa. St. 44.	521
Irby v. Wilson, 1 Dev. & B. Eq. 568.....	380	Jeffersonville R. R. Co. v. Swayne, 26 Ind. 477.....	600
Ireland, Ex parte, 38 Tex. 344....	45	Jeffreys v. Yarborough, 1 Dev. Eq. 506.....	299
Irion v. Lewis, 56 Ala. 190.....	913	Jeffries v. McNamara, 49 Ind. 142.	294
Irions v. Keystone Mfg. Co., 61 Iowa 406.....	358	v. Wright, 51 Mo. 215.....	471, 821
Iron Cliffs Co. v. Lahais, 52 Mich. 394.....	322	Jemison v. Gaston, 21 Tex. 266....	775
Irwin v. Scriber, 18 Cal. 499.....	676	Jenkins, Ex parte, 2 Wall. Jr. 521.	524
Isaacs v. Price, 2 Dill. 347.....	445	v. Crofton, 9 S. W. R. 406....	465, 658
Isabelle v. Iron Cliffs Co., 57 Mich. 120.....	322	v. Peckinpaugh, 40 Ind. 133....	642
Isbell v. Stewart, 125 Ind. 112....	707	v. Putnam, 1 Bay 8.....	631
Isett v. Stuart, 80 Ill. 404....	448, 468	v. Young, 35 Hun 569.....	404
Israel v. Arthur, 7 Colo. 5.....	320	Jenks v. Howland, 3 Gray 536....	767
Iverson v. Loberg, 26 Ill. 179....	262	Jennerson v. Garvin, 7 Kan. 136....	722
Ives v. Ashley, 97 Mass. 198.....	581	Jenness v. Berry, 17 N. H. 549....	223
v. Salisbury, 56 Vt. 565.....	609	Jennings v. Carson, 4 Cranch 2....	416
Ivy v. Barnhart, 10 Mo. 151.....	595	v. Le Breton, 80 Cal. 8.....	881
Jack v. Tease, 12 Irish Ch. 279....	909	v. Simpson, 12 Neb. 558.....	641
Jackson, Ex. parte, 45 Ark. 158....	103	v. Stafford, 1 Ired. Law 404....	222
v. Astor, 1 Pinney 137.....	887	Jeter v. Hewitt, 22 How. 352.....	637
v. Boyd, 53 Iowa 536.....	797	Jewell v. Van Steenburgh, 58 N. Y. 85.....	368
v. Brown, 3 Johns 459.....	508	Jewett v. Rines, 39 Me. 9.....	780
v. Crawfords, 12 Wend. 533..	548, 611	Jilz, Ex parte, 64 Mo. 205.....	741
v. Cummings, 15 Ill. 449.....	823	Jochumsen v. Suffolk Savings Bank, 3 Allen 87.....	645
v. Erwin, 10 Wend. 442.....	832	Johns v. Marion Co., 4 Or. 46....	258
v. Hoag, 6 Johns. 59.....	508	v. Pattee, 55 Iowa 665.....	575
v. Jackson, 1 Johns. 424.....	694	Johnson, Ex parte, 15 Neb. 512....	49
v. Magruder, 51 Mo. 55.....	846	Johnson, In re, 46 Fed. R. 477....	816
v. Myers, 14 Johns. 354.....	669	v. Anderson, 76 Va. 766.....	753
v. Reeve, 44 Ark. 496.....	543, 544	v. Baker, 38 Ill. 98.....	499
v. Robinson, 4 Wend. 436		v. Barker, 57 Iowa 32.....	400
176, 546, 548, 611		v. Beazley, 65 Mo. 250.....	681
v. Smith, 120 Ind. 520.....	209	v. Billingsley, 22 Tenn. 151....	828
v. State, 104 Ind. 516.....	85, 497	v. Brewers, etc., Co., 51 Wis. 570.	734
v. Summerville, 13 Pa. St. 359..	576	v. Clark, 18 Kan. 157... 280, 287,	358
v. Tift, 15 Ga. 557.....	438	v. Cobb, 29 S. C. 372.....	404
Jacobs' Appeal, 23 Pa. St. 477....	847	v. Corpenning, 4 Ired. Eq. 216..	683
v. Frere, 28 La. Ann. 625.....	331	v. Dobbins, 12 Phila. 518.....	586
v. Hogan, 85 N. Y. 243.....	248	v. Eureka County, 12 Nev. 28....	86
v. Louisville, 10 Bush 263.....	876	v. Gage, 57 Mo. 160.....	351, 407
Jacobson v. Miller, 41 Mich. 90....	16	v. Iron, etc., Co., 78 Wis. 159. 218,	607
Jacoby v. Waddell, 61 Iowa 247..	813	v. Johnson, 67 How. Pr. 144....	694
Jaehne v. New York, 128 U. S. 189.	110	v. Johnson, 30 Ill. 215.....	499
James v. Adams, 22 How. Pr. 409.	399	v. Johnson, 26 Ind. 441.....	899
v. Meyer, 41 La. Ann. 1100. 620,	628	v. Johnson, 70 Mich. 65.....	782
v. Stokes, 77 Va. 225.....	605	v. Johnson's Estate, 66 Mich. 525.	264
v. Surrogate Court, 36 Hun. 218.	683	v. Jones, 2 Neb. 126.....	236
Jamieson v. Robb, 7 Victorian 170.	510	v. Kimbro, 3 Head 557.....	530
Janney v. Spedden, 38 Mo. 395....	385	v. Maxon, 23 Mich. 129.....	287
January v. Rice, 33 Mo. 409....	698	v. Pomeroy, 31 O. St. 247.....	576
Jardine v. Reichert, 39 N. J. L. 165.	445	v. Powers, 21 Neb. 292.....	762
		v. Ramsay, 91 Ind. 189.....	697
		v. Ray, 67 Ala. 603.....	625
		v. United States, 3 McLean 89..	293
		v. Von Kettler, 66 Ill. 63.....	401

	Page		Page
Johnston v. San Francisco Savings Bank, 75 Cal. 134.....	342	Kambieskey v. State, 26 Ind. 225..	739
Jolley v. Foltz, 34 Cal. 321.....	695	Kaminsky, In re, 70 Mich. 653.....	789
Jones v. Bittinger, 110 Ind. 476....	620	Kamp v. Kamp, 59 N. Y. 212.....	750
v. Cardwell, 98 Ind. 331.....	411	Kane v. Cook, 8 Cal. 449.....	385
v. Church, etc., 15 Neb. 81.....	41	v. Desmond, 63 Cal. 464.....	493
v. Coffey, 97 N. C. 347.....	649	v. McCown, 55 Mo. 181.....	329, 407
v. Davenport, 40 N. J. Eq. 77....	802	v. Paul, 14 Peters 33.....	624, 627
v. Driskill, 94 Mo. 190		v. Rock River, 15 Wis. 179.....	313
77, 371, 597, 814		v. State, 70 Md. 546.....	709
v. Edwards, 78 Ky. 6.....	889	Kanne v. Minneapolis and St. L. Ry. Co., 33 Minn. 419.....	760
v. Gordon, 2 Jones Eq. 352.....	228	Karnes v. Alexander, 92 Mo. 660..	870
v. Huff, 36 Tex. 683.....	168	v. Kunkle, 2 Minn. 313.....	919
v. Jones, 14 B. Mon. 464.....	571	Kase v. Best, 15 Pa. St. 101.....	820
v. Jones, 3 Dev. L. 360.....	525, 793	Kauffman, Ex parte, 73 Mo. 588..	629
v. Jones, 115 Ind. 504.....	371	Kay v. Walter, 28 Kan. 111.....	389
v. Jones, 36 Hun 414.....	695	Kearney, Ex parte, 7 Wheat. 38..	13
v. Jones, 108 N. Y. 415.....	695	v. Kearney, 72 Cal. 591.....	397, 416
v. Jones, 60 Tex. 451.....	694	Kearny, Ex parte, 55 Cal. 212..	289, 870
v. Judkins, 4 Dev. & B. L. 454..	471	Keating v. Serrell, 5 Daly 278....	728
v. League, 18 How. 76.....	698	Keeler v. Stead, 56 Conn. 501.....	
v. Le Baron, 3 Dem. 37.....	408	Keener v. Goodson, 89 N. C. 273..	739
v. Levi, 72 Ind. 586.....	299, 632	Keith v. Hayden, 26 Minn. 212....	835
v. Manganese, 3 Atl. R. 517.....	463	v. Keith, 26 Kan. 26.....	553
v. Manly, 58 Mo. 559.....	850	v. Kellogg, 97 Ill. 147.....	865
v. Martin, 5 Blackf. 351.....	840	Kekauluohi, Est. of, 6 Haw'n 172..	611
v. Read, 1 Humph. 334.....	86	Kellam v. Richards, 56 Ala. 238..	847
v. Sander, 2 Wash. St. 329.....	215	Kellar v. Stanley, 86 Ky. 240.....	346
v. Spencer, 15 Wis. 583.....	388	Keller, Succession of, 39 La. Ann. 579.....	522, 628
v. State, 15 Tex. App. 82.....	287	Keeler v. Stead, 56 Conn. 501.....	60
v. Talbot, 9 Mo. 121.....	575	Kelley v. Dresser, 11 Allen 31....	913
v. Taylor, 7 Tex. 240.....	302	v. Drury, 9 Allen 27.....	384
v. Terry, 43 Ark. 230.....	471, 476	v. Mize, 3 Sneed 59.....	576
v. Warner, 81 Ill. 343.....	374	v. Morrell, 29 Fed. R. 736	
v. Woodstock, 10 S. R. 635.....	847	279, 883, 901	
Jordan, In re, 49 Fed. R. 238.....	101	Kellogg, Ex parte, 6 Vt. 509.....	333
v. Giblin, 12 Cal. 100.....	319, 501	v. Johnson, 38 Conn. 269.....	647
v. Hanson, 49 N. H. 199.....	859	Kelly, Ex parte, 65 Cal. 154.....	799
v. Henry, 22 Minn. 245.....	58	v. Archer, 48 Barb. 68..	245, 247, 279
v. Robinson, 15 Me. 167.....	907	v. Bemis, 4 Gray 83.....	106, 137
v. Van Epps, 19 Hun 526.....	704	v. Donlin, 70 Ill. 378.....	222
v. Van Epps, 85 N. Y. 427.....	704	v. Hooper, 11 Tenn. 394.....	640
Joseph v. Henry, 1 L. M. & P. 388..	550	v. Norwich, 47 N. W. R. 986....	376
v. Pyle, 2 W. Va. 449.....	432	v. Paris, 10 Vt. 261.....	333
Joslin v. Caughlin, 26 Miss. 134..	404	v. People, 115 Ill. 583.....	758
Jourden v. Meier, 31 Mo. 40.....	609	v. Van Austin, 17 Cal. 565.....	865
Journey v. Dickerson, 21 Iowa 308..	345	v. West, 80 N. Y. 139.....	399, 627
Joyce v. McAvoy, 31 Cal. 273....	813	Kelman v. Sheen, 11 Allen 566....	668
v. Whitney, 57 Ind. 550.....	507	Kelsay v. Frazier, 78 Mo. 111....	209
Judah v. Stephenson, 10 Iowa, 493..	385	Kemmler, In re, 7 N. Y. Supp. 145.....	110
Judge of Probate v. Fillmore, 1 D. Chip. (Vt.) 420.....	886	Kemp v. Cook, 18 Md. 130.....	652
v. Mathes, 60 N. H. 433.....	663	v. Neville, 10 C. B. N. S. 523....	915
v. Robins, 5 N. H. 246.....	780	Kempe v. Kennedy, 5 Cr. 173..	560, 876
Judson v. Lake, 3 Day 318.....	660	v. Kennedy, 1 Pet. C. C. 30.....	260
Judy v. Kelley, 11 Ill. 211.....	440	v. Pintard, 32 Miss. 324.....	450
Julian v. Ward, 69 Mo. 153.....	625	Kendall v. Mather, 48 Tex. 585....	810
Jump v. Batton, 35 Mo. 193.....	336	v. Powers, 4 Metc. 553.....	789
Junkans v. Bergin, 64 Cal. 203....	719	Kendrick v. Kimball, 33 N. H. 482.....	388
Justices v. Selman, 6 Ga. 432.....	627	Kennedy v. Gaines, 51 Miss. 625..	404
Kahn v. Kuhn, 44 Ark. 404.....	355	v. New York, 101 N. Y. 487....	317
v. Lesser, 16 N. Y. Supp. 154..	486		
Kamaha, In re, 2 Hawaiian 444....	674		

	Page		Page
Kennedy v. Redwine, 59 Ga. 327...	928	Kirklan v. Brown, 4 Humph. 174...	596
Kenner v. Morrison, 12 Hun 204...	916	Kissinger v. Hanselman, 33 Ind. 80...	492
Kenney v. Greer, 13 Ill. 432.....	698	Kissock v. Grant, 34 Barb. 144...	240
Kent v. Brown, 38 La. Ann. 802...	775	Kitsmiller v. Kitchen, 24 Iowa 163...	351
Kenyon, Ex parte, 5 Dill. 385. 561,	652	Kittredge v. Emerson, 15 N. H. 227...	775
v. Baker, 16 Mich. 373.....	922	v. Folsom, 8 N. H. 98.....	543
Ker v. Illinois, 119 U. S. 436.....	362	v. Kellogg, 8 Abb. N. Cas. 168...	128
Kern v. Huidekoper, 103 U. S. 485...	735	v. Martin, 141 Mass. 410.....	505
Kerr v. Condry, 9 Bush. 372.....	905	Kleinecke v. Woodward, 42 Tex.	
v. Kerr, 41 N. Y. 272.....	439	311.....	271
v. Leighton, 2 G. Greene 196...	575	Kleinsteuber v. Schumacher, 35	
v. Mount, 28 N. Y. 659.....	917	Wis. 608.....	727
Kertchem v. George, 78 Cal. 597...	857	Klenk v. Schwolm, 19 Wis. 111...	244
Ketchum v. Vidvard, 4 T. & C. 138...	248	Kleyla v. Haskett, 112 Ind. 515...	308
v. White, 72 Iowa 193.....	467, 810	Kline v. Kline, 57 Iowa 386.....	383
v. Zeilsdorff, 26 Wis. 514.....	511	Klinesmith v. Socwell, 100 Ind. 589...	707
Keybers v. McComber, 67 Cal.		Knapp v. Abell, 10 Allen 485.....	800
395.....	337, 878	Knell v. Briscoe, 49 Md. 414.....	859
Keyes v. Tait, 19 Iowa 123.....	259	Knickerbocker v. Knickerbocker,	
v. United States, 109 U. S. 336...	57	58 Ill. 399.....	139
Keys v. Williamson, 31 O. St. 561...	492	Knight v. Norton, 15 Me. 337....	314
Kibbe v. Kibbe, Kirby 119.....	385	Knisely v. Parker, 34 Ill. 481.....	152
Kie, Ex parte, 46 Fed. R. 485.....	210	Knoll v. Woelken, 13 Mo. A. 275...	781
Kieffer, Ex parte, 40 Fed. R. 399...	109	Knopf v. Morel, 111 Ind. 570....	805
Kilburn v. Woodworth, 5 Johns. 37...	388	Knott v. Jarboe, 1 Met. (Ky.) 504...	457
Kilgore, Ex parte, 3 Tex. App. 247...	815	v. Taylor 99 N. C. 511.....	639
Kimball v. Fisk, 39 N. H. 110... 14,	502	Knowles v. Muscatine, 20 Iowa 248...	209
v. Merrick, 2 Ark. 12.....	388	Knox v. Noble, 28 N. B. 34.....	131
v. Newport, 47 Vt. 38.....	585	Knox County v. Davis, 63 Ill. 405...	126
Kincaid v. Neall, 3 McCord 201...	871	Koechlept v. Hook, 10 Md. 173...	838
Kindell v. Titus, 9 Heisk. 727		Koehler v. Ball, 2 Kan. 160.....	846
86, 163, 267		Koger v. Franklin, 79 Ala. 505	
King v. Bates, 80 Mich. 367.....	457	55, 58, 61	
v. Belcher, 30 S. C. 381.....	764	Kohlman v. Wright, 6 Cal. 230....	239
v. Burdett, 28 W. Va. 601.....	639	Kolle v. Clausheide, 99 Ind. 97...	813
v. Frazer, 2 Tex. A. C. C. 789...	765	Koon v. Mazuzan, 6 Hill 44.....	608
v. Harrington, 14 Mich. 532. 488,	503	Kopperl v. Nagy, 37 Ill. App. 23...	821
v. Inhabitants, 11 East 388.....	416	Koren v. Roemheld, 7 Ill. A. 646...	572
v. Inhabitants, 8 B. & C. 471....	852	Kowalsky, In re, 73 Cal. 120.....	287
v. Inhabitants, 4 T. R. 596.....	41	Kramer v. Wellendorf (Pa.), 10	
v. Justices, 1 M. & S. 442.....	68	Atl. R. 892.....	280
v. Kent's Heirs, 29 Ala. 542.....	267	Krekeler v. Ritter, 62 N. Y. 372...	598
v. King, 1 Pa. (1 P. & W.) 15...	41	Kress v. State, 65 Ind. 106.....	913
v. Lee Fook, 7 Hawaiian 249...	72	Krueger v. Beckham, 35 Kan. 400...	41
v. Martin, 17 Ala. 177.....	831	Krug v. Davis, 85 Ind. 309... 335,	918
v. Pickett, 32 La. Ann. 1006....	482	Kruse v. Wilson, 79 Ill. 233	
v. Poole, 36 Barb. 242.....	928	238, 240, 244	
v. Randlett, 33 Cal. 318.....	342	Krutina v. Culpepper, 75 Ga. 602...	8
v. Sapp, 66 Tex. 519.....	55	Kundolf v. Thalheimer, 17 Barb.	
v. Sullivan, 67 Tenn. 329.....	669	506.....	868
Kingen v. Kelley, 28 Pac. R. 36...	362	Kungle v. Fasnacht, 29 Kan. 559...	667
Kingman v. Paulson, 126 Ind. 507...	537	Kuntz v. Sumption, 117 Ind. 1....	368
Kingsbury v. Dickinson, 2 Day 1...	860	Kuschke v. St. Paul, 45 Minn. 225...	367
v. Powers, 131 Ill. 182.....	537	Kyle v. Mays, 22 Ala. 673.....	840
v. Yniestra, 59 Ala. 320.....	486	v. Phillips, 6 Baxter 43.....	389
Kinney v. Forsythe, 96 Mo. 414...	903	Lackland v. Stevenson, 54 Mo. 108...	783
Kinnier v. Kinnier, 53 Barb. 454...	929	Lacy v. Williams, 27 Mo. 280.....	681
v. Kinnier, 45 N. Y. 535.... 694,	710	Ladd v. Kimball, 12 Gray 139....	525
Kinyon v. Fowler, 10 Mich. 16...	274	Ladnier v. Ladnier, 64 Miss. 368...	830
Kipp v. Collins, 33 Minn. 394....	903	Lady Bryan Mining Co., Matter	
v. Dawson, 31 Minn. 373... 504,	607	of, 2 Abb. (U. S.) 527.....	154
v. Fernhold, 37 Minn. 132.....	352	Lafayette Ins. Co. v. French, 18	
v. Fullerton, 4 Minn. 473.....	468	How. 404.....	341

	Page		Page
La Fontaine v. Southern Underwriters, 83 N. C. 132.....	111	Laundry License Case, The, 22 Fed. R. 701.....	138
Laird v. Reese, 43 Ala. 148.....	402	Lavell v. McCurdy, 77 Va. 763	359, 812
Lalanne v. Moreau, 13 La. 431. . .	775	Lavin v. Emigrant Industrial Savings Bank, 1 Fed. R. 641.....	645
Lamaster v. Keeler, 123 U. S. 376.	146	Law v. Vierling, 45 Ind. 25.....	778
Lamb v. Brown, 12 N. B. R. 522..	408	Lawler v. White, 27 Tex. 250.....	483
Lambert v. Smith, 11 C. B. 358....	409	Lawrence v. Coffman, 36 Ark. 641.	551
Lamothe v. Lippott, 40 Mo. 142..	546	v. Englesby, 24 Vt. 42.....	616
Lampe v. Manning, 38 Wis. 673..	46	v. Fast, 20 Ill. 338.....	829
Lamphere, In re, 61 Mich. 105....	798	v. Parsons, 27 How. Pr. 26.....	544
Lamprey v. Nudd, 29 N. H. 299..	654	Lawrence's Case, 18 Abb. Pr. 347.	901
Lampton v. Usher, 7 B. Mon. 57	236, 653, 924	Lawson v. Moorman, 85 Va. 880	392, 776
Lancaster v. Lane, 19 Ill. 242.....	818	Leach, In re, 51 Vt. 630.....	194
v. Wilson, 27 Gratt. 624.....	846	v. Pillsbury, 18 N. H. 525.....	723
Lance v. Dugan, 13 Atl. R. 942....	487	v. Western, 65 N. C. 486.....	301
v. McCoy, 34 W. Va. 416.....	415	Learned v. Matthews, 40 Miss.	210..... 235, 547, 848
Landers v. Douglas, 46 Ind. 522..	657	Leary v. Fletcher, 1 Ired. L. 259..	836
v. George, 49 Ind. 309.....	608	Leathers v. Morris, 101 N. C. 184.	336
Landes v. Brant, 10 How. 348.....	479	Leatherwood v. Sullivan, 81 Ala.	458..... 224, 278
Landford v. Dunklin, 71 Ala. 594.	616	Ledford v. Weber, 7 Ill. App. 87.	499
Landon v. Burke, 33 Wis. 452.....	722	Lee v. Back, 30 Ind. 148.....	587
v. Cornet, 62 Mich. 80.....	65, 85	v. Figg, 37 Cal. 328.....	215, 248
v. Wilmington, 88 N. C. 584.....	610	v. Ice, 22 Ind. 384.....	262
Landt v. Hilts, 19 Barb. 283.....	253	v. Kingsbury, 13 Tex. 68.....	568
Lane, In re, 135 U. S. 443.....	284	v. O'Shaughnessy, 20 Minn. 173.	733
Lane v. Bommelmänn, 17 Ill. 95..	714	Leeds v. Bender, 6 W. & S. 315....	549
v. Bommelmänn, 21 Ill. 143.....	829	Lee Tong, In re, 18 Fed. R. 253..	109
v. Crosby, 42 Me. 327.....	794	Lehman, Suc. of, 41 La. Ann. 987.	541
v. Innes, 43 Minn. 137.....	334, 339	v. Glenn, 87 Ala. 618.....	462
Laney v. Garbee, 105 Mo., 355	467, 484	Lehmer v. People, 80 Ill. 601.....	555
Lang v. People, 14 Mich. 439.....	510	Leighton v. Pearson, 49 Me. 100..	767
Lange, Ex parte, 18 Wall. 163....	911	Leith v. Leith, 39 N. H. 20.....	690
v. Benedict, 73 N. Y. 12.....	912	Lemkuhl, Ex parte, 72 Cal. 53....	518
Langford v. Monteith, 102 U. S.	145..... 528	Lenox v. Clarke, 52 Mo. 115.....	800
Langwith v. Dawson, 30 U. C. C.	P. 375..... 41	v. Grant, 8 Mo. 254.....	913
Langworthy v. Baker, 23 Ill. 484.	881	Lerian v. Rohr, 66 Md. 95.....	826
Lanman v. Crooker, 97 Ind. 163..	834	Lessee of Cochran v. Loring, 17	O. 409..... 407
Lanning v. Carpenter, 23 Barb. 402	42, 65	Fowler v. Whiteman, 2 O. St.	270..... 479
Lantz v. Maffett, 102 Ind. 23.....	650	Glover v. Ruffin, 6 O. 255.....	214
Larimer v. Irwin (Pa.).....	548	Heister v. Fortner, 2 Binney 40..	450
v. Knoyle, 43 Kan. 338.. 392, 441,	566	Larimer v. Irwin (Pa.).....	548
Larr v. State, 45 Ind. 364.....	549	Ludlow v. McBride, 3 Ohio 240.	172
Lasere v. Rochereau, 17 Wall. 437.	365	Maxson v. Sawyer, 12 O. 195....	86
Latham v. Edgerton, 9 Cowen 227.	280	Mitchell v. Eyster, 7 O. 257....	717
v. Jones, 6 Ark. 371.....	664, 870	Morgan v. Burnet, 18 O. 535. 755,	889
Lathrop v. American Emigrant	Co., 41 Iowa 547..... 575	Nelson v. Moon, 3 McLean 319.	413
v. Stewart, 6 McLean 630.....	673	Paine v. Moreland, 15 O. 435..	407, 591
Latimer v. Latimer, 22 S. C. 257..	423	Pillsbury v. Dugan, 9 O. 117..	436
v. Union P. Ry. Co., 43 Mo. 105.	388	Rhoades v. Selin, 4 Wash. C. C.	715..... 582
Latrielle v. Dorleque, 35 Mo. 233	766, 838	Lester v. Thompson, 1 Johns. 300.	552
Latta, In re, 43 Kan. 533.....	81	Lesterjette v. Ford, 1 McMull. 86.	385
Latterett v. Cook, 1 Iowa 1.....	447	Letney v. Marshall, 79 Tex. 513..	471
Laub v. Buckmiller, 17 N. Y. 620.	833	Levan v. Milholland, 114 Pa. St.	49..... 617, 624
Laughman v. Thompson, 14 Miss.	259..... 883	Leverett v. Harris, 7 Mass. 292....	548
Lauman's Appeal, 8 Pa. St. 473...	215		

	Page		Page
Levy v. Ferguson Lumber Co., 51 Ark. 317 .....	869, 923	Long v. Bienneman, 59 Tex. 210..	470
v. Shurman, 6 Ark. 182 .....	664	v. Burnett, 13 Iowa 28.....	170
Lewis, In re, 31 Kan. 71 .....	285	v. Fife, 45 Kan. 271 .....	250
v. Adams, 70 Cal. 403.....	783	v. Hammond, 40 Me. 204.....	673
v. Allred, 57 Ala. 628.....	630	v. Joplin, etc., Co., 68 Mo. 422....	924
v. Brewer, 51 Me. 108.....	335	v. Ray, 1 Dana 430.....	820
v. Dutton, 8 How. Pr. 99.....	683	Longfellow v. Quimby, 29 Me. 196.	861
v. Hare, 8 La. Ann. 378.....	610	v. Scammon, 21 Me. 108.....	726
v. Moon, 1 Ohio C. Ct. 211.....	216	Looby v. Austin, 19 Ill. App. 325.	76
v. Morrow, 89 Mo. 174.....	802	Loop v. Gould, 25 Hun 387.....	326
v. Rose, 6 Lans. 206.....	287, 290	Lord, Matter of, 63 How. Pr. 97..	126
v. Rowland, 29 N. E. R. 922.....	282	Lord v. Skinner, 9 Allen 376.....	920
v. Smith, 2 Serg. & R. 142.....	234	v. Wilcox, 99 Ind. 491.....	633
Lexington, etc., v. McMurtry, 6 B. Mon. 214.....	50	Loring v. Arnold, 15 R. I. 428....	610
Life Association of America v. Fassett, 102 Ill. 315.....	640	v. Binney, 38 Hun 152.....	350
Lightsey v. Harris, 20 Ala. 409.....	471, 830	v. Folger, 7 Gray 505.....	638
Ligon v. Ligon, 84 Ala. 555.....	85, 405	v. Mansfield, 17 Mass. 394.....	596
Lincoln v. Cross, 11 Wis. 91.....	825	Loth v. Faconesowich, 22 Mo. App. 68.....	124
v. Tower, 2 McLean 473.....	487	Louis v. Kaskel, 51 N. J. L. 236 ..	502
Lind v. Adams, 10 Iowa 398.....	828	Lovering v. Lamson, 50 Me. 334..	56
Lindau v. Arnold, 4 Strob. L. 290 ..	474	v. McKinney, 7 Tex. 521.....	625
Lindsay v. Jaffray, 55 Tex. 626....	403	Lovett v. Mathews, 24 Pa. St. 330.	609
Ling v. King, 91 Ill. 571.....	563, 864	Lovier v. Gilpin, 6 Dana 321.....	552
Lingo v. Burford, 18 S. W. R. 1081.	471	Loving v. Pairo, 10 Iowa 282.....	890
Lining v. Bentham, 2 Bay 1.....	556	Low v. Henry, 9 Cal. 538.....	234
Lininger v. Glenn, 49 N. W. R. 1128.	724	Lowber v. Beauchamp, 2 Harr. 139.	366
Linman v. Riggins, 40 La. Ann. 761 .....	545	Lowe v. Alexander, 15 Cal. 296....	695
Litchfield v. Cudworth, 15 Pick. 23 .....	581, 775	v. Dore, 32 Me. 27.....	481
Litowich v. Litowich, 19 Kan. 451.	690	v. Lowe, 40 Iowa 220.....	486
Little v. Chambers, 27 Iowa 522..	317	Lowery v. Howard, 103 Ind. 440..	759
v. Dyer, 35 Ill. App. 85.....	128	Lowry v. Erwin, 6 Rob. 192 ..	76, 700
v. Dyer, 27 N. E. R. 905. ....	128	v. McMillan, 35 Miss. 147.....	704
v. Hasey, 12 Mass. 319.....	744	Loy v. Kennedy, 1 W. & S. 396....	782
v. Little, 5 Mo. 227.....	355	Lucas v. Todd, 28 Cal. 182.....	880
v. Moore, 4 N. J. L. 74.....	438, 915	Luckenback v. Anderson, 47 Pa. St. 123 .....	443
v. Sinnett, 7 Iowa 324.....	262, 869	Luco v. Com'l B'k, 70 Cal. 339. 166,	545
Littlefield v. Tinsley, 26 Tex. 353..	505	Ludeling v. Chaffe, 40 La. A. 645.	710
Littleton v. Smith, 119 Ind. 230 ..	7, 48, 63, 235	Ludlow v. Johnson, 3 O. 553.. 519,	533
Livingston v. Coe, 4 Neb. 379.....	355	v. Ramsey, 11 Wall. 581....	247, 365
v. Hollenbeck, 4 Barb. 9.....	551	v. Wade, 5 O. 494.....	138
v. Jordan, Chase's Dec. 454 ..	365	Lutes v. Alpaugh, 23 N. J. L. 165.	778
Lockhart v. Horn, 1 Woods 628..	31	Lutz v. Kelly, 47 Iowa 307.....	385
v. John, 7 Pa. St. 137.....	278	Lydiard v. Chute, 45 Minn. 277 ..	390
v. Locke, 42 Ark. 17.....	770	Lyford v. Demeritt, 32 N. H. 234..	598
Lockwood, Mat. of, 32 How. Pr. 437 .....	468	Lyle v. Siler, 103 N. C. 261.....	619
v. Dills, 74 Ind. 56.....	183	Lyles v. Haskell, 14 S. E. R. 829..	467
Loder v. Phelps, 13 Wend. 46.....	232	Lynch v. Baxter, 4 Tex. 431..	402, 886
Loesnitz v. Seelinger, 127 Ind. 422.	861	v. Bernal, 9 Wall, 315.....	775
Logan v. Sigerson, 2 Blackf. 266..	506	v. Kelly, 41 Cal. 232.....	821
v. Williams, 76 Ill. 175.....	492	v. Kirby, 36 Mich. 238.....	545
Logansport v. La Rose, 99 Ind. 117 .....	778	v. Sanders, 9 Dana 59.....	801
Lomerson v. Hoffman, 24 N. J. L. 674 .....	710	Lyon v. Lyon, 2 Gray 367.....	384
Loney, In re, 38 Fed. R. 101; 134 U. S. 372.....	145, 524	v. Odom, 31 Ala. 234.....	876
		Lyons v. Hamner, 84 Ala. 197....	402
		v. Munson, 99 U. S. 684....	214, 773
		Lysle v. Williams, 15 S. & R. 135.	604
		Lytle v. Lytle, 48 Ind. 200 .....	385
		McAllister v. Strode, 7 Cal. 428 ..	251
		McAlpine v. Sweetser, 76 Ind. 78.	499
		McAnear v. Epperson, 54 Tex. 220 .....	413, 477, 891



# CASES CITED.

lxix

	Page
McArthur v. Allen, 3 Fed. R. 313.	418
McBride v. Bryan, 67 Ga. 584....	890
v. State, 30 N. E. R. 699....	755, 766
McCafferty v. O'Brien, 1 Cin. 64.	598
McCaffrey v. Corrigan, 49 Ind. 175.....	656
McCahill v. Equitable Life Ass. Society, 26 N. J. Eq. 531.....	454
McCall v. Cohen, 16 S. C. 445....	916
McCampbell v. Durst, 73 Tex. 57.	846
McCarter v. Neil, 50 Ark. 188....	597
McCarthy v. Decaix, 2 R. & M. 614.	909
McCartney v. Osburn, 118 Ill. 403.	531
McCaskey v. Graff, 23 Pa. St. 321.	581
McCauley v. Fulton, 44 Cal. 355..	484
v. Hargroves, 48 Ga. 50.....	486
v. Harvey, 49 Cal. 497.....	546, 626
McChord v. Fisher, 13 B. Mon. 193.	679
McClanahan v. West, 100 Mo. 309 578, 891	
McClellan v. Cornwell, 42 Tenn. 298.....	839
McClelland v. Miller, 28 O. St. 488 716, 766, 872	
McCloon v. Beattie, 46 Mo. 391....	870
McCloskey v. Wingfield, 29 La. Ann. 141.....	640
McCloy v. Arnett, 47 Ark. 445....	567
McClure v. Hill, 36 Ark. 268.....	263
M'Clusky, Ex parte, 40 Fed. R. 71.	119
McCollum v. Uhl, 128 Ind. 304....	411
McComb v. Ellett, 16 Miss. 506 223, 509	
v. Reed, 28 Cal. 281.....	207
McCorkle v. Rhea, 75 Ala. 213....	814
McCormack v. Bank, 53 Ind. 466..	430
v. Kimmel, 4 Ill. App. 121..	266, 346
McCormick v. Fiske, 138 Mass. 379 388, 479, 505	
v. Paddock, 20 Neb. 486.....	654
v. Sullivant, 10 Wheaton 192..	214
v. Webster, 89 Ind. 105.....	711
McCoy v. Crawford, 9 Tex. 353..	451
v. Quick, 30 Wis. 521.....	835
v. Zane, 65 Mo. 11.....	260
McCracken v. Flanagan, 52 Hun 614.....	317
v. Flanagan, 127 N. Y. 493....	320
McCraney v. McCraney, 5 Iowa 232.....	236
McCready, Ex parte, 1 Hughes 598.	109
v. Virginia, 94 U. S. 391.....	109
McCrillis v. Harrison, 63 Iowa 592	806
McCrimmin v. Cooper, 37 Tex. 423.	781
McCroskey v. Parks, 13 S. C. 90.	756
McCrubb v. Bray, 36 Wis. 333....	497
McCullough, Ex parte, 35 Cal. 97.	566
v. Estes, 20 Or. 349.....	776
McCurdy v. Baughman, 43 O. St. 78.....	657
McCurry v. Hooper, 12 Ala. 823.	415
McCutcheon v. Askew, 34 La. Ann. 340.....	223

	Page
McDade v. Burch, 7 Ga. 559 269, 547, 881	
McDaniel v. Carver, 40 Ind. 250..	657
v. Correll, 19 Ill. 226.....	326
v. Fox, 77 Ill. 343.....	592
McDermott v. Clary, 107 Mass. 501.....	487
v. Isbell, 4 Cal. 113.....	929
McDonald, Ex parte, 17 Pac. R. 234.....	742
v. Bulwer, 13 Irish C. L. 549....	292
v. Berry, 90 Ala. 464.....	780
v. Bunn, 3 Denio 45.....	44
v. Cooper, 32 Fed. R. 745.....	318
v. Drew, 64 N. H. 547.....	586
v. Frost, 99 Mo. 44.....	825
v. Katz, 31 Cal. 167.....	501
v. Payne, 114 Ind. 359.....	831
v. Red River, etc., 74 Tex. 539..	836
v. Simcox, 98 Pa. St. 619. 342, 373, 407	
McDougal v. Bradford, 80 Tex. 558.	209
McDowell v. Jones, 58 Ala. 25....	45
McElrath v. Butler, 7 Ired. 398....	496
McEneney v. Sullivan, 125 Ind. 407.	665
McEvoy v. Trustees, 38 N. J. Eq. 420.....	358
McEwan v. Zimmer, 38 Mich. 765.	385
McFadden v. Geddis, 17 S. & R. 336.....	545
v. Ross, 108 Ind. 512.....	812
v. Whitney, 51 N. J. L. 391.....	525
McFarland v. State, 68 Wis. 400 425, 584	
v. Stone, 17 Vt. 165.....	593, 616
McFeely v. Scott, 128 Mass. 16....	681
McGahan v. Carr, 6 Iowa 331....	446
McGaughey v. Woods, 106 Ind. 380.	347
McGavock v. Bell, 3 Coldwell 512 653, 846	
v. Pollack, 13 Neb. 535.....	316
McGehan, Ex parte, 22 O. St. 442.	731
McGiffert v. McGiffert, 31 Barb. 69.	380
McGill, Ex parte, 6 Tex. App. 498.	791
v. Weil, 10 N. Y. Supp. 246.....	339
McGinnis v. State, 9 Humph. 43..	930
McGlawhorn v. Worthington, 98 N. C. 199.....	497, 360
McGoon v. Scales, 9 Wall. 23....	775
McGowen v. Zimpelman, 53 Tex. 479.....	566
McGregor v. Morrow, 40 Kan. 730 81, 85	
v. Balch, 14 Vt. 428.....	50
McGrew, Ex p., 40 Tex. 472....	107, 127
McGuire v. Justices, 7 B. Mon. 340.	876
v. Wallace, 109 Ind. 284.....	731
M'Ilvoy v. Speed, 4 Bibb 85.....	777
McIndoe v. Hazelton, 19 Wis. 567.	342
McIntire v. Lucker, 77 Tex. 259..	760
McIntyre v. Marine, 93 Ind. 193 409, 411	
McIver v. Stephens, 101 N. C. 255.....	632, 847

	Page		Page
McKee v. Angel, 90 N. C. 60.....	457	McVey v. McVey, 51 Mo. 406....	715
v. Hann, 9 Dana 526....	648, 653, 855	McVicker v. Beedy, 31 Me. 314...	388
v. McKee, 14 Pa. St. 231.....	415	McWilliams v. Hopkins, 4 Rawle	
v. Thomas, 9 Kan. 343.....	882	382.....	280
McKeever v. Ball, 71 Ind. 398..	269, 854	v. Walthall, 65 Ga. 109.....	810
McKeighan v. Hopkins, 14 Neb.		Mabbett v. Vick, 53 Wis. 158.....	355
361.....	576	Mabin v. Knighton, 67 Ga. 103...	619
McKennan v. Pry, 6 W. & S. 137..	581	Mackay v. Gordon, 34 N. J. L. 286.	800
McKim v. Doane, 137 Mass. 195..	415	Macke, In re, 31 Kan. 54.....	476
McKinley v. Weber, 37 Wis. 279..	824	MacKnight, In re, 27 Pac. R. 336..	810
McKinney v. Collins, 88 N. Y. 216.	385	Macomber v. Peck, 39 Iowa 351..	436
v. Crawford, 8 S. & R. 351.....	590	Madison v. Rano, 4 N. H. 79.....	468
McKivett, Ex parte, 55 Ala. 236...	795	v. Rutz, 63 Ill. 65.....	819
McKnight, Ex p., 28 N. E. R. 1034	362	v. Suman, 79 Mo. 527.....	467
MacKubin v. Smith, 5 Minn. 367..	318	Magoon v. Warfield, 3 G. Gr. 293.	408
McLaughlin v. Cowley, 127 Mass.		Magruder v. Buck, 56 Miss. 314..	661
316.....	335	Mahon, In re, 71 Cal. 586.....	912
v. Etchison, 127 Ind. 474.....	287	Mahoney, Matter of, 34 Hun 501.	843
v. Thompson, 55 Ill. 249.....	606	Maiden v. Marwedel, 1 Queens-	
M'Laurin v. Thompson, Dudley		land Law Rep. (Part 3) 69...	386
(S. C.) 335.....	627	Maker v. State, 123 Ind. 378.....	425
McLawrin v. Salmons, 11 B. Mon.		Mallett v. Uncle Sam, 1 Nev. 188	
96.....	530		47, 468
McLeod v. Applegate, 127 Ind. 349.	575	Mallory v. Riggs, 76 Iowa 748....	340
McLean, Matter of, v. Jephson, 41		Maloney v. Dewey, 127 Ill. 395. 654,	788
Hun 479.....	412, 663	Mangold v. Thorpe, 33 N. J. L. 134	913
McLean v. Hugarin, 13 Johns. 184..	930	Mankin v. State, 2 Swan 206.....	873
McLellan v. St. Louis & H. Ry.		Manley v. Headley, 10 Kan. 88...	237
Co., 103 Mo. 295.....	779	Mann v. Martin, 14 Bush 763. 489,	851
McLemore v. Chicago, etc., R. R.		Manning, In re, 76 Wis. 365.....	50
Co., 58 Miss. 514.....	755	Manning v. Heady, 64 Wis. 630..	323
McMahon v. Mutual Life Ins. Co.,		v. Johnson, 7 Barb. 457.....	493
16 N. Y. Super. 644.....	928	Mannix v. State, 115 Ind. 245....	553
McMannis v. Rice, 48 Iowa 361...	776	Manufacturing Co. v. Donahoe,	
McMaster v. Arthur, 33 S. C. 512.	568	49 Ark. 318.....	725
McMicken, In re, 39 Kan. 406.....	731	Maple v. Beach, 43 Ind. 51.....	922
McMillan v. Hickman, 14 S. E. R.		Maples v. Mackey, 89 N. Y. 146..	468
227.....	638	v. Tunis, 11 Humph. 108.....	248
v. Nichols, 62 Ga. 36.....	55	Marcy v. Marcy, 6 Metc. 360....	489
v. Reynolds, 11 Cal. 372.....	490	Mariner v. Waterloo, 75 Wis. 438.	463
McMillen v. Lovejoy, 115 Ill. 498.	738	Marix v. Franke, 9 Kan. 132.....	815
McMinn v. Whelan, 27 Cal. 300		Markel v. Evans, 47 Ind. 326....	892
	357, 471, 472	Markham v. Burlington Ins. Co.,	
McMullen v. Richie, 41 Fed. R. 502.	908	69 Iowa 515.....	423
v. State, 105 Ind. 334.....	334, 715	Markle v. Board, etc., 55 Ind. 185.	575
McMurray v. McMurray, 66 N.		Marks v. Hill, 46 Tex. 345....	140, 218
Y. 175.....	755	v. Matthews, 50 Ark. 338.....	436
McNairy v. Bell, 5 Rob. 418.....	512	v. Townsend, 97 N. Y. 590.....	443
McNally v. Haynes, 59 Tex. 583		Marquis v. Davis, 113 Ind. 219....	280
	546, 581	Marriott v. Hampton, 7 D. & E.	
McNamara v. Cabon, 21 Neb. 589.	820	269.....	597
McNamee v. Speers, 25 Wis. 539..	727	Marrow v. Brinkley, 85 Va. 55...	471
M'Neil v. Bright, 4 Mass. 282..	102, 514	Marsh, Matter of, McA. & M. 32..	797
McNeil, Suc. of, 9 La. Ann. 113..	541	v. Chesnut, 14 Ill. 223.....	234
v. First Cong. Soc., 66 Cal. 105..	140	v. Sherman, 12 Ind. 358.....	514
McNeill v. Edie, 24 Kan. 108....	9, 479	v. Snyder, 14 Neb. 8.....	818
v. Hallmark, 28 Tex. 157.....	216	Marshall v. Fisher, 1 Jones' L. 111	
McNitt v. Turner, 16 Wall. 352...	274	433, 823, 830, 922	
M'Pherson v. Cunliff, 11 Serg. &		v. Gill, 77 Ind. 402.....	749
R. 422.....	395, 548, 644, 704	Marshalsea, Case of, 10 Co. 68. 529,	708
M'Rae v. Mattoon, 13 Pick. 53. 510,	575	Martin, Ex parte, 46 Fed R. 482..	792
McVeagh v. Little, 7 Pa. St. 279.	597	v. Barron, 37 Mo. 301.....	344
v. Locke, 23 Ill. App. 606.....	601	v. Beasley, 49 Ind. 280.....	623

	Page		Page
Martin v. Burns, 80 Tex. 676.	326, 480	May v. Jameson, 11 Ark. 368.	487
v. Carron, 26 N. J. L. 228.	551, 665	v. Marks, 74 Ala. 249.	402, 616, 847
v. Central Vt. R. R. Co., 51 Hun	642.	Mayberry v. Kelly, 1 Kan. 116.	98
	366, 507	Maybin v. Knighton, 67 Ga. 103.	619
v. Hall, 70 Ala. 421.	245, 250	Mayer v. Hover, 81 Ga. 308.	890
v. Judd, 60 Ill. 78.	436	Mayhew v. Snell, 33 Mich. 182.	8, 736
v. Neal, 125 Ind. 547.	405	Maynes v. Brockway, 55 Iowa	457
v. Nicolls, 3 Sim. 458.	908		183, 218, 562
v. Pifer, 96 Ind. 245.	727	Mayo v. Ah Loy, 32 Cal. 477.	220
v. Pond, 30 Fed. R. 15.	482	v. Foley, 40 Cal. 281.	215
v. Rex, 6 Serg. & Rawle 296.	743	Mayor v. Davenport, 92 N. Y. 604.	551
v. Roach, 1 Harr. 477.	166	v. Thompson, 12 Lea 344.	50
v. Robinson, 67 Tex. 368.	593, 645	Mecklem v. Blake, 19 Wis. 397.	313, 501
v. Tally, 72 Ala. 23.	222, 619	Medley, Petitioner, 134 U. S. 160.	110
v. Weyman, 26 Tex. 460.	653	Medlock v. Cogburn, 1 Rich. Eq.	
v. Williams, 42 Miss. 210.	801		477.
Marvin v. Schilling, 12 Mich. 356.	855		415
Marx, Ex parte, 86 Va. 40.	816	Megowan v. Way, 1 Met. (Ky.) 418.	855
v. Fore, 51 Mo. 69.	438	Meikel v. Borders, 129 Ind. 529.	582
v. Milstead, 9 S. E. R. 617.	816	Meiss v. Gill, 44 O. St. 253.	27
Mary, The, 9 Cranch 126.	396	Meisse v. McCoy, 17 O. St. 225.	502
Maryland v. Bathurst, 5 Gill & J.		Meixell v. Kirkpatrick, 28 Kan. 315.	708
	159.	Melhop v. Doane, 31 Iowa 397.	373, 394
	395	Melia v. Simmons, 45 Wis. 334.	645
Mashburn v. Gouge, 61 Ga. 512.	657	Mellen v. Moline, 131 U. S. 352	
Mason, Matter of, 8 Mich. 70.	629		131, 298
v. Barnard, 36 Mo. 384.	670	Mellon v. Guthrie, 51 Pa. St. 116.	658
v. Messenger, 17 Iowa, 261.	575	Melloy v. Burtis, 124 Pa. St. 161.	234
v. Tuttle, 75 Va. 105.	900	Melms v. Pfister, 59 Wis. 186.	454, 624
v. Wait, 5 Ill. 127.	404	Menage v. Jones, 40 Minn. 254.	540
v. Westmoreland, 38 Tenn. 554.	538	Menefee v. Marge, 4 S. E. R. 726.	365
Massey v. Scott, 49 Mo. 278.	785	Menifee v. Hamilton, 32 Tex. 495	
Massie v. Brady, 41 La. Ann. 553.	596		882, 886
Masters v. Bienker, 87 Ky. 1.	882	Menlove v. Oakes 2 McMull 162.	420
v. Eclectic L. Ins. Co., 6 Daly 455	128	Mercer v. Booby, 6 Fla. 723.	432
v. Scroggs, 3 M. & S. 447.	538	Merkee v. Rochester, 13 Hun 157.	788
Masterson v. Ashcom, 54 Tex. 324	696	Merrill v. Harris, 26 N. H. 142.	269, 546
Mastin v. Gray, 19 Kan. 458.	479	v. Montgomery, 25 Mich. 73.	322
Mather v. Hood, 8 Johns. 44.	538	Merriman v. Knight, 43 Minn. 493.	328
Matheson v. Hearin, 29 Ala. 210.	402	Merritt v. St. Paul, 11 Minn. 223.	105
Mathews v. Densmore, 43 Mich.		v. Portchester, 71 N. Y. 309.	63
	461.	Merry v. Sweet, 43 Barb. 475.	245
	79, 246	Merwin v. Hawker, 31 Kan. 222.	845
v. Eddy, 4 Or. 225.	133	Messina v. Petrocchino, L. R., 4	
Mato, Ex parte, 19 Tex. App. 112.	103	P. C. 144.	908
Matter of N. Y. Catholic Protect-		Messinger v. Kintner, 4 Bin. 97	
ory, 77 N. Y. 342.	569		548, 668
Matthews v. Densmore, 109 U. S.		Metcalf, Matter of, v. Messenger,	
	216.		46 Barb. 325.
	79, 246		67
v. Douthitt, 27 Ala. 273.	406	Metcalf v. Gilmore, 59 N. H. 417.	586
v. Hoff, 113 Ill. 90.	892	Meyer v. Hartman, 14 Mo. App.	
v. Pate, 93 Ind. 443.	705		130.
Matthey v. Wiseman, 18 Com.			762
Bench N. S. 657.	638	v. Hearst, 75 Ala. 390.	640
Mattingly v. Nye, 8 Wall. 370.	565	v. Kohlman, 8 Cal. 44.	252
v. Read, 3 Met. (Ky.) 524.	271, 714	v. Paxton, 14 S. W. R. 568.	568
Mattocks v. Baker, 2 Fed. R. 455.	701	v. Ralli, L. R., 1 C. P. Div. 358.	907
Manarr v. Parrish, 26 O. St. 636.	278	v. Rousseau, 47 Ark. 460.	175
Maulsby, Ex parte, 13 Md. 625.	799	v. Sulzbacher, 76 Ala. 120.	660
Mavity v. Eastridge, 67 Ind. 211.	817	Michaelis v. Branley, 109 Pa. St. 7.	659
Max, Ex parte, 44 Cal. 579.	772	Michaels v. Post, 21 Wall. 398.	552
Maxwell, Ex parte, 37 Ala. 362.	278	Michels v. Stork, 44 Mich. 2.	453
v. Goetschius, 40 N. J. L. 383.	161	v. Stork, 52 Mich. 260.	474
v. Stewart, 22 Wall. 77.	586, 758	Mickel v. Hicks, 19 Kan. 578	
May v. Board, etc., 30 Fed. R. 250.	272		360, 404, 484, 497, 892



	Page		Page
Mickey v. Stratton, 5 Sawyer 475...	495	Mitchell v. Conley, 13 Ark. (8	
Middlesex v. Butman, 29 Me. 19...	388	Eng.) 414.....	355
Middleworth v. McDowell, 49 Ind.		v. Ferris, 5 Houst. (Del.) 34....	388
386.....	383	v. Gray, 18 Ind. 123.....	385
Mikeska v. Blum, 63 Tex. 44. 427,	576	v. Insley, 33 Kan. 654.....	564
Miles v. Davis, 19 Mo. 408.....	299	v. Kintzer, 5 Pa. St. 216.....	576
Millar v. Babcock, 29 Mich. 526...	732	v. Menley, 32 Tex. 460.....	891
Millard v. Marmon, 116 Ill. 649...	755	v. Runkle, 25 Tex. Supp. 132....	903
Miller v. Adams, 7 Lans. 131.....	233	v. Schoonover, 16 Or. 211.....	639
v. Allen, 11 Ind. 389.....	521	v. Sheriff, 7 Abb. Pr. 96.....	745
v. Barkeloo, 8 Ark. 318.....	749	v. Singletary, 19 O. 291.....	408
v. Brinkerhoff, 4 Denio 118.....	247	v. State Bank, 2 Ill. 526.....	100
v. Chicago, etc., Co., 58 Wis. 310.	237	v. St. John, 98 Ind. 598.....	564
v. Corbin, 46 Iowa 150.....	328	Mobberly v. Johnson 78 Ky. 273	
v. Dungan, 36 N. J. L. 21.....	388	278, 709	
v. Finkle, 1 Park. Cr. 374.....	790	Mobile v. Yeates, 67 Ala. 164....	340
v. Grice, 2 Rich. F. 27.....	531	Moch v. Virginia, 4 Hughes 61...	462
v. Hagaart, 2 Shaw App.Cas. 125.	912	Moffitt v. Moffitt, 69 Ill. 641	
v. Hall, 1 Spears 1.....	333	240, 262, 875	
v. Handy, 40 Ill. 448.....	472	Mohr v. Manierre, 101 U. S. 417..	404
v. Indianapolis, 123 Ind. 196....	831	v. Porter, 51 Wis. 487.....	404
v. McAllister, 59 Ind. 491.....	822	v. Tulip, 40 Wis. 66.....	404, 497
v. McMannis, 104 Ill. 421... 705,	849	Monell v. Dennison, 17 How. Pr.	
v. Miller, 1 Bailey 242.....	385	422.....	683
v. Miller, 10 Tex. 319.....	624	Monk v. Horne, 38 Miss. 100.....	493
v. Munson, 34 Wis. 579,... 244,	246	Monroe, In re, 46 Fed. R. 52.....	191
v. Pence, 115 Ill. 576.....	608	v. Fort Howard, 50 Wis. 228....	768
v. Porter, 71 Ind. 521... 339, 342,	345	v. Douglas, 4 Sandf. Ch. 126....	908
v. Reynolds, 13 S. W. R. 597...	849	Montgomery v. Carleton, 56 Tex.	
v. Schnebly, 103 Mo. 368.....	417	361.....	756
v. Snyder, 6 Ind. 1.....	116, 516	v. Heilman, 96 Pa. St. 44.....	928
v. Swan, 14 S. W. R. 964.....	679	v. Johnson, 31 Ark. 74... 831, 832,	835
v. Texas & P. Ry., 132 U. S. 662.	611	v. Wasem, 116 Ind. 343.....	306
v. Woods, 23 Neb. 200... 294, 295,	296	Montour v. Purdy, 11 Minn. 384	
Millett v. Lemon, 113 Mass. 355..	252	855, 857	
Millette v. Mehmke, 26 Minn. 306.	233	Montross v. State, 61 Miss. 429...	109
Millington, In re, 24 Kan. 214....	44	Moody v. Butler, 63 Tex. 210	
Million v. Board, etc., 89 Ind. 5...	665	849, 850, 886	
Mills, In re, 135 U. S. 263.....	789	v. Moody, 11 Me. 247.....	280
Mills v. Alexander, 21 Tex. 154..	639	v. Thurston, 1 Str. 481.....	547
v. Collett, 6 Bing. 85.....	205	Moomey v. Maas, 22 Iowa 380....	464
v. Dickson, 6 Rich. F. 487.....	434	Mooney, Ex parte, 26 W. Va. 36..	798
v. Herndon, 60 Tex. 353.....	885	Moor v. Ames, 3 Caines 170.....	556
v. Herndon, 77 Tex. 89.....	885	Moore, Ex parte, 23 N. B. 229...	230
v. Sleght, 5 N. J. L. 565.....	800	v. Bond, 18 Me. 142.....	728
Milne v. Van Buskirk, 9 Iowa 558.	433	v. Davis, 85 Mo. 464.....	850
Milner v. Shipley, 94 Mo. 106....	809	v. Fields, 42 Pa. St. 467.....	759
Miltimore v. Miltimore, 40 Pa. St.		v. Haskins, 66 Miss. 496.....	870
151.....	502, 553	v. Jeffers, 53 Iowa 202.....	788
Milward v. Caffin, 2 W. Bl. 1330		v. Martin, 38 Cal. 428.....	80, 221
662, 700		v. Mauck, 79 Ill. 391.....	240, 244
Mink v. Shaffer, 124 Pa. St. 280...	919	v. Moore, 50 N. W. R. 443.....	214
Minnesota v. Barber, 136 U. S. 313.	108	v. Moore, 59 Tex. 54.....	549
Minor v. Selectman, 12 Miss. 619..	759	v. Neil, 39 Ill. 256.....	351
Minot v. Tilton, 64 N. H. 371.....	372	v. O'Barr, 87 Ga. 205.....	212
Missouri Pacific Ry. Co. v. Haynes,		v. Philbrick, 32 Me. 102.....	680
82 Tex. 448.....	745	v. Robison, 6 O. St. 302.....	226
v. Reid, 34 Kan. 410.....	785	v. Smith, 11 Rich. L. 569.....	645
Mitchell, In re, 104 Mo. 121.....	560	v. Starks, 1 O. St. 369.....	415
v. Adams, 1 Ired. Law 298.....	628	v. Tanner, 5 Mon. 42.....	571
v. Adams, Tex. Unrep. Cas. 117.	47	v. Titman, 33 Ill. 358.....	567
v. Aten, 37 Kan. 33.....	767	v. Town Council, 32 Fed. R. 498.	527
v. Chambers, 43 Mich. 150.....	708	v. Vrooman, 32 Mich. 526.....	334

# CASES CITED.

lxxiii

	Page		Page
Moore v. Willamette, 7 Or. 359...	236	Mudrock v. Killips, 65 Wis. 622	
v. Wingate, 53 Mo. 398.....	923		253, 255
v. Woodall, 40 Ark. 42.....	276	Mulford v. Estudillo, 23 Cal. 94..	742
Moreland v. Lawrence, 23 Minn.		v. Stalzenback, 46 Ill. 303.....	81
84 .....	883	Mullan v. U. S., 140 U. S. 240....	594
Mcrey v. Com., 108 Mass. 433....	112	Mulley v. White, 3 Tenn. Ch. 9..	389
v. Morey, 27 Minn. 265.....	501	Mulligan v. Smith, 59 Cal. 206....	666
Morgan v. Dodge, 44 N. H. 255....	279	Mullikin v. Bloomington, 72 Ind.	
v. Farned, 83 Ala. 367.....	274	161 .....	555
v. Hammett, 23 Wis. 30 .....	69	Mullins v. Sparks, 43 Miss. 129 ..	464
v. Hughes, 2 Term R. 225 .....	303	Mulvey v. Carpenter, 78 Ill. 580 ..	753
v. Locke, 28 La. Ann. 806 ...65,	540	v. Gibbons, 87 Ill. 367.....	892
v. Woods, 33 Ind. 23.....	347	Muncey v. Joest, 74 Ind. 409.....	497
Morgan's App., 110 Pa. St. 271		Munday v. Baldwin, 79 Ky. 121....	679
822, 849		v. Vail, 34 N. J. L. 418.....	804
Morgans v. Camp, 16 Ill. 175 .....	229	Munger v. Green, 20 Ind. 38.....	836
Morrill v. Morrill, 20 Or. 96....	5, 553	Munroe v. People, 102 Ill. 406....	406
v. Swartz, 39 Ill. 108.....	275	Munson v. Munson, 60 Hun 189....	693
Morris, In re, 40 Fed. R. 824 .....	560	v. Newson, 9 Tex. 109.....	685
Morris, In re, 39 Kan. 28.....	741	Murchison v. White, 54 Tex. 78	
v. Bailey, 15 La. Ann. 2.....	507	576. 685, 981	
v. Chicago, Rock Island and		Murdough v. McPherrin, 49 Iowa	
Pacific R. Co., 65 Iowa 727....	233	479 .....	336
v. Davis, 36 Tenn. 452.....	719	Murphy, Ex parte, 29 Pac. R.	
v. Galbraith, 8 Watts 166 .....	576	652 .....	770
v. Gentry, 89 N. C. 248 .....	421	Murphy v. Creighton, 45 Iowa 179.	600
v. Hand, 70 Tex. 481.....	530	v. De France, 105 Mo. 53...546,	746
v. Hogle, 37 Ill. 150.... 234, 342,	344	v. Lyon, 19 Neb. 689.....	312
v. Holbert, 36 Tex. 19.....	404	Murray, Ex parte, 43 Cal. 455	
v. People, 3 Denio 381 .....	36	819, 870	
Morrison v. Austin, 14 Wis. 601..	722	v. Hankin, 30 Hun 37.....	245
v. Corliss, 44 Me. 97.....	726	v. Laften, 15 Mo. 621.....	485
v. Deaderick, 10 Humph. 341....	770	v. Murray, 6 Or. 17.....	382
Morrow v. Freeman, 61 N. Y. 515.	250	v. Purdy, 66 Mo. 606.....	764
v. Weed, 4 Iowa 77.....	262	v. Weigle, 118 Pa. St. 159... 223,	638
Morse v. Bishop, 55 Vt. 231.....	778	Murzynouski v. Delaware, L &	
v. Cloyes, 11 Barb. 100.....	877	W. R. Co., 15 N. Y. Supp. 841. 236	
v. Hewitt, 28 Mich. 481 .....	832	Mussey v. White, 58 Vt. 45.....	436
v. Presby, 25 N. H. 299.....	408	Mussina v. Belden, 6 Abb. Pr. 165.	588
v. Reed, 13 Metc. 62.....	853	Mutual Acc. Ins. Co. v. Reisinger,	
v. Toppan, 3 Gray 411.....	657	43 Mo. App. 571 .....	127
Morton, Matter of, 10 Mich. 208..	290	Mutual Benefit L. Ins. Co. v. Tis-	
v. Chandler, 7 Me. 44.....	596	dale, 91 U. S. 238 .....	24
v. Crane, 39 Mich. 526.....	435	Mutual Life Ins. Co. v. Schwaner,	
v. Lee, 28 Kan. 286.....	54	36 Hun 373; 101 N. Y. 681....	581
v. Root, 2 Dill. 312.....	385	Muzzy v. Howard, 42 Vt. 23.....	257
Moseley v. Mastin, 37 Ala. 216....	245	Myer v. McDougal, 47 Ill. 278....	581
Mosely v. Cocke, 7 Leigh 224....	775	Myers v. Becker, 95 N. Y. 486 ...	194
Mosier v. Waful, 56 Barb. 80.....	898	v. Davis, 47 Iowa 325	
Mossman v. Forrest, 27 Ind. 233..	832	236, 262, 446	
Mould v. Williams, 5 Ad. & El. N. S.	469	v. Overton, 4 E. D. Smith 428..	457
Moulin v. Ins. Co., 24 N. J. L. 222.	783	v. State, 92 Ind. 390 .....	65
v. Ins. Co., 25 N. J. L. 57.....	419	Mygatt v. Washburn, 15 N. Y. 316.	698
Moulthrop's Adm'r v. School Dis-		Nagle v. Macy, 9 Cal. 426.....	842
trict, 59 Vt. 381.....	837	Nalle v. Fenwick, 4 Rand. 585 ..	747
Moulton v. Moulton, 47 Hun. 606.	463	Napton v. Leaton, 71 Mo. 358....	438
Mount v. Manhattan Co., 41 N. J.		Nash v. Church, 10 Wis. 303.....	391
Eq. 211.....	257, 900	v. Coffey, 105 Mass. 341.....	353
Mousseau, In re, 30 Minn. 202....	219	National Bank v. Elmira, 6 Lans.	
Moyer v. Bucks, 28 N. E. R. 992..	376	116.....	234, 239, 275
Mudge v. Steinhart, 78 Cal. 346		v. Elmira, 53 N. Y. 49...212, 528,	698
207, 243		v. Peabody, 55 Vt. 492.....	388
v. Yaples, 58 Mich. 307.....	736	v. Titworth, 73 Ill. 591.....	432

	Page		Page
National Union Bank v. Dodge, 42 N. J. L. 316.....	735	Nichols v. State, 127 Ind. 406.....	816
Nations v. Johnson, 24 How. 195..	376	Nicholson v. Nicholson, 113 Ind. 131.....	575
Naylor v. Mettler, 11 Atl. R. 859.	921	v. Stephens, 47 Ind. 185.....	217, 870
v. Moffatt, 29 Mo. 126.....	541	Nielsen, Pet., 131 U. S. 176....	104, 112
Neal v. Keller, 12 Kan. 247.....	136	Nightingale, Ex parte, 12 Fla. 272	129, 664
v. Paine, 35 Me. 158.....	233, 710	Niles v. Hancock, 3 Metc. 568....	731
Neale v. Utz, 75 Va. 480.....	718	v. Vanderzee, 14 How. Pr. 547..	672
Nealy v. Brown, 6 Ill. 10.....	876	Nims v. Sabine, 44 How. Pr. 252..	299
Needham v. Gillaspay, 49 Ind. 245.	826	Nixon v. Campbell, 106 Ind. 47...	603
v. Salt Lake City, 26 Pac. R. 920.....	273	Noble v. Cromwell, 27 How. Pr. 289.....	668
v. Thayer, 147 Mass. 536.....	479	Noble v. Cullom, 44 Ala. 554.....	31
v. Wilson, 47 Fed. R. 97.....	407	Noell v. Wells, 1 Levintz, 235....	571
Neff v. Beauchamp, 74 Iowa 92...	690	Norman v. Horn, 36 Mo. App. 419.....	237
Neil v. Ford, 21 Me. 440.....	314	v. Olney, 64 Mich. 553.....	548
Neill v. Cody, 26 Tex. 286.....	848	Norris v. Stephens, 68 Tenn. 433..	891
Neligh v. Keene, 16 Neb. 407....	718	North v. Moore, 8 Kan. 143.....	890
Nelson v. Becker, 14 Kan. 509....	499	Northampton County v. Herman, 119 Pa. St. 373.....	101
v. Boynton, 54 Ala. 368.....	31, 105	Northcutt v. Lemery, 8 Or. 316. 501,	901
v. Moon, 3 McLean 319.....	413	Northern Bank of Ky. v. Hunt, 19 S. W. R. 3.....	355
v. Rountree, 23 Wis. 367.....	315	Norton v. Jamison, 23 La. Ann. 102.	640
Nemetty v. Naylor, 100 N. Y. 562.	501	v. Shelby County, 118 U. S. 425.	32
Nesbit v. Miller, 125 Ind. 106.....	175	v. State, 14 Tex. 387.....	529
Netherland v. Johnson, 73 Tenn. 340.....	483	Norwood v. Cobb, 15 Tex. 500....	487
Nett v. Serwe, 28 Wis. 663.....	818	v. Cobb, 24 Tex. 551.....	487
Nettleton v. Mosier, 3 Fed. R. 387.	687	v. Kenfield, 34 Cal. 329.....	45
Newark Savings Institution, Application of, 28 N. J. Eq. 552.	148	Nowak v. Waller, 56 Hun 647. 296,	915
Newbold v. Schlens, 66 Md. 585..	653	Nowler v. Coit, 1 O. 519.....	530
Newcomb v. Newcomb, 13 Bush 544.....	441, 896	Noyes v. Canada, 30 Fed. R. 665..	297
v. Peck, 17 Vt. 302.....	340	v. Dobson, 85 Ala. 361.....	778
v. Smith, 5 O. 447.....	738	Nueva Anna, The, 6 Wheaton 193.	32
Newcome v. Light, 58 Tex. 141.	38, 55	Nulton v. Isaacs, 30 Gratt. 726....	132
Newell v. Wheeler, 48 N. Y. 486..	186	Nutzenholtser v. State, 37 Ind. 457.	347
Newhall v. Sadler, 16 Mass. 122..	281	Nye v. Kellam, 18 Vt. 594.....	737
New Lamp Chimney Co. v. Ansonia B. & C. Co., 91 U. S. 656..	422	Oakes v. Buckley, 49 Wis. 592....	887
Newman v. Bowers, 72 Iowa 465..	348	Oakley v. Pegler, 30 Neb. 628.....	343
v. Manning, 89 Ind. 422.....	870, 921	Obicini v. Bligh, 8 Bing. 335.....	898
v. Supervisors, 45 N. Y. 676....	698	O'Brien v. State, 12 Ind. 369.....	303
v. Tiernan, 37 Barb. 159.....	916	v. Tallman, 36 Mich. 13.....	133
v. Waterman, 63 Wis. 612.....	609	Ocean v. Francis, 2 Wend. 64.....	780
Newman's Estate, 75 Cal. 213	310, 501, 767	Ochsenbein v. Papelier, 8 L. R. Ch. 695.....	588
New Orleans v. Gaines' Adm'r, 138 U. S. 595.....	640	Ockendon v. Barnes, 43 Iowa 615.	902
New York & Erie R. R. Co. v. Purdy, 18 Barb. 574.....	461, 463	O'Connor, In re, 6 Wis. 288.....	779
New York Catholic Protectory, 77 N. Y. 342.....	569	v. Higgins, 16 N. Y. St. Rep'r 130.	359
Newsom v. Newsom, 4 Ired. L. 381.....	632	v. Huggins, 113 N. Y. 511.....	600
Newton, In re, 16 Com. Bench 97.	599	O'Dea v. O'Dea, 101 N. Y. 23....	380
v. Locklin, 77 Ill. 103.....	795	Odell v. Campbell, 9 Or. 298.....	329
v. Newbegin, 43 Me. 293.....	726	O'Dell v. Rogers, 44 Wis. 136.. 404,	756
Ney v. Swinney, 36 Ind. 454.....	72	Odle v. Frost, 59 Tex. 684.....	746
Nichols v. Lee, 10 Mich. 526.....	271	O'Docherty v. McGloin, 25 Tex. 67..	823
v. Mitchell, 70 Ill. 258.....	358, 893	O'Farrell v. Heard, 22 Minn. 189.	354
v. Shearen, 49 Ark. 75.....	567	v. Stockman, 19 O. St. 296.....	277
v. Smith, 26 N. H. 298.....	352	Ogden v. Davidson, 81 Va. 757... 319, 392, 491,	788
		v. Walters, 12 Kan. 282	576

	Page		Page
O'Hanlin v. Den., 20 N. J. L.	31	Palmer v. Peterson, 46 Wis.	401.. 423
	168, 273	Palm's Appeal, 44 Mich.	637..... 777
Oh Chow v. Brockway, 28 Pac. R.		Pana v. Bowler, 107 U. S.	529..... 386
384 .....	541	Pantall v. Dickey, 123 Pa. St.	431. 359
Ohio and Mississippi R. R. Co. v.		Papillon v. Buckner, Hardres	478. 538
Shultz, 31 Ind.	150..... 904	Parcher v. Bussell, 11 Cush.	107.. 545
O'Leary, Matter of, 25 Mich.	144.. 748	Parchman v. Charlton, 1 Coldw.	
Oliphant v. Atchison, 18 Kan.	386. 667	381 .....	267
Olmstead's Appeal, 43 Conn.	110. 676	Pardee v. Smith, 27 Mich.	33..... 289
Olmsted v. Blair, 45 Iowa	42..... 705	Parhan v. Moran, 4 Hun	717 .....
Olson v. Nunnally, 47 Kan.	391.. 729	Parish v. Golden, 35 N. Y.	462... 527
Oppenheim v. Pittsburgh, C. and		v. Parish, 32 Ga.	653..... 325
St. L. Ry. Co., 85 Ind.	471.... 308	Park v. Johnston, 7 Cush.	265.. 496, 499
Ordinary v. Poulson, 43 N. J. L.	33. 555	Parker v. Betcher, 87 Ga.	110..... 928
O'Reilly v. Nicholson, 45 Mo.	160. 807	v. Brown, 6 Gatt.	554..... 224
Oriol v. Herndon, 38 La. Ann.	759. 402	v. Collier, 1 Humph.	80..... 837
Orleans v. Platt, 99 U. S.	676..... 773	v. Horne, 38 Miss.	215..... 640
O'Rourke v. Chicago, M. & St. P.		v. Kane, 22 How.	1..... 714
R. Co., 55 Iowa	332..... 487	v. Kett, 1 Ld. Raymond	658... 43, 50
Osborne v. Cloud, 23 Iowa	104.... 496	v. Miller, 9 O.	108 .....
v. May, 5 Ind.	217..... 218	v. Nichols, 7 Pick.	111..... 856
v. Segras, 29 La. Ann.	291..... 929	v. Parker, 11 Cush.	519..... 660
v. Sutton, 108 Ind.	443 .....	v. Spencer, 61 Tex.	155..... 437
84, 737		v. Wright, 62 Ind.	398..... 549
Osborne v. Barnett, 1 Tex. App.		Parker's Case, 5 Tex. App.	579. 99, 103
Civil Cases	129. .... 385	Parkhurst v. Sumner, 23 Vt.	538.. 576
Osgood v. Blackmore, 59 Ill.	261.. 471	Parks, Ex parte, 93 U. S.	18..... 203
Osman v. Traphagen, 23 Mich.	80. 844	v. Boston, 8 Pick.	217..... 862
Oswald v. Kampmann, 28 Fed. R.		Parmalee v. Loomis, 24 Mich.	242. 457
36.....	454, 503	Pardon v. Dwire, 23 Ill.	572..... 448
Otis v. De Boer, 116 Ind.	531..... 637	Parsons v. Loyd, 3 Wils.	341..... 359
v. Epperson, 88 Mo.	131..... 330	v. Milford, 67 Ind.	489..... 23
v. The Rio Grande, 1 Woods		v. Pierson, 128 Ind.	479..... 772
279 .....	82, 554	v. Spencer, 83 Ky.	305.... 348, 657
Otterson v. Middleton, 102 Pa. St.		Partello v. Holton, 79 Mich.	372.. 241
78.....	596	Partridge v. Hannum, 2 Metc.	569
Ottumwa v. Schwab, 52 Iowa	515. 770		251, 335
Outhwite v. Porter, 13 Mich.	533. 385	Passmore Williamson's Case, 26	
Overall v. Pero, 7 Mich.	315... 820, 821	Pa. St. 9 .....	287, 528
Overton v. Cranford, 7 Jones' Law		Passwater v. Edwards, 44 Ind.	343. 564
415 .....	236, 457	Pasteur v. Lewis, 39 La. Ann.	5.. 635
v. Johnson, 17 Mo.	442.... 268, 782	Patterson v. Pressley, 70 Ind.	94.. 769
Owens v. Gotzian, 4 Dill.	436.... 457	v. Smith, 4 Dana	153..... 511
v. State, 27 Wis.	456..... 114	Pattison v. Vaughan, 40 Ind.	253.. 507
Oyster v. Shumate, 12 Mo.	580... 303	v. Wilbur, 10 R. I.	448..... 325, 482
Packard v. Packard, 34 Kan.	53... 44	Patton's Appeal, 31 Pa. St.	465... 543
v. Mendenhall, 42 Ind.	598..... 505	Patzack v. Von Gerichten, 10 Mo.	
Packet Company v. Sickles, 24		App. 424.....	529
How.	333 .....	Paul v. Johnson, 9 Phila.	32..... 346
806		v. Smith, 82 Ky.	451..... 243, 250
Page. Ex parte, 49 Mo.	291..... 790	v. Willis, 69 Tex.	261..... 593, 685
v. McKee, 3 Bush	135..... 531	Pawling v. Bird, 13 Johns.	192.... 385
Paine v. Moreland, 15 O.	435.. 407, 591	v. Speed, 5 T. B. Mon.	580..... 679
v. Skinner, 8 O.	159..... 167	v. Wilson, 13 Johns.	192..... 385
v. Spratley, 5 Kan.	525..... 775	Payne v. Able, 7 Bush	344..... 408
Painter v. Henderson, 7 Pa. St.	48. 668	v. Lott, 90 Mo.	676, .....
Palmer v. Colville, 18 N. Y. Supp.		392, 411	
509 .....	227	v. Taylor, 34 Ill. App.	491..... 471
v. Glover, 73 Ind.	529..... 778	v. Young, 8 N. Y.	158..... 248
v. Lawrence, 6 Lans.	282..... 699	Peacock v. Bell, 1 Saunders	73... 868
v. McCormick, 30 Fed. R.	82. 311, 335	Peacocke v. Leffler, 74 Ind.	327... 775
v. McCormick, 28 Fed. R.	541.. 490	Peak v. Shasted, 21 Ill.	137..... 755
v. McMaster, 8 Mont.	186	Peake v. Cantey, 3 McC.	107 .. 233, 913
	501, 896, 897	Pearce v. Atwood, 13 Mass.	324. 59, 674
v. Oakley, 2 Doug.	433. 620, 630, 883		

	Page		Page
Pearce v. Winter, 32 Ala. 68	701	People v. Hagar, 49 Cal. 229	68
Pearson v. Burditt, 26 Tex. 157	581	v. Hagar, 52 Cal. 171	87
Pease v. Chaytor, 9 Jur. N. S. 664	528	v. Halsey, 53 Barb. 547	779
v. Whitten, 31 Me. 117	550	v. Harrison, 84 Cal. 607	493
Peay v. Field, 30 Ark. 600	276	v. Henshaw, 76 Cal. 436	575
Peck v. Andrews, 32 Barb. 445	725	v. Jacobs, 66 N. Y. 8	193
v. Strauss, 33 Cal. 678	490	v. Jarrett, 7 Ill. App. 566	765
v. Woodbridge, 3 Day 30	746	v. Jones, 33 Mich. 303	160
Peckham v. Tomlinson, 6 Barb.		v. Keeper, 37 How. Pr. 494	629
253	791	v. Kelly, 24 N. Y. 74	111
Peebles' App., 15 S. & R. 39	745	v. Kelly, 97 N. Y. 212	789
v. Watt, 9 Dana 102	544	v. Kennedy, 58 Mich. 372	732
Peel v. January, 35 Ark. 331	444	v. Kniskern, 50 Barb. 87	585
Peelle v. State, 118 Ind. 512	279	v. Larson, 68 Cal. 18	296
Peirce v. Graham, 85 Va. 227	624	v. Liscomb, 60 N. Y. 559	798
Pelham v. Murray, 64 Tex. 477	181	v. Markham, 7 Cal. 208	797
Pelton v. Platner, 13 O. 209	288	v. McCaffrey, 75 Mich. 115	693
Pendexter v. Cole, 20 Atl. R. 331	494	v. McGowen, 77 Ill. 644	302, 596
Pendleton v. Fowler, 6 Ark. 41	234, 870	v. Mullan, 65 Cal. 396	9
v. Trueblood, 3 Jones' L. 96	833	v. Norton, 9 N. Y. 176	930
v. Weed, 17 N. Y. 72	710	v. Nowak, 5 N. Y. Supp. 239	295
Pendleton and Eden Turnpike Co.		v. Oliver, 66 Barb. 570	217
v. Barnard, 40 Ind. 146	85	v. Pearson, 76 Cal. 400	9
Penn v. Heisey, 19 Ill. 295	848	v. Pease, 30 Barb. 588	576
Penney v. Slade, 7 Scott 285	68	v. Pirfenbrink, 96 Ill. 68	797
Pennoyer v. Neff, 95 U. S. 714	386	v. Police, 12 Abb. Pr. N. S. 181	866
Pennypacker v. Switzer, 75 Va. 671	617	v. Ramon, 27 Cal. 73	62
Pennywit v. Foote, 27 O. St. 600	365	v. Riley, 21 How. Pr. 451	204
v. Kellogg, 1 Cin. O. 17	365	v. Riseley, 38 Hun 280	794
Penobscot v. Weeks, 52 Me. 456	505	v. Ruloff, 5 Parker Crim. 77	768
Penrose v. McKinzie, 116 Ind.		v. Schuyler, 69 N. Y. 242	538
35	9, 431	v. Sheriff, 7 Abb. Pr. 96	745
Pensoneau v. Heinrich, 54 Ill. 271	921	v. Smith, 13 Hun 414	690
People v. Albertson, 8 How. Pr.		v. Staton, 73 N. C. 546	49, 69
363	36, 48	v. Sturtevant, 9 N. Y. 263	72, 209
v. Allen, 6 Wend. 486	44	v. Sup'rs, 8 Abb. Pr. N. S. 112	629
v. Baker, 76 N. Y. 78	380	v. Supervisors, 35 Barb. 408	527, 698
v. Baker, 89 N. Y. 460	798	v. Supervisors, 11 N. Y. 563	527, 698
v. Bauer, 37 Hun 407	816	v. Terry, 5 N. Y. St. Rep'r 120	33
v. Blake, 49 Barb. 9	32, 36	v. Thayer, 63 N. Y. 348	593
v. Blanchard, 61 Mich. 478	248	v. Toal, 85 Cal. 333	33
v. Board, etc., 12 How. Pr. 50	135	v. Tracy, 9 Wend. 265	64
v. Board, etc., 70 N. Y. 228	603	v. Turner, 49 Hun 466	368
v. Boardman, 24 How. Pr. 512	64	v. Turner, 55 Ill. 280	107
v. Bork, 96 N. Y. 188	67	v. Warden, 100 N. Y. 20	634
v. Carroll, 44 Mich. 371	798	v. Webster, 14 How. Pr. 242	190
v. Carter, 29 Barb. 208	50, 54	v. White, 24 Wend. 520	35, 51
v. Carter, 48 Hun 165	794	v. Whitson, 74 Ill. 20	751
v. Cavanaugh, 2 Park. Cr. 650	788	v. Wilcox, 22 Barb. 178	901
v. Cassels, 5 Hill 164	476	Peoples v. Cowles, 34 How. Pr. 481	648
v. Chapman, 62 Mich. 280	282	Peoples' Savings Bank v. Wilcox,	
v. Clark, 67 Cal. 99	296	15 R. I. 258	91, 684
v. Coghill, 47 Cal. 361	67	Pepin v. Lachenmeyer, 45 N. Y. 27	63
v. Com'rs, 27 Barb. 94	666	Pepper v. Zahnsinger, 94 Ind. 88	705
v. Dawell, 25 Mich. 247	440, 690	Perkins, Ex parte, 29 Fed. R. 900	529
v. De Wolf, 62 Ill. 253	109	v. Corbin, 45 Ala. 103	31
v. Dohring, 59 N. Y. 374	67	v. Fairfield, 11 Mass. 227	278
v. Downing, 4 Sandford 189	576	v. Proctor, 2 Wilson 382	631
v. Dwyer, 90 N. Y. 402	161	v. Winters, 7 Ala. 855	402
v. Edson, 19 J. & S. 238	144	Perley v. Jewell, 26 Me. 101	729
v. Garnett, 130 Ill. 340	123	Permstick v. Sheriff, 29 Pac. R. 350	128
v. Gray, 19 How. Pr. 238	351, 501	Perrine v. Farr, 22 N. J. L. 356	70
v. Greene, 74 Cal. 400	8, 488	Perry, In re, 30 Wis. 268	264



	Page		Page
Perry v. Adams, 98 N. C. 167.....	404	Piipūlani, In re, 7 Hawaiian 95....	772
v. Brainard, 11 O. 442.....	631	Pike v. Kennedy, 15 Or. 420.....	317
v. Clarkson, 16 Ohio 571....138,	533	Pikulik, In re, 51 N. W. R. 261....	103
v. Morse, 57 Vt. 509.....	14	Pilcher v. Ligon, 15 S. W. R. 513.	539
v. Saint Joseph, etc., R. R. Co.,		Pile, Ex parte, 9 Ark. 336.....	222
29 Kan. 420.....	600, 645	v. McBratney, 15 Ill. 314....	504, 897
v. Towl, 48 Mo. 148.....	764	Pillsbury v. Dugan, 9 O. 117	
Persinger v. Jubb, 52 Mich. 304...	651		343, 436, 657
Peru v. Bearss, 55 Ind. 576....812,	859	Pinckney v. Hagerman, 4 Lans.	
Peterman v. Watkins, 19 Ga. 153...	450	374.....	533, 762
Peters v. Griffie, 108 Ind. 121....	308	Pinson v. Ivey, 9 Tenn. 296.....	397
v. League, 13 Md. 58.....	443	Piper v. Pearson, 2 Gray 120...529,	599
Petersilea v. Stone, 119 Mass. 465.	456	v. Rhodes, 30 Ind. 309.....	259
Pettiford v. Zoellner, 45 Mich. 358		Pitner v. Flanagan, 17 Tex 7....	777
	319, 490	Pittenger v. Pittenger, 3 N. J. Eq.	
Pettit v. Pettit, 32 Ala. 288.....	267	156.....	835
Pettus v. McClannahan, 52 Ala.		Pitts v. Clay, 27 Fed. R. 635.....	390
55.....	575, 746	Pittsburgh v. Cluley, 74 Pa. St. 262.	713
Petty, In re, 22 Kan. 477.....	790	Pittsburgh and S. L. R. Co's. Ap-	
Peyser v. Mayor, 70 N. Y. 497....	603	peal (Pa.), 4 Atl. R. 385.....	531
Pfirman v. Wattles, 86 Mich. 264.	235	Pittsburgh, C. and St. L. Ry. Co. v.	
Phelan v. Johnson, 80 Iowa 727.	575	Marshall, 85 Pa. St. 187.....	604
Phelps v. Baker, 60 Barb. 107....	383	Pittsburgh, Cincinnati & St. Louis	
v. Borland, 103 N. Y. 406...385,	909	Ry. Co. v. Elwood, 76 Ind. 309.	828
v. Brewer, 9 Cush. 390....420,	438	Placer Co. v. Campbell, 11 Pac. R.	
v. Duffy, 11 Nev. 80.....	919	602.....	777
v. Sill, 1 Day 315.....	913	Planters' Bank v. Chester, 11	
Phelps County v. Bishop, 68 Mo.		Humph. 577.....	833
250.....	576	v. Johnson, 15 Miss. 449.....	450
Philadelphia v. Wetherby, 15		Platt v. Harrison, 6 Iowa 79....	137
Phila. 403.....	383	v. Parker, 4 Hun 135.....	408
Phillips' Appeal, 34 Pa. St. 489...	525	v. Woodruff, 61 N. Y. 378.....	590
Phillips, Ex parte, 7 Kan. 48....	116	Platt's Appeal, 80 Pa. St. 501....	382
Phillips, Ex p., 57 Miss. 357.....	709	Pleasants v. Dunkin, 47 Tex. 343.	232
v. Crawley, Freem. 84.....	561	Plowman v. Henderson, 59 Ala.	
v. Eyre, L. R., 6 Q. B. 1.....	56	559.....	55, 61
v. Hunter, 2 H. Bl. 402.....	907	Plume v. Howard Savings' Insti-	
v. Lewis, 109 Ind. 62...537, 710,	918	tution, 46 N. J. L. 211.....	644
v. Stevens Point, 25 Wis. 594...	750	Plummer v. Douglas, 14 Iowa 69.	215
v. Thralls, 26 Kan. 780.....	41	v. Plummer, 37 Miss. 185.....	576
Philpot v. Newman, 11 Neb. 299.	719	v. Waterville, 32 Me. 566.....	85
Phinney, Petitioner, 32 Me. 440...	648	Poillon v. Lawrence, 43 N. Y. Su-	
Pick v. Strong, 26 Minn. 303...616,	618	perior 385; 77 N. Y. 207.....	673
Pickens v. Hill, 30 Ind. 269....	238	Pollard v. Baldwin, 22 Iowa 328...	486
Pickering v. Lomax, 120 Ill. 289...	352	v. Hanrick, 74 Ala. 334.....	274
v. State, 106 Ind. 228.....	497	v. Otter, 4 Dana 516.....	772
Pickett v. Hartsock, 15 Ill. 279....	501	v. Wegener, 13 Wis. 569. 72, 471,	495
v. Ferguson, 45 Ark. 177.....	420	Pollock v. Buie, 43 Miss. 140.....	402
v. Hartsock, 15 Ill. 279.....	229	Pond v. Ennis, 69 Ill. 341.....	339
v. Thurston, 7 Ark. 397.....	863	v. Makepeace, 2 Metc. 114.....	11
v. Wallace, 57 Cal. 555.....	913	Ponder v. Moseley, 2 Fla. 207....	753
Pico v. Sunol, 6 Cal. 294.....	468	Poole v. Canning, 2 L. R., C. P. 241	656
Picot v. Bates, 47 Mo. 390.....	775	Poor v. Boyce, 12 Tex. 440....75,	617
Pier v. Amory, 40 Wis. 571.....	767	Poorman v. Crane, Wright 347....	389
Pierce, In re, 44 Wis. 411....121,	298	Pope v. Harrison, 16 Lea 82	
v. Bowers, 8 Baxter 353.....	61		4, 9, 888, 891
v. Carleton, 12 Ill. 358.....	8, 491	v. Hibernia, 24 St. 481.....	249
v. Chicago, 36 Wis. 283.....	570	Poplin v. Hawke, 8 N. H. 124....	660
v. Irish, 31 Me. 254.....	402	Port Huron v. Judge, 31 Mich. 456.	160
v. Jackson, 6 Mass. 242...575, 576,	583	Porter v. Bronson, 29 How. Pr. 292.	437
v. Prescott, 128 Mass. 140...651,	665	v. Byrne, 10 Ind. 146.....	836
v. Strickland, 26 Me. 277. 11, 618,	717	v. Gile, 47 Vt. 620.....	556
Pierro v. St. Paul, 37 Minn. 314...	888	v. Partee, 26 Tenn. 168.....	765

	Page		Page
Porter v. Pico, 55 Cal. 165.....	364	Proctor v. Andover, 42 N. H. 348	
v. Purdy, 29 N. Y. 106.....	714	258, 795, 801	
v. Robinson, 3 A. K. Marsh. 253		Prohibitory Am. Cas., 24 Kan. 700.	287
755, 813		Propst v. Meadows, 13 Ill. 157....	875
v. Stout, 73 Ind. 3.....	343, 345, 411	Prosser v. Secor, 5 Barb. 607	
Posey v. Branch, 2 McMull. 338..	359	569, 661, 698	
v. Eaton, 77 Tenn. 500.....	61, 547	v. Warner, 47 Vt. 667.....	383
Post v. Harper, 61 Mich. 434.....	736	Prudham v. Phillips, Ambler 763.	576
Postlethwaite v. Ghiselin, 97 Mo.		Pryor v. Downey, 50 Cal. 388..	263, 617
420.....	546, 733	Pulliam v. Aler, 15 Gratt. 54....	432
Pott v. Oldwine, 7 Watts 173.....	702	Public Works v. Columbia Col-	
Potter v. Adams, 24 Mo. 159.....	771	lege, 17 Wall. 521.....	386
v. Merchants' Bank, 28 N. Y. 641.	902	Pugh v. McCue, 86 Va. 475.....	639
v. Todd, 73 Mo. 101.....	314	Pullan v. Kinsinger, 9 Am. Law	
v. Webb, 2 Me. 257.....	545	Reg. N. S. 557.....	212
Potwin v. Oades, 45 Ill. 366.....	829	Pursley v. Hayes, 22 Iowa 11	
Poult v. Slocum, 3 Blackf. 421....	303	279, 343, 822, 869	
Powell v. Geisendorff, 23 Kan. 538.	373	Purviance v. Com., 17 Serg. &	
v. Powell, 104 Ind. 18.....	51	Rawle 30.....	840
Power v. Speckman, 126 N. Y. 354.	623	Putman v. Holbrook, 27 Me. 419.	780
Powers v. Thayer, 30 Vt. 361.....	526	Putnam v. Longley, 11 Pick. 487	
Powles v. Dilley, 9 Gill 222.....	673	463, 475	
v. Jordan, 62 Md. 499.....	661	v. Man, 3 Wend. 202.....	471, 472
Pratt v. Bogardus, 49 Barb. 89....	287	Quarl v. Abbett, 102 Ind. 233..	72, 370
v. Chase, 44 N. Y. 597.....	384	Quayle v. Missouri, 63 Mo. 465...	713
v. Donovan, 10 Wis. 378.....	511	Quidort v. Pergeaux, 18 N. J. Eq.	
v. Gardner, 2 Cush. 63.....	913	472.....	610
v. Stocke, Cro. Eliz. 315.....	60	Quin, Succession of, 30 La. Ann.	
Prell v. McDonald, 7 Kan. 426.....	205	947.....	595
Pressler v. Turner, 57 Ind. 56....	448	Quinlan v. Meyers, 29 O. St. 500.	666
Pressley v. Harrison, 102 Ind. 14		Quinn v. Com., 20 Gratt. 138.....	562
434, 473, 902		Quinn's Appeal, 86 Pa. St. 447....	659
v. Lamb, 105 Ind. 171		Quivey v. Porter, 37 Cal. 458.....	484
182, 435, 473, 902		Raborg v. Hammond, 2 H. & G. 42.	680
Preston v. Dunn, 25 Ala. 507. 344,	413	Radde, In re, 9 N. Y. Supp. 812..	625
v. Walsh, 10 Fed. R. 315.....	897	Radnor v. Reeve, 2 B. & P. 391..	702
Prezinger v. Harness, 114 Ind. 491.	342	Ragland v. Green, 14 Sm. & M. 194.	543
Price, Re, 6 New South Wales 140.	792	v. Justices, 10 Ga. 65.....	726
v. Dewhurst, 8 Sim. 279.....	59	v. King's Adm'r, 37 Ala. 80....	626
v. Fenn, 3 Demarest 341.....	400	Rahm v. Mims, 40 Cal. 421.....	590
v. Graham, 3 Jones' Law 545....	294	Raiford v. Thorn, 15 La. Ann. 81.	762
v. Hickok, 39 Vt. 292.....	388	Railroad v. Trimble, 10 Wall. 367.	509
v. Peters, 15 Abb. Pr. 197.....	40	Rains v. Simpson, 50 Tex. 495....	913
v. Springfield, 101 Mo. 107... 57,	884	Raley v. Guinn, 76 Mo. 263... 829,	897
v. Ward, 25 N. J. Law 225.....	439	Ralston v. Lahee, 8 Iowa 17.....	813
v. Winter, 15 Fla. 66.....	433	v. Wood, 15 Ill. 159.....	536
Price County Com'rs v. Lawrence,		Ramp v. McDaniel, 12 Or. 108... 618	
29 Kan. 158.....	718	Randall v. Brigham, 7 Wall. 523.	913
Prickett v. Cleek, 13 Or. 415....	457	v. Lower, 98 Ind. 255.....	550
Prigg v. Adams, 2 Salk. 674... 526,	795	Randall's Case, 2 Mod. 308.....	640
Prime, Matter of, 1 Barb. 340....	253	Randolph v. Metcalf, 6 Coldw. 400.	829
v. Mapp, 80 Ga. 137.....	545	v. Simon, 29 Kan. 406.....	155
Prince, Ex parte, 27 Fla. 196.....	287	Randolph Co. v. Ralls, 18 Ill. 29..	927
v. Antle, 13 S. W. R. 436.....	222	Rangely v. Webster, 11 N. H. 299	
Pringle v. Woolworth, 90 N. Y.		505, 800	
502.....	904	Rankin v. Goddard, 54 Me 28....	907
Prior v. Prior, 49 Hun 502.....	635	v. Miller, 43 Iowa 11.....	450
Pritchard v. Madren, 31 Kan. 38..	814	Ranoul v. Griffie, 3 Md. 54.....	214
Privett v. Pressley, 62 Ind. 491...	833	Ransley v. Stott, 26 Pa. St. 126....	813
Probate Court v. Van Duzer, 13		Rape v. Heaton, 9 Wis. 328.....	495
Vt. 135.....	582	Rasmussen v. McCabe, 43 Wis. 471.	785
Probate Court v. Winch, 57 Vt. 282.	887	Rassier v. Grimmer, 28 N. E. R.	
Procter v. Newhall, 17 Mass. 81..	508	866.....	919

# CASES CITED.

lxxix

	Page		Page
Ratliff v. Stretch, 117 Ind. 526...	836	Reimers v. Druce, 23 Beavan 145...	907
Ray v. Rowley, 1 Hun 614 .....	889	Reinhart v. Lugo, 86 Cal. 395.....	8
Rayl v. Lapham, 27 O. St. 452...	408	Relyea v. Ramsay, 2 Wend. 602...	730
Raymond v. Bolles, 11 Cush. 315...	913	Remer v. Mackay, 35 Fed. R. 86...	391
v. Hinkson, 15 Mich. 113.....	526	Remick v. Butterfield, 31 N. H. 70...	778
v. Morrison, 59 Iowa 371.....	253	Remington v. Samana Bay Co.,	
v. Rockland Co., 40 Conn. 401...	463	140 Mass. 494.....	638
v. Smith, 1 Metc. (Ky.) 65.....	738	v. Superior Court, 69 Cal. 633...	805
v. Southerland, 3 Vt. 494.....	474	Renaud v. Abbott, 116 U. S. 277...	800
Rea v. M'Eachron, 13 Wend. 465...	845	Rendleman v. Rendleman, 118 Ill.	
Read v. Buffalo, 4 Abb. App. D. 22...	52	257 .....	905
v. French, 28 N. Y. 285.....	219	Renew v. State, 79 Ga. 162 .....	527
v. Howe, 39 Iowa 553.....	262, 269	Renier v. Hurlbut, 50 N. W. R.	
v. Sutler, 2 Cush. 115 .....	564	783 .....	73
Reading v. Price, 3 J. J. Marsh. 61...	525	Reno v. Pinder, 24 Barb. 423.....	495
Real Estate Savings Institution v.		Repine v. McPherson, 2 Kan. 340...	494
Collonious, 63 Mo. 290.....	807	Requa v. Holmes, 16 N. Y. 193...	639
Reams v. McNail, 9 Humph. 542...	40	Revill v. Pettit, 3 Met. (Ky.) 283...	67
Rebstock v. Rebstock, 2 Pittsb. 124...	690	Rex v. Bowman, 6 C. & P. 337...	871
Record v. Howard, 58 Me. 225 .....	680	v. Carlile, 4 C. & P. 415.....	66
Rector v. Drury, 3 Pinney 298 .....	785	v. Collier, Sayer 44.....	799
v. State, 6 Ark. 187.....	119	v. Croke, Cowper 29.....	894
Reddick v. President, 27 Ill. 145...	889	v. Evenwood, 3 Q. B. 370.....	416
Redman v. White, 25 Mich. 523...	736	v. Gibson, R. & R. Cr. C. 342...	18
Redus v. Burnett, 59 Tex. 576.....	487	v. Loggen, 1 Strange 73.....	552
v. Wofford, 12 Miss. 579.....	236	v. Lolley, Russ. & Ry. 237.....	909
Reed, Ex parte, 100 U. S. 13.....	70	v. St. Mary, 6 T. R. 615.....	416
v. Gage, 33 Mich. 179 .....	736	Reynolds v. Cooper, 100 Ill. 356...	162
v. Higgins, 86 Ind. 143.....	43	v. Faris, 80 Ind. 14.....	85
v. Pratt, 2 Hill 64.....	436	v. Fleming, 30 Kan. 106.....	436
v. Reed, 52 Mich. 117.....	690	v. Harris, 14 Cal. 667.....	813
v. Reed, 107 N. Y. 545.....	664	v. Lincoln, 71 Cal. 183.....	238
v. Shum, 63 Iowa 378.....	525, 796	v. Orvis, 7 Cow. 269.....	334
v. Thomas, 66 Ga. 595.....	42	v. Schmidt, 20 Wis. 374.....	686, 857
v. Whitton, 78 Ind. 579.....	738	v. Stockton, 43 N. J. Eq. 211...	806
v. Wright, 2 G. Greene 15.....	105	v. Stockton, 140 U. S. 254.....	806
Reel v. Elder, 66 Pa. St. 308.....	384	Rhinehart v. Lance, 45 N. J. L. 311...	795
Reeve v. Kennedy, 43 Cal. 643		Rhoades v. Delaney, 50 Ind. 468...	221
598, 608		v. Selin, 4 Wash. C. C. 715.....	582
v. State, 34 Ark. 610.....	289	Rhode v. Davis, 2 Ind. 53.....	878
Reeves v. Clark, 5 Ark. 27.....	303	Rhode Island v. Mass., 12 Peters	
v. Davis, 80 N. C. 209 .....	66	657 .....	72
v. Townsend, 22 N. J. L. 396...	918	Rhodes v. Crutchfield, 75 Tenn.	
Regina v. Alley, 9 Victorian 302...	554	518 .....	641
v. Bolton, 1 Ad. & El. N. S. 66		v. Gunn, 35 O. St. 387.....	891
74, 611		v. King, 52 Ala. 272.....	291
v. Cleary, 5 Wyatt, W. & A'B. 85	757	v. Piper, 40 Ind. 369.....	635, 665
v. Houghton, 1 El. & Bl. 501...	294	v. Union Bank, 7 Rob. 63 .....	547
v. Hughes, 4 Q. B. Div. 614.....	302	Ricard v. Williams, 7 Wheaton 59...	593
v. Inhabitants, 7 Ad. & El. N. S.		Ricardo v. Garcias, 12 C. & F. 368...	908
880 .....	602	Rice v. Cleghorn, 21 Ind. 80.....	857
v. M'Leod, 11 N. S. W. 218.....	693	v. Loomis, 28 Ind. 399.....	440
v. Row, 14 U. C. C. P. 307.....	41	v. Smith, 14 Mass. 431.....	801
v. Scotton, 5 Q. B. 493.....	286	Rich v. Mentz, 134 U. S. 632.....	667
v. Wright, 17 N. B. 363.....	690	Richards v. Nixon, 20 Pa. St. 19...	709
Reid v. Boyd, 13 Tex. 241.....	905	v. People, 81 Ill. 551.....	780
v. Holmes, 127 Mass. 326.....	639	v. Skiff, 8 O. St. 586.....	483
v. Hood, 2 Nott & M. 168.....	913	Richardson, Est. of, 132 Pa. St. 292...	741
v. Jordan, 56 Ga. 282.....	499	v. Beldam, 18 Ill. App. 527.....	564
v. Kelley, 1 Dev. L. 313.....	572	v. Beldam, 119 Ill. 320 .....	564
v. Mitchell, 93 Ind. 469.....	6	v. Butler, 82 Cal. 174... 75, 266,	481
v. Spoon, 66 N. C. 415.....	663	v. Estate of Merrill, 32 Vt. 27...	777
Reily v. Lancaster, 39 Cal. 354...	484	v. Farwell, 51 N. W. R. 915 .....	759



	Page		Page
Richardson v. Hazelton, 101 Mass.		Robertson v. Roberts, 1 A. K.	
108 .....	562	Marsh. 247.....	672
v. Parrott, 7 B. Mon. 379 .....	236	v. Smith, 129 Ind. 422.....	929
v. Seevers, 84 Va. 259.....	508	v. Winchester, 1 Pickle 171....	483
Richter v. Fitzsimmons, 4 Watts		Robinson, Ex p., 6 McL. 355 .....	524
251 .....	8	Robinson, In re, 29 Neb. 135.....	362
Richtmeyer v. Remsen, 38 N. Y.		v. Allen, 11 Gratt. 785 .....	660
206 .....	663	v. Epping, 24 Fla. 237.....	492, 600
Richards v. Ladd, 6 Sawyer 40... ..	923	v. Fair, 128 U. S. 53.....	780
Ricketts v. Spraker, 77 Ind. 371... ..	81	v. Ferguson, 78 Ill. 538.....	45
Rickman v. Williams, 10 Ire. L. 126. .	471	v. Hodge, 117 Mass. 222.....	269
Riddle v. Murphy, 7 S. & R. 230. .	581	v. Jones, 8 Mass. 536.....	811
v. Pakeman, 2 C. M. & R. 30... ..	256	v. Kious, 4 O. St. 593.....	726
v. Turner, 52 Tex. 145.....	710	v. Ramey, 8 B. Mon. 214.....	748
Rider v. Alexander, 1 D. Chip. 267: .	767	v. Redman, 2 Duval 82.....	788
v. Thompson, 23 Me. 244.....	744	v. Rippey, 111 Ind. 112.....	665
Ridgeley v. Bennett, 14 Lea 210... ..	885	v. Ward, 8 Johns. 86 .....	388
Rigby v. Lefevre, 58 Miss. 639....	446	Robson v. Eaton, 1 T. R. 62.....	423
Rigg v. Cook, 9 Ill. 336.....	710	Roby v. Verner, 31 Kan. 306.....	730
Riggs v. Johnson Co., 6 Wall. 166. .	524	Rocco v. Hackett, 2 Bosw. 579....	221
Rigney v. Coles, 6 Bosw. 479.....	725	Roche v. Waters, 18 Atl. R. 866. .	756
v. Rigney, 28 N. E. R. 405.....	383	Rock Creek v. Strong, 96 U. S.	
Riley v. Gitterman, 10 N. Y. Supp.		271.....	773
38 .....	701	Rockwell v. Jones, 21 Ill. 279..	217, 787
v. McCord, 24 Mo. 265.....	616	v. Perine, 5 Barb. 573.....	219
v. Murray, 8 Ind. 354 .....	586	Roderigas v. East River Savings	
Riley's Case, 2 Pick. 172.....	102	Institution, 76 N. Y. 316.....	572
Ringgenberg v. Hartman, 124 Ind.		Rodgers v. Evans, 8 Ga. 143.....	708
186.....	812	Rodman v. Harcourt, 4 B. Mon.	
v. Hartman, 20 N. E. R. 637....	812	224 .....	36
Ringle v. Weston, 23 Ind. 588....	739	Roeber v. Dawson, 3 N. Y. Supp.	
Risley v. Phenix Bank, 83 N. Y. 318	157	122 .....	719
Ritchie v. Putnam, 13 Wend. 524. .	576	Rogers v. Beauchamp, 102 Ind. 33	
Ritten v. Griffith, 16 Hun 454.....	330	49, 591	
Ritter v. Hoffman, 35 Kan. 215... ..	862	v. Clemmans, 26 Kan. 522 .....	178
Rivard v. Gardner, 39 Ill. 125. .	346, 441	v. Coleman, Hardin 422.....	385
Rivenburgh v. Henness, 4 Lans.		v. Duval, 23 Ark. 77 .....	600
208 .....	62	v. Felcher, 77 Ga. 46.....	61
Riverside Co. v. Howell, 113 Ill.		v. Loop, 51 Iowa 41... ..	40
256 .....	606	v. McLean, 34 N. Y. 536.....	433
Roach v. Martin, 1 Harr. 548.....	166	v. Rogers, 15 B. Mon. 364.....	743
Robb, In re, 19 Fed. R. 26.....	145	v. Western Marine & Fire Ins.	
v. Connolly, 111 U. S. 624.....	145	Co., 1 La. Ann. 161.....	409
v. Lessee of Irwin, 15 O. 689... ..	413	v. Wilson, 13 Ark. 507.....	247, 402
v. McDonald, 29 Iowa 330, 360		Rolf v. Timmermeister, 15 Mo.	
188, 746		App. 249.....	569
Robbins v. Clemmens, 41 O. St. 285. .	451	Rolfe v. Dudley, 58 Mich. 208....	322
v. Foster, 20 Mo. App. 519.....	772	Rollins, Ex parte, 80 Va. 314.....	108
v. Gorham, 25 N. Y. 588.....	191	v. Henry, 78 N. C. 342.....	739, 921
Robert v. Caldwell, 5 Dana 512... ..	439	v. Henry, 84 N. C. 569.....	684
Roberts, Ex parte, 9 Nev. 44.....	46	Rood v. School District, 1 Doug.	
v. Burrell, 3 T. & C. 30.....	738	(Mich.) 502 .....	839
v. Flanagan, 21 Neb. 503.....	488	Root v. Fellowes, 6 Cush. 29.....	340
v. Johnson, 57 Tex. 62.....	832	v. McFerrin, 37 Miss. 17... ..	404, 883
v. Lindley, 121 Ind. 56.....	179	Roraback v. Stebbins, 33 How. Pr.	
v. McCamant, 70 Tex. 743.....	779	278 .....	657
v. Schultz, 45 Tex. 184.....	402	Rorke v. Errington, 7 H. L. Cases	
v. Stowers, 7 Bush 295.....	385	617.....	831
Robertson v. Bradford, 70 Ala. 385. .	272	Rose, Estate of, 63 Cal. 346.....	857
v. Davidson, 14 Minn. 554.....	815	v. D. V. R. Co., 47 Iowa 420....	336
v. Huffman, 92 Ind. 247 .....	216	v. Garrett, 91 Mo. 65.....	715
v. Johnson, 57 Tex. 62.....	301	v. Himely, 4 Cranch 269.....	646
v. Kinkhead, 26 Wis. 560.....	174	v. Newman, 26 Tex. 131.....	764

# CASES CITED.

lxxxī

	Page		Page
Roseboom v. Van Vechten, 5 Denio 414	397	St. Louis & Sandoval C. & M. Co. v. Sandoval, 111 Ill. 32	466
Rosenblatt, Ex parte, 19 Nev. 439	106	St. Louis Perpetual Ins. Co. v. Ford, 11 Mo. 295	785
Rosenheim v. Hartsock, 90 Mo. 357	82, 780	St. Louis, etc., Ry. Co. v. Barnes, 35 Ark. 95	747
Ross v. Fuller, 12 Vt. 265	333	St. Louis, V. & T. H. R. R. Co. v. Dawson, 3 IH. App. 118	460
v. State, 119 Ind. 90	836	Sacramento Sav. Bank v. Spencer, 53 Cal. 737	446
v. Wood, 8 Hun 185	598	Saddlesvene v. Arms, 32 How. Pr. 280	151
Ross's Case, 2 Pick. 165	102	Safford v. Clark, 105 Mass 389	252
Rossiter v. Peck, 3 Gray 538	870	Sage v. Laurain, 19 Mich. 137	913
Roth v. Roth, 104 Ill. 35	910	Sagendorph v. Shult, 41 Barb. 102	499
Rountree v. Walker, 46 Tex. 200	566	Sailesbury v. Creswell, 14 Hun 460	598
Rouss v. Wright, 14 Neb. 457	152	Salisbury v. Chadbourne, 45 Wis. 74	722
Rowan v. Lamb, 4 G. Greene 468	494	v. Merrimack, 59 N. H. 359	861, 866
Rowden v. Brown, 91 Mo. 429	884	Salladay v. Bainhill, 29 Iowa 555	476
Rowe, Ex parte, 7 Cal. 184	111	Salmond v. Price, 13 O. 368	530
v. Palmer, 29 Kan. 337	265, 346	Salter v. Hilgen, 40 Wis. 363	767
v. Smith, 16 Mass. 306	597	Salters v. Tobias, 3 Paige 338	666
Rowland, Ex parte, 104 U. S. 604	185	Saltonstall v. Riley, 28 Ala. 164	756, 759, 880
Rowley v. Howard, 23 Cal. 401	457	Sam, Ex parte, 51 Ala. 34	270, 292
Royall, Ex parte, 117 U. S. 241	103	Sanborn v. Fellows, 22 N. H. 473	866
Royer v. Foster, 62 Iowa 321	328	v. Piper, 64 N. H. 335	357
Royston v. Wilson, 53 Wis. 625	238	Sanders v. Gatewood, 5 J. J. Marsh. 327	780
Royston's Appeal, 53 Wis. 612	238	v. Rains, 10 Mo. 770	359
Rubush v. State, 112 Ind. 107	296, 570	Sanderson v. Taylor, 1 Cush. 87	766
Rucker v. Dyer, 44 Miss. 591	281	Sandford v. Sandford, 28 Conn. 6	751
v. Moore, 48 Tenn. 726	415	Sanger v. Trainwell, 66 Tex. 361	485
Rudolf v. McDonald, 6 Neb. 163	277	Sannoner v. Jacobson, 47 Ark. 31	8, 82, 229, 233
Rue v. Perry, 63 Barb. 40	334	Sargeant v. State Bank, 12 How. 371	484
Rugle v. Webster, 55 Mo. 246	237	Sargent v. Salmond, 27 Me. 539	576, 583
Ruhland v. Jones, 55 Wis. 673	723	Satcher v. Satcher, 41 Ala. 26	274, 402, 853
v. Supervisors, 55 Wis. 664	723	Saunders v. Pike, 6 Or. 312	562
Rule v. Roach, 58 Miss. 552	404, 801	v. Tioga, 27 Mich. 520	869
Rumfelt v. O'Brien, 57 Mo. 569	471	Savage, Petitioner, 134 U. S. 176	110
Rumrill v. Bank, 28 Minn. 202	855	v. Benham, 17 Ala. 119	620
Runyon v. Newark India Rubber Co., 24 N. J. L. 467	581, 775	v. Hussey, 3 Jones' L. 149	810
Rush v. Rush, 46 Iowa 648	236	Sawyer, In re, 124 U. S. 200	210, 524
Rushing v. Thompson, 26 Fla. 583	722	v. Moyer, 109 Ill. 461	575
Russell v. Coffin, 8 Pick. 143	278	v. Rector, 5 Dak. 110	408
v. Dickson, 1 Con. & Law. 284	610	Sayles v. Briggs, 4 Metc. 421	740
v. Geyer, 4 Mo. 384	865	Schaale v. Wasey, 70 Mich. 414	759
v. Gilson, 36 Minn. 366	329	Schaettler v. Gardiner, 47 N. Y. 404	732
v. Perry, 14 N. H. 152	58	Schee v. La Grange, 78 Iowa 101	340, 448
v. State, 11, Kan. 308	576	Schell v. Leland, 45 Mo. 294	681
v. Work 35 N. J. L. 316	249, 879	Schermerhorn v. Mitchell, 15 Ill. App. 418	819
Ruston v. Grimwood, 30 Ind. 364	832	Schenck, In re, 74 N. C. 607	789
Ruth v. Oberbrunner, 40 Wis. 238	401	v. Griffin, 38 N. J. L. 462	372
Rutherford v. Holmes, 5 Hun 317	66 N. Y. 368	Schermerhorn v. Mahaffie, 34 Kan. 108	632, 720
Rutter v. Puckhofer, 15 Hun 638	652		
Ruthven, Ex parte, 17 Mo. 541	117		
Ryan v. Ferguson, 28 Pac. R. 910	403		
v. Jackson, 11 Tex. 391	532		
Ryder v. Cohn, 37 Cal. 69	881		
v. Flanders, 30 Mich. 336	169, 856		
v. Norsting, 29 N. E. R. 567	919		
Ryno v. Ryno, 27 N. J. Eq. 522	544, 609		
St. Clair v. Cox, 106 U. S. 350	461		
v. Morris, 9 O. 15	418		
St. Joseph Hydraulic Co. v. Cincinnati, W. & M. Ry. Co., 109 Ind. 172	259		

	Page		Page
Schibsby v. Westenholz, L. R., 6 Q. B. 155.....	386	Seguin v. Maverick, 24 Tex. 526..	775
Schindler v. Smith, 18 La. Ann. 476.....	432	Seibels v. Hodges, 65 Ga. 245.....	120
Schissel v. Dickson, 129 Ind. 139..	340	Seligson v. Collins, 64 Tex. 314...	568
Schlatterer v. Nickodemus, 50 Mich. 315.....	870	Selin v. Snyder, 7 Serg. & R. 166.	422
Schlawig v. Depeyster, 49 N. W. R. 843.....	479	Sellars v. Cheney, 70 Ga. 790.....	44
Schley v. Mayor, 29 Md. 34.....	641	Semine v. Semine, 2 Levinz 90...	619
Schlosser's Appeal, 58 Pa. St. 493.	657	Semler, Petition of, 41 Wis. 517..	287
Schluter v. Bowery, 117 N. Y. 125.	543	Semple v. Hagar, 27 Cal. 163.....	662
Schmidt v. Neimeyer, 100 Mo. 207 337, 482	482	Senichka v. Lowe, 74 Ill. 274.....	489
v. Stern, 2 Tex. App. C. C. 92...	385	Sennott's Case, 146 Mass. 489 105, 784, 789, 790	790
Schneider v. McFarland, 4 Barb. 139.....	302, 756	Sergeant v. George, 5 Litt. 198...	472
Schneitman v. Noble, 75 Iowa 120	460	Sermon v. Black, 79 Ala. 507... 269,	880
Schnell v. Chicago, 38 Ill. 382 ...	234	Sessions v. Crunkilton, 20 O. St. 349.....	226
Schoonmaker v. Clearwater, 41 Barb. 200.....	61	v. Stevens, 1 Fla. 233.....	326
v. Spencer, 54 N. Y. 366.....	79, 240	Settlemyer v. Sullivan, 97 U. S. 444.	453
Schoppenhast v. Bollman, 21 Ind. 280.....	243, 249	Sever v. Russell, 4 Cush. 513.....	883
Schroeder v. Merchants and Mech. Ins. Co., 104 Ill. 71.....	75	Sevier v. Teal, 16 Tex. 371.....	40
Schroepel v. Taylor, 10 Wend. 196	392	Sewall v. Ridlon, 5 Me. 458.... 41,	757
Schultz v. Schultz, 10 Gratt. 358..	783	v. Sewall, 122 Mass. 156.....	690
Schuyler v. McCrea, 16 N. J. L. 248.....	800	v. Sullivan, 108 Mass. 355.....	582
Schwartz, Ex parte, 2 Tex. App. 74.	752	Seymour v. Ricketts, 21 Neb. 240.	708
Schwinger v. Hickok, 53 N. Y. 280.	385	v. Seymour, 22 Conn. 272.....	648
Scobey v. Gano, 35 O. St. 550....	619	v. Street, 5 Neb. 85.....	582
Scofield v. Cahoon, 31 Mich. 206.	739	Shackleford v. Fountain, 1 T. B. Monroe 252.....	348
Scott, Ex parte, 9 B. & C. 446.....	362	v. Miller, 9 Dana. 273.....	882
v. Adams, 12 Wend. 218.....	359	Shaefer v. Gates, 2 B. Mon. 453..	414
v. Coleman, 5 Litt. (Ky.) 349....	905	Shadbolt v. Bronson, 1 Mich. 85..	797
v. Crews, 72 Mo. 261.....	537	Shafer v. Bushnell, 24 Wis. 372...	382
v. Kreamer, 37 Kan. 753.....	754	Shaffer v. Weech, 34 Kan. 595...	668
v. Moore, 41 Vt. 205.....	526	Shanks' Case, 15 Abb. Pr. N. S. 38.	797
v. Noble, 72 Pa. St. 115.....	385	Shannon, In re, 27 Pac. R. 352...	191
v. Pilkington, 2 B. & S. 11.....	908	v. Shannon, 4 Allen 134.....	690
v. Pleasants, 21 Ark. 364.....	490	v. Taylor, 16 Tex. 413.....	617
v. Shearman, 2 W. Bl. 977.....	570	Sharon v. Sharon, 79 Cal. 633....	741
v. Stanfield, L. R., 3 Exch. 220..	912	Sharp v. Baird, 43 Cal. 577.....	446
v. Streepy, 73 Tex. 547.....	385	v. Brunnings, 35 Cal. 528.....	460
v. West, 1 Bush 23.....	516	v. Long, 28 Pa. St. 433.....	581
Scovil v. Fisher, 77 Iowa 97.....	890	v. Lumley, 34 Cal. 611.....	431
Scrivener v. Dietz, 68 Cal. 1.....	248	Shaver v. Shell, 24 Ark. 122.....	730
Scroggs v. Tutt, 20 Kan. 271.....	400	Shaw, Ex parte, 7 O. St. 81.....	816
Seamster v. Blackstock, 83 Va. 232.	805	v. Att. Gen., L. R., 2 P. & D. 156.	690
Searcy v. Holmes, 43 Ala. 608....	402	v. Broadbent, 129 N. Y. 114....	928
Searle v. Galbraith, 73 Ill. 269....	891	v. Gould, L. R., 3 H. L. Cas. 55.	909
Sears v. Stone County, 105 Mo. 236	860	v. Rowland, 32 Kan. 154.....	527
v. Terry, 26 Conn. 273.....	479, 676	Shawhan v. Loffer, 24 Iowa 217..	342
Seaver v. Fitzgerald, 23 Cal. 86. 319,	346	Shea v. Quintin, 30 Iowa 58.....	499
Seaverus v. Gerke, 3 Sawyer, 353.	400	Shealor v. Super. Ct., 70 Cal. 564..	526
Second N. B'k's Appeal, 85 Pa. St. 528; 96 Pa. St. 460.....	565	Shearman v. State, 1 Tex. App. 215.	46
Secrist v. Green, 3 Wall. 744.....	472	Shears v. Solhinger, 10 Abb. Pr. N. S. 282.....	514
Seely v. Reid, 3 G. Greene, 374..	505	Shed v. Tileston, 8 Gray 244.....	338
Seelye v. Smith, 85 Ala. 25.....	897	Sheehan's Case, 122 Mass. 445....	36
Segee v. Thomas, 3 Blatchf. 11...	477	Sheets v. Hawk, 14 Serg. & R. 173.	591
		Sheldon v. Hill, 33 Mich. 171.....	766
		v. Newton, 3 O. St. 494.... 413,	885
		v. Stryker, 34 Barb. 116, 120....	215
		v. Wright, 7 Barb. 39 232, 399, 845,	885
		v. Wright, 5 N. Y. 497 232, 238, 309, 497,	924

	Page		Page
Shelton v. Tiffin, 6 How.	163	Singleton v. Cogar, 7 Dana	479... 925
	437, 438, 439	Sire v. Merrick, 6 N. Y. Supp.	661. 726
Shepard v. Wright, 35 Hun.	444... 385	Sitting of Circuit Court, Re, 1	
v. Wright, 113 N. Y.	582... 385	New Zeal. Ct. of App.	329... 46
Shephard v. Rhodes, 60 Ill.	301... 543	Sitzman v. Pacquette, 13 Wis.	291
Shepherd v. Ware, 46 Minn.	174... 367		72, 164
Shepler v. State, 114 Ind.	194... 296	Skeen, Ex parte, 41 Ind.	418... 210
Sheppard v. Powers, 50 Ala.	377... 354	Skelton v. Sackett, 91 Mo.	377... 344
Sherman v. Ballou, 8 Cowen	304... 616	Skinner v. Frost, 6 Allen	285... 252
v. Palmer, 37 Mich.	509... 838	v. Moore, 2 Dev. & Bat. Law	138
Sherrard v. Nevius, 2 Ind.	241... 438		388, 662, 671, 895
Sherwood v. Baker, 105 Mo.	472	Skinnion v. Kelley, 18 N. Y.	355... 240
	884, 924	Skrine v. Simmons, 36 Ga.	402... 708
Shideler v. State, 129 Ind.	523, 424, 584	Slade v. Slade, 58 Me.	157... 566
Shields v. Miller, 9 Kan.	390... 315, 316	v. Washburn, 3 Ired. L.	557... 543
v. Miltenberger, 14 Pa. St.	76... 848	Slasson v. Brown, 20 Pick.	436, 339, 475
Shipman v. Butterfield, 47 Mich.		Sledge v. Blum, 63 N. C.	374... 277
	487... 620	Sloan v. Graham, 85 Ill.	26... 484
Shippen v. Kimball, 15 Pac. R.	813... 323	v. McLean, 12 Ired. Law	260... 509
Shoemaker v. Brown, 10 Kan.	383... 545	v. Mitchell, 84 Mo.	546... 899
Shoemate v. Lockridge, 53 Ill.	503... 625	v. Sloan, 25 Fla.	53, 607... 267
Short v. Galway, 83 Ky.	501... 530	Slocumb, Ex parte, 9 Ark.	375... 739
Showers v. Robinson, 43 Mich.	502... 273	Slocum v. English, 62 N. Y.	494... 176
Shriver v. Reister, 65 Md.	278... 401	v. Wheeler, 1 Conn.	429... 211
v. Lynn, 2 How.	43... 182, 810	Small v. Banfield, 20 Atl. R.	284... 778
Shroyer v. Richmond, 16 O. St.	455... 885	v. Graves, 7 Barb.	576... 409
Shyrock v. Buckman, 121 Pa. St.		v. Jones, 1 Watts & S.	128... 581
	248... 659	v. Pennell, 31 Me.	267... 303, 878
Shultz v. Sanders, 11 Stew.	154... 216	v. Roberts, 51 Ind.	281... 707
Shumard v. Philips, 53 Ark.	37, 617, 849	v. Wheaton, 4 E. D. Smith	306... 239
Shumate v. McGarity, 83 Pa. St.	38... 140	Smalley v. Lighthall, 37 Mich.	348... 309
Shumway v. Stillman, 6 Wend.	447... 439	Smelzer v. Lockhart, 97 Ind.	315... 770
Sibley v. Waffle, 16 N. Y.	180... 484, 497	Smith, Ex parte, 16 Ill.	347... 255
Sidensparker v. Sidensparker, 52		Smith's Ldg. Cas., vol. 2, pp.	620,
Me.	481... 576, 583, 584	800... 928	
Sidewell v. Worthington, 8 Dana		Smith, Petition of, 2 Nev.	338... 765
	74... 483	v. Abbott, 40 Me.	442... 598
Siebold, Ex parte, 100 U. S.	371... 103	v. Biscailuz, 83 Cal.	344... 717
Sigourney v. Sibley, 21 Pick.	101;	v. Bradley, 14 Miss.	485... 447, 756
22 Pick.	507... 59	v. Brown, 34 Mich.	455... 500
Silsbe v. Lucas, 36 Ill.	462... 808	v. Burlingame, 4 Mason	121... 415
Silverman v. Gundelfinger, 82 Cal.		v. Chenault, 48 Tex.	455... 840
	548... 266	v. Clifford 99 Ind.	113... 779
Sim v. Frank, 25 Ill.	125... 862	v. Dickson, 58 Iowa	444... 553
Simmons, Ex parte, 62 Ala.	416... 520	v. Downes, 40 Tex.	57... 777
v. Baynard, 30 Fed. R.	532... 414	v. Engle, 44 Iowa	265... 408, 778
v. McKay, 5 Bush	25... 755	v. Eureka Bank, 24 Kan.	528... 402
v. Saul, 138 U. S.	439... 620	v. Finley, 52 Ark.	373... 429
v. Thomas, 43 Miss.	31... 659	v. Grady, 68 Wis.	215... 385
Simms v. Slacum, 3 Cr.	300... 582	v. Granberry, 39 Ga.	381... 580
Simonds v. Simonds, 103 Mass.	572... 108	v. Hess, 91 Ind.	424... 562
Simons v. De Bare, 4 Bosw.	547... 876	v. Keen, 26 Me.	411... 608, 810
v. Kern, 92 Pa. St.	455... 409, 412	v. Knowlton, 11 N. H.	191... 527
Simonton v. Hays, 88 Ind.	70... 554	v. Lambert, 30 Me.	137... 527
Simpson v. Bowker, 11 Cush.	306... 264	v. Long, 9 Daly	429... 841
v. Burch, 4 Hun	315... 319, 504	v. McDonald, 42 Cal.	484... 433
v. Cook, 24 Minn.	180... 628	v. McCutchen, 38 Mo.	415... 385
v. Fogo, 1 Hem. & M.	195... 907	v. M'Iver, 9 Wheaton	532... 779
v. Gonzalez, 15 Fla.	9... 628	v. Maryland, 18 How.	71... 158
v. Kimberlin, 12 Kan.	579... 575	v. Mayo, 83 Va.	910... 57
Sims v. Gay, 109 Ind.	501... 84, 891	v. Mulliken, 2 Minn.	319... 919
v. Gray, 66 Mo.	613... 764	v. Palmer, 6 Cush.	513... 13
v. Waters, 65 Ala.	442... 880	v. Pattison, 45 Miss.	619... 464

	Page		Page
State v. Trout, 75 Ind. 563.....	822	Stewart v. Griswold, 134 Mass.	
v. Vernon, 25 Vt. 244.....	156	391.....	481
v. Wakefield, 60 Vt. 618.....	426	v. Hawley, 21 Wend. 552.....	295
v. Wanee, 30 N. E. R. 161.....	739	v. Nunemaker, 2 Ind. 47.....	596
v. Waterman, 79 Iowa 360.....	503	v. Spaulding, 72 Cal. 264.....	801
v. Waupaca, 20 Wis. 640.....	83	v. Stewart, 27 W. Va. 167.....	904
v. Weare, 38 N. H. 314.....	801, 871	v. Waite, 19 Kan. 218.....	726
v. Weatherbee, 45 Mo. 17.....	665	v. Warner, 1 Day 142.....	586
v. Wenzel, 77 Ind. 428.....	458	Stigers v. Brent, 50 Md. 214.....	654
v. Wheeler, 127 Ind. 451.....	23	Stiles v. Bradford, 4 Rawle 394...	556
v. White, 7 Ired. 116.....	645	Stillman v. McConnell, 36 Kan. 398.	727
v. Wiley, 19 S. W. R. 197.....	33	Stillwell v. Swarthout, 81 N. Y.	
v. Williams, 35 La. Ann. 742....	35	109.....	360, 845
v. Witherspoon, 75 N. C. 222..	821	Stimpson v. Malden, 109 Mass.	
v. Wolever, 127 Ind. 306.....	914	313.....	359
v. Worley, 11 Ired. L. 242.....	335	Stingley v. Nichols, 30 N. E. R. 34.	873
v. Wright, Busbee Law 209....	426	Stockett v. Nicholson, Walker	
v. Younts, 89 Ind. 313.....	764	(Miss.) 75.....	758, 837
State Bank v. Wilson, 9 Ill. 57....	369	Stockwell v. McCracken, 109 Mass.	
State Ins. Co. v. Waterhouse, 78		84.....	142
Iowa 674.....	460, 463	Stoddard v. Johnson, 75 Ind. 20	
Stearns v. Aguirre, 7 Cal. 443....	66	85, 665,	869
v. St. Louis, 94 Mo. 317.....	771	Stoetzell v. Fullerton, 44 Ill. 108..	641
v. Smith, 25 Minn. 132.....	501	Stokes v. Middleton, 28 N. J. L. 32.	889
v. Wright, 51 N. H. 600.....	56	Stone v. Carter, 13 Gray 575...69.	256
Steel v. Smith, 7 Watts & S. 447..	388	v. Graves, 8 Mo. 148.....	913
v. Williams, 13 Ind. 73.....	135	v. Hawkins, 56 Conn. 111.....	925
Steele v. Bates, 2 Aiken 338.....	443	v. Miller, 62 Barb. 430.....	495
v. Dunham, 26 Wis. 393.....	750	v. Mitchell, 10 Heisk. 488.....	248
v. Renn, 50 Tex. 467.....	571	v. Smiley, 46 Ark. 373.....	541
Steen v. Bennett, 24 Vt. 303.....	886	v. State, 75 Ind. 235.....	822
Steere v. Vanderberg, 67 Mich. 530.	312	v. Tilson, 19 Me. 265.....	747
Stegall v. Huff, 54 Tex. 193.....	323	Stone Cattle and Pasture Co. v.	
Steinbach v. Leese, 27 Cal. 295....	490	Boon, 73 Tex. 548.....	592
Stephens v. Howe, 127 Mass. 164..	596	Stoolfoos v. Jenkins, 8 S. & R. 267.	668
v. Santee, 51 Barb. 532.....	821	Storm v. Adams, 56 Wis. 137..324,	874
Stephenson v. Doe, 8 Blackf. 508..	138	v. Ermantrout, 89 Ind. 214.....	566
v. Newcomb, 5 Harr. 150.....	765	Story Eq. Pl. 392.....	805
Sternbergh v. Schoolcraft, 2 Barb.		Story v. Elliott, 8 Cow. 27.....	...
153.....	465	Stout v. Woods, 79 Ind. 108.....	361
Sternes, Ex parte, 77 Cal. 156....	556	Stoutenburgh v. Vandenberg, 7	
Steuben v. Alberger, 78 N. Y. 252.	229	How. Pr. 229.....	434
Stevellie v. Read, 1 Wash. C. Ct. 274.	340	Stovall v. Banks, 10 Wall. 583....	565
Stevens v. Deering, 9 S. W. R. 292.	657	Stow v. Kimball, 28 Ill. 93	
v. Edwards, 12 Cush. 79.....	314	344, 546,	746
v. Enders, 13 N. J. L. 271.....	161	Stradley v. King, 84 N. C. 635....	236
v. Fisher, 30 Vt. 200.....	461	Strahl, Ex parte, 16 Iowa 369.....	49
v. Griffith, 111 U. S. 48.....	31	Strait v. Strait, 3 McArthur 415...	690
Stevenson v. Bonesteel, 30 Iowa		Strang, Ex parte, 21 O. St. 610...	35
286.....	608	Streisguth v. Reigelman, 75 Wis.	
v. Flournoy, 89 Ky. 561.....	840	212.....	230
v. Huddleson, 13 B. Mon. 299..	882	Strickland v. Cox, 102 N. C. 411..	777
v. McReady, 20 Miss. 9.....	884	v. Laraway, 55 Hun 612.....	747
v. Miller, 2 Lit. 306.....	53, 929	v. Strickland, 95 N. C. 471.....	922
v. Polk, 71 Iowa 278.....	431	Strieb v. Cox, 111 Ind. 299....215,	665
v. Riser, 23 La. Ann. 421.....	332	Striker v. Mott, 6 Wend. 465....	608
v. Superior Court, 62 Cal. 60....	645	Strobe v. Downer, 13 Wis. 10....	808
Stewart v. Anderson, 70 Tex. 588		Strohmier v. Stumph, 1 Wilson 304.	456
338,	894	Stromberg v. Esterly, 62 Wis. 632.	724
v. Bailey, 28 Mich. 251.....	854	Stromburg v. Earick, 6 B. Mon. 578	
v. Bodley, 26 Pac. R. 719.....	476	217,	740
v. Colter, 31 Minn. 385.....	834	Strong v. Bradley, 13 Vt. 9.....	737
v. Colwell, 24 Pa. St. 67.....	604	v. Catlin, 3 Pinney 121.....	335



	Page		Page
Strong v. Perkins, 3 N. H. 517....	609	Symonds v. Barnes, 59 Me. 191....	408
Strouse v. Drennan, 41 Mo. 289		Taafe v. Downes, 3 Moore P. C. 41.	913
	681, 884	Tabb v. Collier, 68 Ga. 641.....	848
Strugis v. Drew, 11 Hun 136.....	640	Tabler v. Castle, 22 Md. 94.....	827
Strusburgh v. Mayor of New		Tadlock v. Eccles, 20 Tex. 782...	568
York, 87 N. Y. 452.....	867	Taggart v. Muse, 60 Miss. 870....	661
Stuart v. Allen, 16 Cal. 473		Tainter v. Mayor, 19 N. J. Eq. 46.	409
	75, 233, 266, 709	Talbot v. Kuhn, 50 N. W. R. 791..	768
v. Hines, 33 Iowa 60.....	449, 468	v. Woodle, 19 Wis. 174.....	230
v. Palmer, 74 N. Y. 183.....	366	Talcott v. Rozenberg, 3 Daly 203.	335
v. Peay, 21 Ark. 117.....	596	Taliaferro v. Herring, 29 Tenn. 271.	430
Stubblefield v. McRaven, 5 Sm. &		Tallman v. Ely, 6 Wis. 244.....	889
M. 130.....	545	v. McCarty, 11 Wis. 401. 83, 708,	757
Sturdy v. Jackoway, 19 Ark. 499		Tamm v. Williams, 3 Douglas 281.	398
	170, 173	Tant v. Wigfall, 65 Ga. 412.....	677
Sturgeon v. Gray, 96 Ind. 166....	768	Tappan v. Nutting, Brayton 137..	456
Sturgis v. Rogers, 26 Ind. 1.....	781	Tarbell v. Parker, 106 Mass. 347	
Sturn v. Fleming, 22 W. Va. 404.	365		545, 546
Stuttmeister's Estate, 75 Cal. 346.	400	Tarbox v. French, 27 Wis. 651....	769
Succession of Dejan, 40 La. Ann.		v. Hays, 6 Watts 398.....	466
437.....	552	Tardy v. Morgan, 3 McLean 358..	530
Succession of Lampton, 35 La.		Tarleton v. Cox, 45 Miss. 430.....	509
Ann. 418.....	508	v. Tarleton, 4 M. & S. 20.....	908
Succession of Quin, 30 La. Ann.		Tate v. Bush, 62 Miss. 145.....	280
947.....	595	v. James, 50 Vt. 124.....	714
Succession of Theze, 44 La. Ann.		v. Mott, 96 N. C. 19.....	653
—.....	546	v. Norton, 94 U. S. 746.....	545
Sullivan v. Fosdick, 10 Hun. 173.	600	Tatem, Ex parte, 1 Hughes 588....	532
v. Fugate, 1 Heisk. 20.....	248	Tavener v. Barrett, 21 W. Va. 656.	657
v. Jones, 2 Gray 570.....	913	Taylor v. Benjamin, 76 Ga. 762... 152	
v. Rabb, 86 Ala. 433.....	624	v. Carryl, 20 How. 583.....	394
Summers v. Howard, 33 Ark. 490.	169	v. Carryl, 24 Pa. St. 259.....	416
Sumner v. Beeler, 50 Ind. 341....	106	v. Conner, 7 Ind. 115.....	126
v. Parker, 7 Mass. 79.....	163	v. Coots, 48 N. W. R. 964.....	215
v. Sessions, 94 N. C. 371.....	708	v. Doremus, 16 N. J. Law 473..	728
Sunier v. Miller, 105 Ind. 393. 364,	763	v. Gladwin, 40 Mich. 232... 786,	813
Supervisors v. Briggs, 2 Denio 26.	860	v. Harris, 21 Tex. 438.....	227
v. United States, 4 Wall. 435... 780		v. Hosick, 13 Kan. 518..... 345,	399
Surtell v. Brailsford, 2 Bay 333... 657		v. Hoyt, 15 Atk R. 892.....	506
Sutherland v. De Leon, 1 Tex. 250.	388	v. Judd, 41 Conn. 483.....	925
Suydam v. Palmer, 63 Ga. 546....	852	v. Lewis, 2 J. J. Marsh. 400....	472
Swain, Ex parte, 19 Tex. App. 323.	283	v. Moffatt, 2 Blackford 305.....	150
v. Chase, 12 Cal. 283.....	318	v. Ormsby, 66 Iowa 109.....	324
v. Gilder, 61 Miss. 667..... 424,	821	v. Phelps, 1 Har. and G. 492....	908
Swan v. Bournes, 47 Iowa 501....	770	v. Porter, 4 Hill 140.....	190
v. Scott, 11 Serg. & R. 155.....	596	v. Rountree, 83 Tenn. 725.....	389
Swartz, In re, 47 Kan. 157.....	144	v. Runyan, 3 Iowa 474.....	826
Swasey v. Antram, 24 O. St. 87... 639		v. Sanford, 8 Blackford 169.....	218
Swayne v. Lyon, 67 Pa. St. 436... 657		v. Skrine, 3 Brev. 516..... 31,	54
Swearengen v. Gulick, 67 Ill. 208		v. Snow, 47 Tex. 462.....	638
	299, 342, 891	v. Webb, 54 Miss. 36.....	452
Sweeley v. Van Steenburg, 69		v. Wilkinson, 22 Wis. 40.....	724
Iowa 696.....	324, 391	Teel v. Yost, 28 N. E. R. 353.....	862
Sweeney, Ex parte, 126 Ind. 583.. 147		v. Yost, 49 Hun 456.....	905
Sweet v. Ward, 43 Kan. 695.....	8	Telford v. Coggins, 76 Ga. 683....	334
Sweetman v. Stratton, 74 Tex. 76.	781	Temple v. Hammock, 52 Miss. 360.	465
Sweetser v. Eaton, 14 Allen 157.. 730		Templeton v. Falls Land & Cattle	
Swift v. Poughkeepsie, 37 N. Y.		Co., 77 Tex. 55.....	619
511.....	102	Tennell v. Breedlove, 54 Tex. 540.	891
v. Lee, 65 Ill. 336.....	833	Tennis v. Anderson, 55 Iowa 625..	771
v. Meyers, 37 Fed. R. 37.....	467	Tenny v. Filer, 8 Wend. 569.....	41
v. Stark, 2 Or. 97.....	800	Tenth National Bank v. Sanger, 42	
Swiggart v. Harber, 5 Ill. 364....	787	How. Pr. 179.....	524

	Page		Page
Terre Haute v. Beach, 96 Ind. 143.	308	Thornton v. McGrath, 1 Duvall 349	
Terre Haute & Indianapolis R. R.		714, 851, 852	
Co. v. Baker, 122 Ind. 433. 449,	569	v. Mulquinne, 12 Iowa 549.....	857
Terre Haute and Logansport R.		Thorp v. Cullum, 6 Ill. 615.....	581
R. Co. v. Soice, 128 Ind. 105..	866	v. Hanes, 107 Ind. 324 .....	651
Terrill v. Auchaner, 14 O. St. 80.	852	v. McCullum, 6 Ill. 614.....	923
Territory v. Sheriff, 6 Mont. 297..	716	v. Wray, 68 Ga. 359.....	286
Terry v. Dickinson, 75 Va. 475. 301,	444	Thouvenin v. Rodriguez, 24 Tex.	
v. Huntington, Hardres 480.....	538	468.....	369, 576
Terwilliger v. Brown, 44 N. Y.		Thumb v. Gresham, 2 Met. 306...	172
237.....	853	Thurber v. Blackbourne, 1 N. H.	
Teverbaugh v. Hawkins, 82 Mo.		242 .....	904
180.....	302	Thurmond v. Andrews, 10 Bush	
Tervis v. Richardson, 7 Mon. 654		400 .....	408
327, 503		Thurston v. Wilkerson, 65 Ga. 557.	499
Texas v. White, 7 Wall. 700.....	31	Tibbs v. Allen, 29 Ill. 535.....	761
Thacker v. Chambers, 5 Humph.		Tidd v. Rines, 26 Minn. 201.....	829
313 .....	605	Tiernan v. Beam, 2 O. 383.....	836
Thain v. Rudisill, 126 Ind. 272		Tiffany v. Glover, 3 G. Greene 387.	494
831, 833, 834		v. Lord, 65 N. Y. 310.....	280
Tharp v. Brenneman, 41 Iowa 251.	464	Tilton v. Gordon, 1 N. H. 33.....	597
Thatcher, Ex parte, 7 Ill. 167.....	189	Tingue v. Portchester, 101 N. Y.	
Thatcher v. Gammon, 12 Mass. 267.	609	294 .....	921
v. Maack, 7 Ill. App. 635.....	820	Tippin v. Whitehead, 66 Ga. 688.	120
v. Powell, 6 Wheaton 119.....	227	Tisdale v. Conn. Mut. L. Ins. Co.,	
Thaw v. Ritchie, 136 U. S. 519.....	404	26 Iowa 170 and 28 id. 12.....	24
Thayer v. Mowry, 36 Me. 287.....	13	Tobin v. Addison, 2 Strobhart 3..	838
v. Winchester, 133 Mass. 447.....	168	Todd v. Crumb, 5 McLean 172....	487
Theze, Succession of, 44 La. Ann.	546	v. Flournoy, 56 Ala. 99.....	271, 744
Thomas v. Burrus, 23 Miss. 550....	627	Toft v. Rayner, 5 M. G. and S.	
v. Hinsdale, 78 Ill. 259.....	46	162.....	742
v. Holcombe, 7 Ired. 445.....	838	Toliver v. Morgan, 75 Iowa 619...	492
v. Hunsucker, 108 N. C. 720....	654	Tolman v. Jones, 114 Ill. 147.....	807
v. Ireland, 88 Ky. 581.....	9	Tom v. Sayers, 64 Tex. 339.....	886
v. Jarden, 57 Pa. St. 331.....	421	Tomlinson v. Devore, 1 Gill 345..	654
v. Mahone, 9 Bush. 111.....	278	v. Litze, 47 N. W. R. 1015.....	727
v. Morrisett, 76 Ga. 384.....	677	Toney, Ex parte, 11 Mo. 661.....	702
v. Pendleton, 46 N. W. R. 180....	922	Tootle v. Jones, 19 Neb. 588.....	753
v. People, 107 Ill. 517.....	645	Torr v. State, 115 Ind. 188.....	43
Thompson, In re, 46 Kan. 254.....	192	Torrance v. Torrance, 53 Pa. St.	
Thompson, In re, 9 Mont. 381.....	560	505 .....	171
Thompson's Appeal, 57 Pa. St. 175.	576	Torrans v. Hicks, 32 Mich. 307...	489
v. Brown, 16 Mass. 172.....	268, 546	Tower v. Lamb, 6 Mich. 362.....	927
v. Chicago, S. F. and C. Ry.		Town v. Smith, 14 Mich. 348.....	549
Co., 19 S. W. R. 77.....	307, 445	v. Tabor, 34 Mich. 262.....	322
v. Eastburn, 16 N. J. L. 100....	899	Town of Cherry Creek v. Becker,	
v. Emmert, 15 Ill. 415.....	438	123 N. Y. 161.....	665
v. O'Hanlen, 6 Watts 492.....	184	Town of Cicero v. Williamson, 91	
v. Phillips, 1 Baldwin 246.....	846	Ind. 541.....	392
v. Scanlan, 16 S. W. R. 197.....	491	Town of Duanesburgh v. Jenkins,	
v. State, 28 Ala. 12.....	690	40 Barb. 574.....	666
v. Tolmie, 2 Peters 157		Town of Huntington v. Charlotte,	
214, 279, 545, 631		15 Vt. 46.....	901
v. Van Vechten, 27 N. Y. 568.	215	Town of Lewiston v. Proctor, 23	
v. Whitman, 18 Wall. 457		Ill. 533.....	50
377, 586, 603, 687, 889		Town of Lyons v. Cooledge, 89	
Thomson v. Morris, 57 Ill. 333....	298	Ill. 529.....	767
Thorn v. Newsom, 64 Tex. 161....	781	Town of Mentz v. Cook, 108 N.	
v. Salmonson, 37 Kan. 441.....	486	Y. 504.....	667
Thornton v. American Writing		Town of Ontario v. First National	
Machine Co., 83 Ga. 288.....	444	Bank, 12 N. Y. Supp. 434....	576
v. Baker, 15 R. I. 553 .....	83, 684	Town of St. Albans v. Bush, 4 Vt.	
v. Hogan, 63 Mo. 143.....	408	58 .....	421

# CASES CITED.

lxxxix

	Page		Page
Town of Springport v. Teutonia Savings Bank, 84 N. Y. 403...	773	Tyler v. Langworthy, 37 Iowa 555.	838
Town of Wellsboro v. New York, etc., R. R. Co., 76 N. Y. 182...	667	v. Peatt, 30 Mich. 63.....	385
Townsend v. Cox, 45 Mo. 401.....	432	Tyrrell v. Baldwin, 67 Cal. 1....	345
v. Gordon, 19 Cal. 188.....	809, 880	Tyson v. Belcher, 102 N. C. 112...	709
v. Munger, 9 Tex. 300.....	763, 886	Ullman v. Lion, 8 Minn. 381.....	491
v. Rees, 2 Har. 324.....	814	Ulrich, Ex parte, 42 Fed. R. 587,	
v. Tallant, 33 Cal. 45, 360, 454, 497,	501	661.....	118
v. Townsend, 4 Coldw. 70.....	592	v. Voneida, 1 P. & W. 245.....	743
Towsley v. McDonald, 32 Barb. 604.....	323	Una v. Dodd, 39 N. J. Eq. 173....	148
Trabue v. Connors, 84 Ky. 283....	390	Underhill v. Devereux, 2 Saund. 71.....	640
Tracy v. Seaman's, 7 N. Y. St. Rep'r 144.....	293	Underwood, Mat. of, 30 Mich. 502.	99
v. Williams, 4 Conn. 107.....	303	v. McVeigh, 23 Gratt. 409.....	365
Trader v. McKee, 2 Ill. 558.....	904	Unfried v. Heberer, 63 Ind. 67....	634
Traer v. Whitman, 56 Iowa 443....	537	Union Trust Co. v. Rochester and P. R. Co., 29 Fed. R. 609.....	553
Trail v. Snouffer, 6 Md. 308.....	636	United States v. Arredondo, 6 Peters 691.....	3, 70, 554
Trammell v. Russellville, 34 Ark. 105.....	137	v. Board, 28 Fed. R. 407.....	223
Trapnall v. State Bank, 18 Ark. 53.	755	v. Brown, 1 Sawyer 531.....	111
Trawick v. Trawick, 67 Ala. 271. 61,	271	v. Council, etc., 6 Wall. 514.....	524
Traylor v. Lide, 7 S. W. R. 58....	873	v. De Walt, 128 U. S. 393.....	119
Treadway v. Eastburn, 57 Tex. 209		v. Eldredge, 5 Utah 161.....	287
	484, 502	v. Gayle, 45 Fed. R. 107....	472, 657
Treat v. Maxwell, 82 Me. 76.....	892	v. Labette County, 7 Fed. R. 318.	794
Trebilcox v. McAlpine, 17 N. Y. Supp. 221.....	588, 862	v. Lawrence, 3 Dall. 42.....	861
Treutlen v. Smith, 54 Ga. 575....	696	v. McCarthy, 18 Fed. R. 87.....	111
Trope v. Kerns, 83 Cal. 553.....	721	v. Patterson, 29 Fed. R. 775....	798
Trotter v. Neal, 50 Ark. 340.....	48	v. Payne, 4 Dill. 387.....	645
Trowbridge v. Sickler, 42 Wis. 417.	247	v. Thibaut, 19 Fed. R. 631.....	144
Troy v. Com'rs, 32 Kan. 507.....	508	v. Three Tons of Coal, 6 Biss. 379.	111
Troyer v. Dyar, 102 Ind. 396.....	411	v. Walker, 109 U. S. 258.....	647
v. Wood, 96 Mo. 478.....	345	v. Winchester, 99 U. S. 372....	602
Truesdell v. Combs, 33 O. St. 186.	292	University v. Finch, 18 Wall. 106.	365
Truman v. Robinson, 44 Cal. 623.	483	Updegraff v. Palmer, 107 Ind. 181.	85
Trumble v. William, 18 Neb. 144....	236	Updyke v. Wheeler, 37 Mo. App. 680.....	247
Tuchman v. Welch, 42 Fed. R. 548.	108	Vail v. Owen, 19 Barb. 22....	569, 661
Tucker v. Gill, 61 Ill. 236.....	864	Valderes v. Bird, 10 Rob. 396.....	272
v. Harris, 13 Ga. 1.....	869, 877	Valentine v. Cooley, Meigs 613...	890
v. Malloy, 48 Barb. 85.....	248	Valle v. Fleming, 19 Mo. 454.....	497
v. Sellers, 30 N. E. R. 531.....	367	Vallee v. Dumergue, 4 Exch. 290.	418
Turnbull v. Davis, 1 Mart. N. S. 568.	762	Van Alstyne v. Erwine, 11 N. Y. 331.....	237, 244
v. Thompson, 27 Gratt. 306.....	444	Van Cleaf v. Burns, 30 N. E. R. 661.	384
Turner, Ex parte, 3 Woods 603....	524	Vance v. Corrigan, 78 Mo. 94....	411
v. Barr, 75 Iowa 758.....	772	Vandenheuvel v. United Ins. Co., 2 Cai. Cas. 217.....	395
v. Douglass, 72 N. C. 127.....	432	Vanderburg v. Williamson, 52 Miss. 233.....	281
v. Dupree, 19 Ala. 198.....	840	Vanderpoel v. Van Valkenburgh, 6 N. Y. 190.....	224
v. Ireland, 11 Humph. 446.....	573	Van Deusen v. Sweet, 51 N. Y. 378.	920
v. Nesbit, 1 Hill's Ch. 445.....	547	Vandyke v. Bastedo, 15 N. J. L. 224.....	556, 747, 810
v. Wilkins, 56 Ala. 173.....	622	v. Johns, 1 Del. Ch. 93.....	580
Turney v. Barr, 75 Iowa 758.....	768	Van Epps v. Walsh, 1 Woods 598	
v. Dibrell, 3 Baxt. 235.....	49		32, 365
Turpin v. Dennis, 28 N. E. R. 1065.	787	Van Fossen v. State, 37 O. St. 317.	690
Turrell v. Warren, 25 Minn. 9....	892	Van Hagan, Ex parte, 25 O. St. 426.	520
Tustin v. Gaunt, 4 Or. 306.....	878	Van Horn v. Ford, 16 Iowa 578..	847
Tutt v. Boyer, 51 Mo. 425.....	844	Van Inwagen v. Van Inwagen, 86 Mich. 333.....	689
Tweedy, Ex parte, 22 Fed. R. 84..	527		
Twogood v. Pence, 22 Iowa 543....	609		
Twohig, Ex parte, 13 Nev. 302....	283		
Tyler v. Alford, 38 Me. 530.....	860		



	Page		Page
Van Kirk v. Wilds, 11 Barb. 520..	229	Voorhees v. Bank of United States,	
Van Kleek v. Eggleston, 7 Mich.		10 Peters 449.....	899
511.....	879, 921	Voorhis v. Gamble, 6 Mo. App. 1.	639
Van Kraken, Ex p., 47 Fed.R. 888.	704	Vorce v. Page, 28 Neb. 294....	298, 438
Van Loon v. Lyons, 61 N. Y. 22..	279	Vosburgh v. Welch, 11 Johns. 175	
Van Metre v. Wolf, 27 Iowa, 341.	657	287, 303	
Van Nostrand v. Wright, Hill &		Vose v. Morton, 4 Cush. 27.....	700
D. 260.....	261	Vosler v. Brock, 84 Mo. 574.....	84
Van Orsdal v. Van Orsdal, 67 Iowa		Vowles v. Buckman, 6 Dana 466..	653.
35.....	380	Vredenburg v. Hendricks, 17	
Vanquelin v. Bouard, 15 C. B. N.		Barb. 179.....	255
S. 341.....	698	Waddell v. Judson, 12 La. Ann. 13.	660
Van Rensselaer v. Cottrell, 7 Barb.		Wade v. Hancock, 76 Va. 620. 300,	812
127.....	131	v. Wisenant, 86 Ga. 482.....	696
v. Witbeck, 7 Barb. 133.....	551	Waggoner v. Lyles, 29 Ark. 47....	528
Van Slyke v. Trempealeau, etc.,		Wagner v. Ewing, 44 Ind. 441....	657
Ins. Co., 39 Wis. 390.....	36	Wagstaff v. Schippel, 27 Kan. 450.	296
Van Steenbergh v. Bigelow, 3		Wahrenberger v. Horan, 18 Tex.	
Wend. 42.....	713	57.....	817
v. Kortz, 10 Johns. 167.....	238	Wainwright v. Smith, 106 Ind.	
Van Storch v. Griffin, 71 Pa. St. 240.	386	239.....	808
Vansyckel's Appeal, 13 Pa. St. 128.	527	Wait v. Maxwell, 5 Pick. 217....	415
Vantilburg v. Black, 3 Mont. 459.	657	Wake, Ex parte, L. R., 11 Q. B.	
Vanvabry v. Staton, 88 Tenn. 334.	159	Div. 291.....	555
Van Voorhis v. Budd, 39 Barb.		Wakefield v. King, 2 Tex. A. C. C.	
479.....	339	695.....	879
Van Wyck v. Hardy, 39 How. Pr.		v. State, 5 Ind. 195.....	202
392.....	313, 351, 504	Walcott v. Wells, 24 Pac. R. 367..	33
Varrell v. Church, 36 Wis. 318....	778	Waldo v. Waldo, 52 Mich. 94....	694
Vasquez v. Richardson, 19 Mo. 96.	884	Wales v. Bogue, 31 Ill. 464.....	830
Vassault v. Austin, 36 Cal. 691. 484,	490	v. Willard, 2 Mass. 120.....	592
Vaughan v. Doe, 1 Leigh 287.....	224	Walkenhorst v. Lewis, 24 Kan....	
Vaughn v. Congdon, 56 Vt. 111.. 75,	205	420.....	755
v. Sugg, 82 Ala. 357.....	632	Walker v. Chase, 53, Me. 258....	566
Vaux v. Nesbit, 1 McCord Eq. 352.	710	v. Cottrell, 65 Tenn. 257....	483, 891
Veach v. Rice, 131 U. S. 293.....	781	v. Cronkhite, 40 Fed. R. 133..	479
Velasquez, Ex parte, 26 Tex. 178..	516	v. Day, 67 Tenn. (8 Baxt.) 77....	392
Venable v. Curd, 2 Head 582.....	44	v. Goldsmith, 14 Or. 125....	274, 884
Vermont v. Ladd, 59 Vt. 5.....	609	v. Hill, 111 Ind. 223....	570, 624, 710
Verner v. Carson, 66 Pa. St. 440....	783	v. Ivey, 74 Ala. 475.....	303
Verplanck v. Van Buren, 11 Hun		v. Lyon, 3 Pa. 98.....	80, 221
328.....	598	v. Mosely, 5 Denio 102.....	664
Verry v. McClellan, 6 Gray 535. 776,	809	v. Myers, 36 Tex. 203.....	174
Vetterlein, Petitioner, 14 R. I. 378.	690	v. Roberts, 4 Rich. L. 561.....	246
Vick v. Mayor, 1 How. (Miss.) 379.	884	v. Sturbans, 38 Fed. R. 298....	787
v. Pope, 81 N. C. 22.....	657	v. Wynne, 11 Tenn. 61.....	525
Vickery v. Scott, 20 Ga. 795.....	65	Wall v. Trumbull, 16 Mich. 228..	910
Viele v. Van Steenberg, 31 Fed. R.		v. Wall, 28 Miss. 409.....	224
339.....	390	v. Wall, 123 Pa. St. 545.....	224
Vilas v. Railroad Co., 123 N.Y. 441.	436	Wallace v. Brown, 22 Ark. 118....	597
Visart v. Bush, 46 Ark. 153....	869, 920	v. Usher, 4 Bibb 508.....	136
Vischer v. Hudson, 15 Barb. 37....	524	Wallahan v. Ingersoll, 117 Ill. 123	
v. Vischer, 12 Barb. 640.....	380	355, 501,	801
Vizzard v. Taylor, 97 Ind. 90.....	411	Wallbridge v. Hall, 3 Vt. 114.....	147
Vogel v. Brown Township, 112		Walley v. McConnell, 13 Ad. &	
Ind. 299.....	342	El. N. S. 903.....	477
v. Brown School Township, 112		Walsh v. Crook, 19 S. W. R. 19..	178
Ind. 317.....	332	Walter v. Bickham, 122 U. S. 320.	364
v. People, 37 Ill. App. 388.....	140	Walton v. Develing, 61 Ill. 201, 205.	160
Von Kettler v. Johnson, 57 Ill. 109		Waltz v. Borroway, 25 Ind. 380	
557, 766		306, 344,	350
Von Rhade v. Von Rhade, 2		Walworth v. Henderson, 9 La.	
Thomp. & Cook 491.....	240	Ann. 339.....	439

# CASES CITED.

xcii

	Page		Page
Walworth v. Stevenson, 24 La. Ann. 251.....	407	Watts v. Pond, 4 Met. (Ky.) 61....	714
Wandling v. Straw, 25 W. Va. 692.....	436, 576	v. State, 22 Tex. App. 572.....	40
Wanzer v. Howland, 10 Wis. 8....	72	v. Waddle, 1 McLean 200.....	530
Ward v. Barber, 1 E. D. Smith 423.....	421	Way v. Howe, 108 Mass. 502.....	582
v. Clapp, 4 Metc. 455.....	475	Wearne v. Smith, 32 Wis. 412.....	727
v. Dougherty, 75 Cal. 240.....	597	Weatherbee v. Weatherbee, 20 Wis. 499.....	469
v. Farwell, 97 Ill. 593.....	767	Weaver v. Boggs, 38 Md. 255.....	389
v. Freeman, 2 Ir. C. L. 460.....	913	v. Brenner, 21 Atl. R. 1010.....	433
v. Glenn, 9 Rich. L. 127.....	537	v. Brown, 87 Ala. 533.....	889
v. Howard, 12 O. St. 158.....	277	v. Carpenter, 42 Iowa 343.....	345
v. Lowndes, 96 N. C. 367.....	311	v. Devendorf, 3 Denio 117.....	551, 911, 913
v. State, 40 Miss. 108.....	545	v. Parish, 1 Hawks 319.....	471
Warden v. Eichbaum, 3 Grant's (Pa.) Cases 42.....	656, 843	v. Price, 3 B. & A. 409.....	89, 698, 700
Warder v. Tainter, 4 Watts 270.....	637	Webb v. Hanson, 3 Cal. 65.....	570
Wardrup v. Jones, 23 Tex. 489.....	548	v. Keller, 26 La. Ann. 596.....	547
Ware v. Jackson, 24 Me. 166.....	61	v. Keller, 39 La. Ann. 55.....	545
v. Pennington, 15 Ark. 226.....	825	Weber v. Noth, 51 Iowa 375.....	269
Warfield, Matter of, 22 Cal. 51.....	6, 125	v. Tschetter, 46 N. W. R. 201.....	26
Warner v. Perry, 14 Hun 337.....	294	Webster v. Lowell, 2 Allen 123.....	207
v. Webster, 13 O. 505.....	591	v. Daniel, 47 Ark. 131.....	309, 489
Warnock v. Thomas, 48 Ala. 463.....	274	v. French, 11 Cush. 304.....	264
Warren v. Glynn, 37 N. H. 340.....	60	v. Reid, 11 How. 437.....	385
v. Hall, 6 Dana 450.....	604, 801	v. Reid, Morris 467.....	99, 575
v. Kelly, 80 Me. 512.....	110	Weeks v. Ellis, 2 Barb. 320.....	63
v. McCarthy, 25 Ill. 95.....	752	v. Thomas, 21 Me. 465.....	596
v. Saunders, 27 Gratt. 259.....	359	Weems v. Masterson, 80 Tex. 45.....	261
Warren Mfg. Co. v. Aetna Ins. Co. 2 Paine C. C. 501.....	487	v. Raiford, 8 S. R. 260.....	503
Warten v. Howard, 2 Sm. & M. 527.....	847	Wehle v. Butler, 43 How. Pr. 5.....	917
Wartner v. State, 102 Ind. 51.....	759	Wehrle v. Wehrle, 39 O. St. 365.....	176
Washburn v. Phillips, 13 Miss. 600.....	402	Weigel, Suc. of, 18 La. Ann. 49.....	744
Washington v. McCaughan, 34 Miss. 304.....	281, 625	Weil v. Simmons, 66 Mo. 617.....	657
Washington Bridge Co. v. Stewart, 3 How. 413.....	124	Weir v. Monahan, 67 Miss. 434.....	540
Washington, etc., Packet Co. v. Sickles, 24 How. 333.....	806	v. State, 96 Ind. 311.....	564
Waterhouse v. Cousins, 40 Me. 333.....	637	v. West, 27 Kan. 650.....	63
Waterman v. Lawrence, 19 Cal. 210.....	808	Weiss v. Guereineau, 109 Ind. 438.....	575
v. Tuttle, 18 Ill. 292.....	698	Welch v. Louis, 31 Ill. 446.....	761
Waters v. Bates, 44 Pa. St. 473.....	236	v. McCane, 55 Conn. 25.....	509
Watkins, Ex parte, 3 Peters 193.....	198, 703	v. Nash, 8 East. 394.....	88, 90
Watkins v. Davis, 61 Tex. 414.....	470	v. Sykes, 8 Ill. 197.....	438, 586
v. Helman, 16 Peters 25.....	530	Wellborn v. People, 76 Ill. 516.....	537
v. State, 68 Ind. 427.....	425, 584	Welles v. Thornton, 45 Barb. 390.....	319
v. Watkins, 125 Ind. 163.....	690	Wellman v. Lawrence, 15 Mass. 326.....	268
Watson, In Matter of, 5 Lans. 466.....	190	Wells v. Brackett, 30 Me. 61.....	90, 533
Watson, In re, 30 Kan. 753.....	572, 733	v. Cowherd, 2 Met. (Ky.) 514.....	714
v. Camper, 119 Ind. 60.....	556	v. Dench, 1 Mass. 232.....	827
v. Hopkins, 27 Tex. 637.....	423	v. Morton, 10 Wis. 468.....	865
v. New Eng. B'k, 4 Metc. 343.....	421	v. Parker, 26 Mich. 102.....	245
v. Tromble, 50 N. W. R. 331.....	718	v. Polk, 36 Tex. 120.....	264
v. Ulbrich, 18 Neb. 186.....	391	v. Scott, 4 Mich. 347.....	927
Watt v. Brookover, 35 W. Va. 323.....	638	v. Stearns, 35 Hun 323.....	224
v. Donnell, 80 Mo. 195.....	411	v. Stevens, 2 Gray 115.....	740, 913
Wattles v. Hyde, 9 Conn. 10.....	881	Wells, Fargo & Co. v. Clarkson, 5 Mont. 336.....	800
Watts v. Cook, 24 Kan. 278. 264, 278, 281.....		Wellshear v. Kelley, 69 Mo. 343.....	241
		Welsh v. Blackwell, 14 N. J. L. 344.....	710
		v. Kirkpatrick, 30 Cal. 202.....	341
		Welty v. Ruffner, 9 Pa. St. 224.....	780
		Wenner v. Thornton, 98 Ill. 156.....	625
		Wentworth v. Alexander, 66 Ind. 39.....	116

	Page		Page
Wernecke v. Kenyon, 66 Mo. 275.	625	White v. Mandeville, 72 Ga. 705.	723
Werner v. Werner, 30 Ill. App. 159.	905	v. Memphis, 64 Miss. 566.	757
Wernse v. McPike, 76 Mo. 249.	625	v. Merritt, 7 N. Y. 352.	576
Wertheimer v. Howard, 30 Mo. 420	866, 915	v. Morse, 139 Mass. 162.	784
v. Howe, 30 Miss. 420.	860	v. Moss, 67 Ga. 89.	580
Werz v. Werz, 11 Mo. App. 26. 207,	214	v. Riggs, 27 Me. 114.	41
Wescott v. Archer, 12 Neb. 345. 352,	407	v. State, 28 Neb. 341.	282
Wesson v. Chamberlain, 3 N. Y.	331	v. Weatherbee, 126 Mass. 450.	540
	608	Whitehurst v. Coleen, 53 Ill. 247.	510
West v. Carter, 25 Ill. App. 245.	589	White Water Valley Canal Co. v.	
v. Cochran, 104 Pa. St. 482.	266	Henderson, 3 Ind. 3.	575, 596
v. St. Paul & N. P. Ry. Co., 40		Whithead v. Mallory, 4 Gray 180.	226
Minn. 189.	501	Whiting v. Beebe, 12 Ark. 421.	98, 356
v. Williamson, 31 Tenn. 276.	728	Whitley v. Black, 2 Hawks 179.	533
Westcott v. Brown, 13 Ind. 83.	487	Whitlow v. Echols, 78 Ala. 206	269, 668, 814
v. Sharp, 50 N. J. L. 392.	237	Whitman v. Fisher, 74 Ill. 147. 445,	782
West Duluth Land Co. v. Kurtz,		v. Heneberry, 73 Ill. 109.	780
45 Minn. 380.	857	Whitmore v. Johnson, 29 Tenn. 609.	885
Western R. R. Co. v. Nolan, 48		Whitney v. Brunette, 15 Wis. 61.	245
N. Y. 513.	867	v. Lehmer, 26 Ind. 503.	432
Westerwelt v. Lewis, 2 McLean		v. Porter, 23 Ill. 445.	464
511.	487	v. Shufelt, 1 Denio 592.	255
Westfall v. Preston, 49 N. Y. 349.	234	Whittaker v. Murray, 15 Ill. 293.	438
West Feliciana R. R. Co. v. Thorn-		Whittier v. Wendell, 7 N. H. 257.	505
ton, 12 La. Ann. 736.	780	Whittlesey v. Frantz, 74 N. Y. 456.	79
Westoby v. Day, 2 El. & Bl. 605.	672	Whitwell v. Barbier 7 Cal. 54.	502
Weston v. Lumley, 33 Ind. 486.	259	Whitworth v. Detroit, 45 N. W. R.	
v. Palmer, 51 Me. 73.	657	500.	593
v. Weston, 14 Johns. 428.	683	Whorton v. Moragne, 62 Ala. 201	655, 782
Wetherill v. Stillman, 65 Pa. St.		Wicker v. Pope, 6 Rich. L. 366.	354
105.	487, 919	Wickliffe v. Dorsey, 1 Dana 462	698, 801
Weyer v. Zane, 3 O. 305.	505, 511	Wicks v. Caulk, 5 Har. & J. 36.	48
Wheatley v. Harvey, 31 Tenn.		v. Ludwig, 9 Cal. 173.	45
484.	404, 641	Widber, Ex parte, 91 Cal. 367	129, 194
Wheaton v. Fay, 62 N. Y. 275.	253	Wigand v. Dejonge, 8 Abb. New	
v. Thompson, 20 Minn. 196.	353	Cas. 260.	55
Wheeler v. Boyce, 36 Kan. 350.	506	Wight v. Wallbaum, 39 Ill. 554	544, 678
v. Mills, 40 Barb. 644.	497	v. Warner, 1 Doug. 384.	870
v. Nance, 11 Humph. 184.	837	Wightman v. Karsner, 20 Ala. 416	44
Whelen v. Weaver, 93 Mo. 430.	346	Wigwall v. Union Coal & M. Co.	
Whitaker v. Ashby, 43 La. Ann.		37 Iowa 129.	569
117.	847	Wilbur v. Abbot, 60 N. H. 40.	929
v. Merrill, 28 Barb. 526.	585	Wilburn v. McCalley, 63 Ala. 436.	269
Whitcomb v. Cook, 39 Vt. 585.	333	Wilcher v. Robertson, 78 Va. 602.	636
v. Hutchinson, 48 Vt. 310.	716	Wilcox v. Jackson, 13 Peters 498.	604
White, Ex parte, 15 Nev. 146.	46	v. Kassick, 2 Mich. 165.	487
White, In re, 17 Fed. R. 723.	293	v. Raber, 24 Neb. 368.	841
White, In re, 43 Minn. 250.	183	v. Williamson, 61 Miss. 310.	303
White v. Bogart, 73 N. Y. 256		Wilcoxson v. Burton, 27 Cal. 228.	424
468, 491,	720	Wild v. Deig 43 Ind. 455. 109, 483,	814
v. Appleton, 22 Wis. 639.	528	Wildes v. Russell, L. R., 1 C. P.	
v. Clapp, 8 Metc. 365.	814	722.	558
v. Conover, 5 Blackf. 462.	837	Wiles v. Brown, 3 Barb. 37.	159
v. Crow, 17 Fed. R. 98.	436	Wiley v. C. Aultman & Co., 53	
v. Crow, 110 U. S. 183.	767	Wis. 560.	237
v. Floyd, Speers Eq. 351.	388	v. Pavey, 61 Ind. 457.	408, 582
v. Foote, 29 W. Va. 385.	658	v. Pratt, 23 Ind. 628.	436, 438
v. Gates, 42 O. St. 109.	195	v. Sutherland, 41 Ill. 25.	562
v. Hobart, 90 Ala. 368.	786		
v. Jones, 38 Ill. 159.	216		
v. Jones, 67 Tex. 638.	766		
v. Landaff, 35 N. H. 128.	76		

	Page		Page
Wilkerson v. Allen, 67 Mo. 502...	764	Wills v. Chandler, 2 Fed. R. 273	841, 845
v. Schoonmaker, 77 Tex. 615...	879	v. Whittier, 45 Me. 544.....	211
Wilkins v. Malone, 14 Ind. 153...	111	Wilmersdoerfer v. Lake Mahopac	
v. Tourtellott, 28 Kan. 825		Improvement Co., 18 Hun 387.	128
	446, 495, 922	Wilmurt v. Morgan, —N. J.—	835
Wilkinson v. Conaty, 65 Mich. 614.	620	Wilson, Ex parte, 114 U. S. 417...	119
v. Filby, 24 Wis. 441.....	856	Wilson, In re, 140 U. S. 575.....	283
v. Moore, 79 Ind. 397.....	672	v. Armstrong, 42 Ala. 168.....	271
v. Vorce, 41 Barb. 370.....	423	v. Arnold, 5 Mich. 98.....	313
Willard v. Whitney, 49 Me. 235...	564	v. Caneadea, 15 Hun 218.....	667
Willet's Appeal, 50 Conn. 330...	676	v. Coolidge, 42 Mich. 112.....	657
Williams' Appeal, 47 Pa. St. 307...	657	v. Davis, 1 Mich. 156.....	303
Williams, Ex parte, 24 Pac. R. 602	629	v. Gaston, 92 Pa. St. 207.....	611
Williams, Ex parte, 1 Wash. T. 240.	147	v. Hastings, 66 Cal. 243.....	264
v. Armroyd, 7 Cranch 423.....	103	v. Hilliard, 5 Atl. R. 258.....	439
v. Ball, 52 Tex. 603.....	879	v. Holt, 83 Ala. 528.....	269
v. Barnaman, 28 How. Pr. 59...	495	v. Mayor, 1 Denio 595.....	913
v. Board, 78 N. Y. 561.....	569	v. Montgomery, 14 Sm. & M. 205	14
v. Bruffy, 96 U. S. 176, and 102		v. Nance, 11 Humph. 184.....	837
U. S. 248.....	31	v. Packman, Cro. Eliz. 459.....	619
v. Burrill, 23 Me. 144.....	563	v. Seligman, 36 Fed. R. 154.....	387
v. Central, 32 Minn. 440.....	836	v. Seligman, 144 U. S. 41.....	387
v. Childress, 25 Miss. 78.....	811	v. Smith, 22 Gratt. 493.....	554
v. Coggeshall, 11 Cush. 442.....	252	v. Sparkman, 17 Fla. 871.....	525
v. Harrington, 11 Ired. L. 616...	684	v. Spring, 38 Ark. 181.....	388
v. Harris, 36 Tenn. 331.....	797	v. St. Louis, 18 S. W. R. 286...	387
v. Hays, 77 Tex. 283.....	421	v. Wilson, 36 Ala. 665.....	61, 591
v. Heirs of Petticrew, 62 Mo. 460.	545	Wilson's Trusts, In re, L. R. 1 Eq.	
v. Holmes, 2 Wis. 129.....	666	247.....	909
v. Hudson, 93 Mo. 524.....	638	Wimberly v. Hurst, 33 Ill. 166...	775
v. Lowe, 4 Neb. 382.....	132	v. Mansfield, 70 Ga. 783.....	923
v. Mitchell, 49 Wis. 284.....	763	Wimbish v. Breeden, 77 Va. 324...	713
v. Moorehead, 33 Kan. 609.....	492	Winborn v. King, 35 Miss. 157...	402
v. Morgan, 1 Litt. 167.....	876	Winchester v. Beardin, 10 Humph.	
v. Morton, 38 Me. 47.....	281	247.....	800
v. Petticrew, 62 Mo. 460.....	545	v. Everett, 80 Me. 535.....	656
v. Preston, 3 J. J. Marsh 600. 385,	388	Windsor v. McVeigh, 93 U. S.	
v. Reed, 5 Pick. 480.....	281	274.....	303, 364, 398, 758, 802
v. Robinson, 4 Cush. 529.....	726, 727	Winfree v. Bagley, 102 N. C. 515...	385
v. Sharp, 2 Ind. 101.....	775	Wing v. Dodge, 80 Ill. 564.....	8, 620
v. Simmons, 79 Ga. 649 p. 8.....	635	Wingate v. Haywood, 40 N. H. 437.	889
v. State, 88 Ala. 80.....	294	v. James, 121 Ind. 69.....	167
v. Turner, 19 Me. 454.....	64	v. Wait, 6 M. & W. 739.....	227
v. Weaver, 75 N. Y. 30.....	778	Wingfield v. McLure, 48 Ark. 510.	208
v. Whitaker, 14 S. E. R. 924.....	417	v. Rhea, 73 Ga. 477.....	657
v. Williams, 125 Ind. 156.....	328	Winn v. Albert, 2 Md. Ch. 42.....	590
v. Williams, 130 N. Y. 193.....	689	Winslow v. Donnelly, 119 Ind. 565.	589
v. Williams, 63 Wis. 58.....	25	*Winsor v. Farmers', etc., Bank, 81	
Williamson's Case, 26 Pa. St. 9...	528	Pa. St. 304.....	710
Williamson, Suc. of, 3 La. Ann. 261	680	Winston, Ex parte, 9 Nev. 71.....	517
v. Berry, 8 How. 495.....	175	v. Taylor, 28 Mo. 82.....	385
v. Mimms, 49 Ark. 336.....	109, 597	Wisdom v. Buchner, 31 La. Ann.	
v. Williamson, 3 Sm. & M. 715.	281	52.....	796
v. Wright, Tex. Unrep. Cas. 711	803	Wise v. Withers, 3 Cranch 331...	702
Willis v. Bayles, 105 Ind. 363.....	772	Wiseman v. Panama R. R. Co. 1	
v. Ferguson, 46 Tex. 496.....	757	Hilton 300.....	726
v. Ferguson, 59 Tex. 172.....	885	Wishmier v. State, 110 Ind. 523...	779
v. Havemeyer, 5 Duer. 447.....	596	Withers v. Fuller, 30 Gratt. 547...	45
v. Matthews, 46 Tex. 478.....	568	v. Livezey, 1 Watts & S. 433...	475
v. Mooring, 63 Tex. 340.....	899	v. Patterson, 27 Tex. 491.....	542
v. Willis, 12 Pa. St. 159.....	902	Witherspoon v. Texas-Pacific R.	
Willoughby v. Dewey, 54 Ill. 266.	470	R. Co., 48 Tex. 309.....	463
v. Jenks, 20 Wend. 96.....	608		



# Collateral Attack on Judicial Proceedings.

## CHAPTER I.

### PRINCIPLES, ANALOGIES, COMPARISONS AND DEFINITIONS.

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| <p>§ 1. Principle involved in a collateral attack on judicial proceedings—Duty of the courts.</p> <p>2. Direct attack, defined.</p> <p>3. Collateral attack, defined.</p> <p>4. Extrinsic evidence, attempt to use, is a collateral attack.</p> <p>5. Fraud, mistake or excusable neglect—Suit to set aside for.</p> <p>6. Irregular motion or petition to set aside judgment.</p> <p>7. Purchasers at judicial sales—Garnishees and subsequent attachers—Motions by—When collateral.</p> <p>8. Purchasers at judicial sales.</p> <p>9. Service, contradicting — When collateral.</p> <p>10. Service, contradicting — When direct.</p> | <p>§ 11. Service, defective—Suit to set aside for, collateral.</p> <p>12. Strangers, attacks by.</p> <p>13. Subsequent agreements.</p> <p>14. Analogy between void deeds and void judgments.</p> <p>15. Appeal from inferior tribunals not given—Effect collaterally.</p> <p>16. When void collaterally.</p> <p>17. Collateral attack distinguished from <i>res judicata</i>—Criminal and civil action—"Incidentally cognizable" — "Inferred by argument"—<i>In rem</i>—Letters of administration—Marriage and divorce—Pleading former adjudication—"What might have been decided"—Rule in collateral attack—Rule in <i>res judicata</i>.</p> |
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§ 1. Principle involved in a collateral attack on judicial proceedings.—One who does not understand the theory of a science, who has no clear conception of its principles, cannot apply it with certainty to the problems it is adapted to solve. In order to understand the principles which govern in determining the validity of RIGHTS AND TITLES depending upon the proceedings of judicial tribunals, generally called the doctrine of COLLATERAL ATTACK ON JUDGMENTS, it is necessary to have a clear conception of the THEORY OF JUDICIAL PROCEEDINGS.

It is the duty of each person to yield to all others their rights according to the law of the land. But as differences will arise in regard to the facts in particular cases, and also in regard to the law, judicial tribunals are organized to settle those differences.

It is the SWORN DUTY of such tribunals to determine and fix the rights of the parties in each particular case brought before them, *if they have power to do so*. To do this, they must determine what the facts are and the law applicable thereto. This duty rests with equal weight upon the humblest magistrate and the highest court; and the duty being the same, the power must be the same. The facts must be determined either from the evidence or from the want of evidence. On that the tribunal may err. The law must be determined from the books. On that the tribunal may err. By assuming to act at all, or to investigate any case, the tribunal determines that a valid, constitutional law authorizes its own organization, and that it has been duly organized; that the judge or judges presiding, and the other officers present, are the proper ones, and duly qualified to act, and that by and through them the corporate tribunal may lawfully act; and that the time and place of sitting are authorized by law. By assuming to order process for the defendant, or to pass upon or ratify process already issued, the tribunal determines that a valid constitutional law gives it jurisdiction over the subject-matter of the particular case presented, and by assuming to call or default the defendant, it determines that process, lawful in form, has been lawfully served upon him by the proper officer or person at the proper time and place. By allowing an appearance, it determines that the person so appearing has the lawful right to do so. All questions concerning the organization of the tribunal, the time and place of its sitting, its jurisdiction over the subject-matter, its right to issue process for the defendant, the validity of the process issued and service made, are questions of law that must be decided in each case. They may be constitutional, statutory or common law, and a critical examination and comparison of all three may be necessary in order to determine some small right before a magistrate, commissioner, or board exercising judicial powers; and as the command of the law that justice shall be done in each case is as imperative to the lowest judicial tribunal as to the highest, and as it requires the same oath from the magistrate and the judge of the court of last resort, it necessarily follows that in determining the validity of their proceedings collaterally, the same rule must be applied to all. And as no one would think of holding a judgment of the court of last resort void if its jurisdiction were *debatable* or even *colorable*, the same rule must be applied to the judgments of all judicial



tribunals. This is the true theory of judicial action when viewed collaterally. If any jurisdictional question is *debatable* or *colorable*, the tribunal must decide it; and an erroneous conclusion can only be corrected by some proceeding provided by law for so doing, commonly called a Direct Attack. It is only where it can be shown, lawfully, that some matter or thing essential to jurisdiction is *wanting*, that the proceeding is void, collaterally.

DUTY OF THE COURTS.—It is the duty of the courts to set their faces against all collateral assaults on judicial proceedings for two reasons, namely: First. Not one case in a hundred has any merits in it. The reader of this work will see that innocent purchasers, by means of collateral assaults on their titles derived through judicial proceedings, have been compelled to yield millions to dishonest debtors on account of bald technicalities that caused no actual harm whatever, and that, by the same means, criminals who have been fairly tried and justly convicted and sentenced, have caused untold vexation and expense to innocent prosecutors and officers. An old case said: "Judges will invent reasons and means to make acts according to the just intent of the parties, and to avoid wrong and injury which by rigid rules might be wrought out of the act."<sup>1</sup> When the court can plainly see that a dishonest debtor or criminal is attempting to use it as a tool to wrest property from innocent purchasers, or to punish honest people, the judge ought to be astute in inventing reasons to thwart him. Second. The second reason why the courts should reduce the chances for a successful collateral attack to the lowest minimum is, that they bring the courts themselves into disrepute. Many people look upon the courts as places where jugglery and smartness are substituted for justice, and nothing tends more to increase their numbers than to see their property and rights, held under the solemn adjudications of the courts, snatched away on account of some defect or omission in a summons, or return of service, or petition, which caused no actual harm to any one. Such things tend to weaken law and order and to cause men to settle their rights by violence. For these reasons, when the judgment rendered did not exceed the possible power of the court, and the notice was sufficient to put the defendant upon inquiry, a court should hesitate long before holding the proceedings void collaterally.

1. Hobart 277, as quoted in *United States v. Arredondo*, 6 Peters 691, 739.



**STARE DECISIS.**—Where a court has erroneously held that certain things were sufficient to give jurisdiction, and titles have been built thereon, the doctrine of *stare decisis* forbids the overruling of those decisions; but where the court has erroneously held that certain defects prevented jurisdiction from attaching or caused its loss, the doctrine of *stare decisis* does not forbid the overruling of those decisions, because the sooner they are overruled the more titles are saved.

§ 2. **Direct attack defined.**—A direct attack on a judicial proceeding is an attempt to avoid or correct it in some manner provided by law.

**ILLUSTRATIONS.**—A motion for a new trial or for a *venire de novo*; a motion in the cause to vacate, modify or correct the judgment according to the statute or the practice of the court; appeals; writs of error, *certiorari*, *audita querela* and prohibition; petitions for rehearing and bills of review; bills in equity or complaints and petitions under the codes to set aside, vacate, modify or correct judgments for fraud, accident, mistake or excusable neglect, are some of the modes provided by law for avoiding or correcting judgments, and are *direct attacks* with which this work has nothing to do.

A late case in Indiana,<sup>1</sup> says: “Whatever the form of the proceeding may be by which a party to a judgment is seeking to review it, or to obtain relief therefrom, if the proceeding is one for which provision is made by statute, and the statutory method is being pursued,” that is a direct attack. It also says that a bill in equity to set aside a judgment for fraud or mistake is, as a general rule, a direct attack.<sup>2</sup>

“A direct attack upon a judgment is by appropriate proceedings between the parties to it seeking, for sufficient cause alleged, to have it annulled, reversed, vacated or declared void.”<sup>3</sup>

A late case in Texas<sup>4</sup> holds that a proceeding by heirs to set aside a judgment against their ancestor, in the court where it was rendered, is a direct and not a collateral attack. It is said that, if they had attempted to treat the judgment as a nullity on

1. *Harmon v. Moore*, 112 Ind. 221, 227 (13 N. E. R. 718).

when it seeks to affect a *bona fide* purchaser under the judgment.

2. Such a bill only becomes collateral when not filed within the time allowed by statute or the rules of equity, or

3. *Pope v. Harrison*, 16 Lea (84 Tenn.) 82, 90.

4. *Buchanan v. Bilger*, 64 Tex. 589, 593.

presentation to the probate court for allowance, that would have been collateral.

§ 3. **Collateral attack, defined.** — A collateral attack on a judicial proceeding is an attempt to avoid, defeat, or evade it, or to deny its force and effect in some manner not provided by law. As there are only two ways to attack a judicial proceeding, direct and collateral, it is obvious that this definition complements the one in the last section, and they are both self-evident. Any proceeding provided by law for the purpose of avoiding or correcting a judgment, is a direct attack which will be successful upon showing the error; while an attempt to do the same thing in any other proceeding is a collateral attack, which will be successful only upon showing a want of power.

ILLUSTRATIONS.—When a judicial order, judgment or proceeding is offered in evidence in another proceeding, an objection thereto on account of judicial errors is a collateral attack. Familiar instances are where a person relies on a judgment as a justification for a trespass, assault, or imprisonment; or to show his right or title in *habeas corpus*, replevin, trover, ejectment, trespass to try title, or suit to quiet title. That the objection to the judgment for judicial errors in such cases is a collateral attack, the cases all agree. Hence citations are useless. Less familiar instances are where the purchaser at execution or judicial sale refuses to complete or seeks to avoid the same on account of judicial errors; or where a garnishee or trustee refuses to comply with or seeks to avoid the order made against him because of judicial error in the main proceeding; or where the right of an executor, administrator, guardian, tutor, assignee, receiver, commissioner, trustee, or other person acting under judicial order, to sue or defend, is denied because of judicial error in the proceeding in which he was appointed, or in the order authorizing him thus to sue or defend. In all such cases the attack is collateral.

A late case in Oregon<sup>1</sup> thus defines a collateral attack: "An attempt to impeach the decree in a proceeding not instituted for the express purpose of annulling, correcting, or modifying the decree or enjoining its execution." This definition assumes that a proceeding to annul or enjoin is always direct. It is direct only when pursued in the time and manner provided by law and against one who is not a *bona fide* purchaser. As all judicial records must

1. *Morrill v. Morrill*, 20 Or. 96 (25 Pac. R. 362, 364), quoting from 12 Am. & Eng. Encyc. of Law 147j.

be tried by inspection,<sup>1</sup> an attempt to overturn or overhaul them by evidence *dehors*<sup>2</sup> in a proceeding not provided by law, is a collateral attack. As each proceeding calls upon the adverse party to show any and all causes that may exist why judgment should not be rendered against him, it necessarily follows that the last judgment rendered bars and concludes all others inconsistent therewith,<sup>3</sup> and that an attempt to use them to impair any right derived therefrom is a collateral attack. So where the statute authorized an appeal from an order dissolving or refusing to dissolve an attachment, an attack on the attachment in an appeal from the final judgment, was held to be collateral.<sup>4</sup> A person was ordered by a writ of *mandamus* to deliver over the books of an office to his successor, and refused, and was imprisoned for contempt. He then sought to be released on *habeas corpus*. This was held to be a collateral attack on the mandate proceeding.<sup>5</sup>

§ 4. **Extrinsic evidence, attempt to use, is a collateral attack.**—A special judge was trying a cause, and orally appointed a private person to preside, and went home. The person so appointed presided until the trial was finished and the verdict received, and then continued the cause to an adjourned term, at which time the special judge appeared and rendered judgment on the verdict. The record did not show the absence of the special judge but purported to be made by him. Afterwards the defeated party brought an action to cancel the judgment and reinstate the cause on the record for trial, alleging all the foregoing facts in regard to the actual absence of the judge, and claiming that said appointment was made over his objection and protest. The five judges all agreed that the attack was collateral, three holding that he could not thus contradict the record, and the other two contending that, as no judge was present, the apparent record was void.<sup>6</sup> The court was undoubtedly correct in holding the attack to be collateral, as the chancellor never interfered in that kind of a case, and the minority were clearly wrong in their contention that a record, fair on its face, could be falsified in another action. For

1. *Hersey v. Walsh*, 38 Minn. 521 (38 N. W. R. 613); *Leedom v. Lombaert*, 80 Pa. St. 381. See section 526, *infra*.

2. See section 6, *infra*.

3. *Tyrrell v. Baldwin*, 67 Cal. 1; *Accord*, *Matter of Will of Warfield*, 22 Cal. 51, 63, where the attempt was to

re-probate a will, ignoring the former probate.

4. *Mudge v. Steinhart*, 78 Cal. 34 (20 Pac. R. 147, 149).

5. *In re Delgado*, 140 U. S. 586, 588.

6. *Reid v. Mitchell*, 93 Ind. 469, 474.

all the cases agree that a record of a domestic court of general jurisdiction cannot be overturned in another action by matters *dehors* the record;<sup>1</sup> and such an attempt, when the sole object is to declare the judgment void and not to get a review or new trial for newly discovered evidence, or to set it aside under the rules of equity, is always a collateral attack.<sup>2</sup>

**§ 5. Fraud, mistake or excusable neglect—Suit to set aside for.**—A new suit in the same court or any other to set aside a judgment for fraud, accident, surprise, mistake or excusable neglect, not falling within the scope of equity in those matters, is a collateral attack. Thus, a judgment was rendered against a township. It brought a new action, not within the scope of the code or equity rules, to set it aside for fraud. This was held to be a collateral attack.<sup>3</sup>

**FRAUD OF JUDGE.**—A verdict was returned before a justice against one defendant and was silent as to the other. The justice rendered a judgment against both, and a transcript was filed in the district court and execution issued thereon. The defendant against whom the verdict was silent brought an action in chancery to cancel the judgment on account of the fraud of the justice, and this view was sustained and the judgment canceled. It was also said to be a direct attack.<sup>4</sup>

This case seems to me to be a misconception of the law. Many early cases held that an action would lie directly against the judge of an inferior court for malicious and corrupt conduct in a judicial proceeding, but all the later and better-considered cases deny even the right to do that. But no case ever before held, so far as I can find, that the fraud or corruption of a judge or justice was a matter that could be investigated in a suit where he was not a party in order to overturn his decision. As the new action was one not recognized by any rule of the common law, equity or the code, it was clearly collateral.

**§ 6. Irregular motion or petition to set aside judgment.**—An attempt to set aside a judgment by a motion or petition filed at a wrong time, or in the wrong court; or an attempt to do so by the wrong kind of a proceeding, is a collateral attack. Thus, an

1. *Harmon v. Moore*, 112 Ind. 221, 228 (13 N. E. R. 718); *Newcomb v. Newcomb*, 13 Bush, 544 (26 Am. R. 222).

2. *Littleton v. Smith*, 119 Ind. 230 (21 N. E. R. 886); *Harmon v. Moore*, *supra*.

3. *Cicero Township v. Picken*, 122 Ind. 260, 266 (23 N. E. R. 763).

4. *Dady v. Brown*, 76 Iowa, 528 (48 N. W. R. 209).

attempt to contradict a recital of an appearance by a bill of review;<sup>1</sup> and a motion to set aside a judgment by default on account of defects in the petition, filed seven days afterwards, there being no statute providing for such a motion;<sup>2</sup> a cross-bill to review a judgment for error of law, filed after the statute had barred the right to do so;<sup>3</sup> and a motion in the circuit court to vacate a justice's judgment docketed therein,<sup>4</sup> are collateral. A late California case holds that a motion to vacate a judgment on the ground that it was void was a direct attack.<sup>5</sup> If it was really void, any kind of a proceeding to cancel it would be proper. The clerk or judge might cross it off on his own motion.

§ 7. **Purchasers at judicial sales, garnishees and subsequent attachers—Motions by, when collateral.**—A petition or motion by a purchaser at a sale made by a guardian,<sup>6</sup> or administrator,<sup>7</sup> or in partition,<sup>8</sup> to be relieved from his purchase on account of judicial errors in the proceeding; or a motion by a second attacher to dismiss the proceedings of the first attacher;<sup>9</sup> or any interference by a garnishee,<sup>10</sup> or third person claiming the attached property,<sup>11</sup> with the main proceeding, are collateral attacks.

CONTRA.—A motion to quash an attachment levy, made after judgment, by a subsequent attacher, was held not to be collateral in Georgia, and was sustained because the affidavit was defective.<sup>12</sup> I know of no principle upon which this decision can be sustained. To allow creditors to interfere with and manage the litigation of the debtor, infringes his personal liberty just as much as to dictate what he shall buy or sell or the prices he shall pay or receive.

§ 8. **Purchasers at judicial sales—motions and suits by and against, when direct attacks.**—A refusal by a purchaser at a tutor's sale to comply with her bid because of judicial irregularities;<sup>13</sup> and a suit

1. *Harmon v. Moore*, 112 Ind. 221 (13 N. E. R. 718, 721).

2. *Sweet v. Ward*, 43 Kan. 695 (23 Pac. R. 941).

3. *Williams v. Simmons*, 79 Ga. 649 (7 S. E. R. 133, 136).

4. *Mayhew v. Snell*, 33 Mich. 182.

5. *Reinhart v. Lugo*, 86 Cal. 395 (24 Pac. R. 1089); *Accord* where the judgment was void on its face and the motion made twelve years afterwards. *People v. Greene*, 74 Cal. 400 (16 Pac. R. 197).

6. *Wing v. Dodge*, 80 Ill. 564, 566.

7. *Matter of Dolan*, 88 N. Y. 309, 319, *reversing* 26 Hun 46; *Richter v. Fitzsimmons*, 4 Watts 251.

8. *Herbert v. Smith*, 6 Lans. 493.

9. *Sannoner v. Jacobson*, 47 Ark. 31, 40 (14 S. W. R. 458).

10. *Pierce v. Carleton*, 12 Ill. 358 (54 Am. D. 405); *Atcheson v. Smith*, 3 B. Mon. 502.

11. *Atkinson v. Foxworth*, 53 Miss. 741, 747.

12. *Krutina v. Culpepper*, 75 Ga. 602.

13. *Dumestre, Succession of*, 40 La. Ann. 571 (4 S. R. 328).

by wards, begun fourteen years after a sale of their land, to set it aside for defects in the petition and the failure of the guardian to give an additional bond, which made the sale void by virtue of a statute;<sup>1</sup> and a suit by a purchaser of land at a sheriff's sale to enjoin the sheriff from executing a deed to one who had purchased it at a sale made under his own judgment which was void because the record showed a want of service;<sup>2</sup> and a motion by a purchaser of land to set aside a prior judgment against his vendor because of void service by publication,<sup>3</sup> were all held to be direct attacks. It can hardly be said that these cases conflict with those cited in section 7, because in each of them the judgment assailed was void, and all that was necessary to obtain relief was to call the attention of the court to that matter.

§ 9. **Service, contradicting—When collateral.**—A suit in equity by the judgment defendant against the plaintiff to set aside the judgment and sheriff's deed because the return of service was false, not making the sheriff a party;<sup>4</sup> and a bill in equity by an heir to cancel the deed of a purchaser at a sheriff's sale of his ancestor's land for alleged want of service on the ancestor,<sup>5</sup> were held to be collateral attacks.

§ 10. **Service contradicting—When direct.**—Where the record showed service, a motion to set aside the judgment on the ground of actual want of service, although filed after the time limited by the statute for making such motion;<sup>6</sup> and a motion by a non-resident defendant to vacate a judgment rendered on service by publication because of the entire want of an order therefor and of any affidavit to warrant such order;<sup>7</sup> and a suit by a non-resident defendant to enjoin a judgment because of a false return of service by copy left at his usual place of residence, when he had no residence in the State,<sup>8</sup> were said to be direct attacks.

A mine belonging to a corporation had been seized on attachment and sold, and finally conveyed to third persons. The

1. *McKeever v. Ball*, 71 Ind. 398, as explained in *Davidson v. Bates*, 111 Ind. 391, 401 (12 N. E. R. 687).

2. *Penrose v. McKinzie*, 116 Ind. 35, 39 (18 N. E. R. 384).

3. *People v. Mullan*, 65 Cal. 396 (4 Pac. R. 348).

4. *Thomas v. Ireland*, 88 Ky. 581 (11 S. W. R. 653).

5. *Pope v. Harrison*, 84 Tenn. (16 Lea) 82, 90.

6. *Hanson v. Hanson*, — Cal. — (20 Pac. R. 736).

7. *People v. Pearson*, 76 Cal. 400 (18 Pac. R. 424).

8. *McNeil v. Edie*, 24 Kan. 108.

corporation then sued them, apparently to recover the mine and cancel the sheriff's deed. The original attachment plaintiffs were not made parties. The court said: "The proceedings in this case are a direct attack upon the judgment, and it is useless to discuss the question so ably presented by counsel whether a judgment can be attacked collaterally for want of due service."<sup>1</sup> This case seems to me to be wrong at all points. The sheriff's return showed service on the "general agent" of the corporation, and the record appeared fair on its face; yet the corporation was allowed, in a new and collateral suit against innocent purchasers, to show that the person served was only its foreman.

§ 11. **Service, defective—Suit to set aside for, collateral.**—A complaint which admits that there was some notice but seeks to set aside the judgment because it was insufficient, is a collateral attack.<sup>2</sup> It must never be overlooked that a court of equity has no rightful authority to overhaul the record of any other court for any error of law or fact committed by that court, and any attempt to do so is necessarily collateral. The right of a court of equity to overhaul the record of another court is founded on the assumption that the court was imposed upon and that the point was not brought to its attention. It is somewhat difficult to maintain the right on reason, as it is not easy to see why the common-law judge is not as capable of keeping matters straight in his own court as the chancellor. But such right exists, and is appellate in its nature; and the true boundary line being somewhat indefinite and shadowy, the courts will necessarily clash more or less in applying the right to particular cases; but whenever the chancellor does step across the line and begin to rectify the errors of another court, his proceeding is collateral. Thus, in the Indiana case just cited, the plaintiff sought to have the chancellor enjoin the judgment at law for defects in the notice; but as the sufficiency of the notice was a question the court of law necessarily passed upon, any interference by the chancellor would be collateral.

§ 12. **Strangers, attacks by.**—An attempt by a stranger to the issues to avoid or correct a judgment or to interfere with the litigation, is collateral, unless he brings himself within the rules laid down for annulling judgments by the bankruptcy or insolvency

1. *Great Western Min. Co. v. Wood-*  
*mas of Alston Min. Co.*, 12 Colo. 46 (20  
*Pac. R.* 771).

2. *Kleyla v. Haskett*, 112 Ind. 515 (14  
*N. E. R.* 387).



statutes or the statutes against fraudulent conveyances, in all of which the attack is direct and does not touch the jurisdiction of the court nor interfere with the rights of *bona fide* purchasers.

In a Maine case it is said: "The presumption, *prima facie* is, that all judgments rendered by courts of competent jurisdiction, are properly rendered, and upon due proceedings had preparatory thereto; and between the parties thereto and privies are conclusive, unless fraudulently obtained. Between a party thereto and a stranger it is otherwise. Against the latter they are evidence only that such judgments were rendered upon due proceedings had therefor, and in support of proceedings had thereupon, as in the case of levies upon real estate to satisfy them, in which case they become a muniment of title. There are exceptions, however, to this general rule as to judgments *inter alios*, but they are not applicable to the case before us. But when a judgment is introduced collaterally, as a muniment of title, which was rendered *inter alios*, it is not conclusive upon the one not a party to it. It will be competent for him to show that it was unduly or irregularly obtained"<sup>1</sup> In order to substantiate these views, the court cited *Pond v. Makepeace*,<sup>2</sup> and *Downes v. Fuller*.<sup>3</sup> In the first case cited, an administrator from Rhode Island, without being appointed in Massachusetts, had there recovered a judgment upon and collected a note belonging to the decedent, and this was held to be no defense to a suit on the same note by an administrator afterwards appointed in the latter state. But that does not support the Maine case. The Rhode Island administrator did not own the note, and of course his judgment did not give him a title against the true owner. In the second case cited, the plaintiff had taken a judgment on two notes, against a person who had absconded eleven months before, without any service at all, and then, on the strength of that void judgment, attempted to redeem from the defendant land upon which he had a valid levy. It was held that he could not do so. It was also said that "the defendant was neither party nor privy to the plaintiff's judgment, and is not entitled by the rules of law to reverse it by a writ of error. . . . This rule of law does not appear, in any case, to have been controverted, and it seems reasonable and just, that where a judg-

1. *Pierce v. Strickland*, 26 Me. 277, 293; *Accord*, *Caswell v. Caswell*, 28 Me. 232, 237.

2. *Pond v. Makepeace*, 2 Metc.

114.  
3. *Downes v. Fuller*, 2 Metc. 135.

ment is recovered contrary to law, and prejudicial to a third party, he should have a right to avoid it."

This latter sentence is not law, except as applied to the case then before the court, where the judgment was absolutely *void*. When a judgment, or judicial record, is offered by the plaintiff in ejectment as a link in his chain of title, the only objection open to the defendant to make is that it is *void*. If it is good as against the judgment defendant, it does not concern the ejectment defendant. It effects his title in no manner. The only reason he can object at all is, that the plaintiff must recover on the strength of his own title, and if a judgment which is a link in his title is *void*, or a deed which is a link is *forged*, his title fails. But the ejectment defendant cannot raise the question that a deed offered by the plaintiff was without consideration, or procured by fraud, or deceit, or any other mere irregularity. So in regard to a judgment: he cannot show that it was erroneous, irregular, fraudulent or liable to reversal. Those are matters solely between the plaintiff and the person whose title was transferred by the deed or judgment. If he do not complain, no one else can.

The supreme court of New York once said: "A judgment may be assailed collaterally, for fraud, by persons not parties to it, or privies who are injured by the fraud."<sup>1</sup> This statement is very misleading. A judgment cannot be assailed collaterally unless void. The only plea allowed against it is *null tiel record*, and it must be tried by inspection. It never shows the fraud on its face. And no law ever authorized creditors or privies to overturn the judgments of others against their debtor or privy because he was unjustly or fraudulently defeated to their injury. It is only *collusive* judgments that they can touch, and for so doing the law affords a direct remedy. That the remedy in such case is direct, is evident from the fact that creditors cannot wrest the property of the debtor from *bona fide* purchasers, while a collateral attack sweeps away their rights. No one deraigning title through a void judgment can be a *bona fide* purchaser, because the invalidity appears in his chain of title.

A CLERK taxed illegal costs. This was a judicial act and became a judgment of the court. He was sued upon his bond to recover them back. The court said: "There is no force in the objection that the suit on the bond for illegal fees is a collateral attack on the judgment for costs, and that the complaint was for that reason

1. *Spicer v. Waters*, 65 Barb. 227, 233.

subject to a demurrer." It admits that such a judgment is conclusive between the parties until set aside by a re-taxing, but says that the failure to re-tax cannot relieve an officer from his statutory liability if he has in fact charged, demanded, or taken illegal fees.<sup>1</sup> It was only by virtue of the statute, that the validity of his fees could be investigated in a suit on his bond while the judgment wrongfully taxing stood in force.

A WITNESS convicted for contempt in refusing to answer a question, cannot be relieved on *habeas corpus* because of errors where there was jurisdiction.<sup>2</sup>

§ 13. **Subsequent agreements.**—To an action on a judgment, it is not a collateral attack to plead in defense any matter not barred by it. Thus, where a judgment was taken without deducting payments, and the creditor afterwards agreed to credit them on the judgment, but, without doing so, sued upon it, a plea relying upon the agreement was held not to be a collateral attack;<sup>3</sup> and where the plaintiff, after suit brought, agreed for a valuable consideration to discontinue it, but proceeded to judgment, which the defendant paid, and then sued the plaintiff for breach of the contract to discontinue, this was decided not to be a collateral attack on the judgment.<sup>4</sup>

§ 14. **Analogy between void deeds and void judgments.**—There is a close analogy between a void deed and a void judgment. If a deed is a forgery, or was never delivered, or was executed by an assumed agent without color of authority, the apparent grantor can rest at ease, ignoring it entirely. He can defeat all rights and titles based on it whenever and wherever he meets them. So with a void judgment. The party whom it professes to bind can rest at ease, ignoring it entirely. He can defeat an action on it and all rights and titles derived through it whenever and wherever he meets them. Like a void deed it is simply waste paper.

§ 15. **Appeal from inferior tribunals not given—Effect collaterally.**—Some old cases hold, that where no appeal is given from the judgments of inferior courts, they may be impeached collaterally.<sup>5</sup> Thus, where alimony was given in a divorce suit, no statute so authorizing and no writ of error lying, it was held void,<sup>6</sup> and

1. *State ex rel. Scobey v. Stevens*, 103 Ind. 55, 67 (2 N. E. R. 214).

2. *Ex parte Kearney*, 7 Wheaton 224, 229.

38.

3. *Thayer v. Mowry*, 36 Me. 287.

4. *Smith v. Palmer*, 6 Cush. 513.

5. *Guernsey v. Edwards*, 26 N. H.

6. *Davol v. Davol*, 13 Mass. 264;

*Smith v. Rice*, 11 Mass. 507, 513.

for the same reason a plea of infancy was held to be a good defense to an action on a judgment by confession.<sup>1</sup> But the later and better considered cases hold the contrary.<sup>2</sup> The action of the common council of a city in making sewer assessments was judicial, and no appeal lay therefrom, but such assessments were held not void for error.<sup>3</sup> It is familiar law that an action for malicious prosecution cannot be maintained until the original suit is terminated. But where an action of that kind was brought before a justice of the peace pending the original suit, and judgment recovered, from which no appeal lay, it was held not void.<sup>4</sup> So a court of equity cannot revise the action of inferior judicial tribunals for error of law, even though no relief can be had at law.<sup>5</sup>

§ 16. **When void collaterally.**—In order to make a judgment void collaterally either (1) a legal organization of the tribunal, or (2) jurisdiction over the subject-matter, or (3) jurisdiction over the person must be wanting; or (4) one or more of these matters must have been lost after it once existed. When either of these defects can be shown, the judgment, and all rights and titles founded thereon, are void, even in the hands of a *bona fide* purchaser. In such cases the dignity of the court is of no concern. Thus where a void judgment had been affirmed on appeal by the supreme court of Texas, the court said: "The judgment of affirmance rendered by this court could not impart to it validity, but would itself be void by reason of the nullity of the judgment appealed from."<sup>6</sup> The supreme court of Mississippi said that the affirmance of a void judgment on appeal, upon grounds not touching but overlooking its invalidity, did not make it valid.<sup>7</sup> When a judgment is lacking in any of the foregoing particulars, it matters not whether it was rendered by the highest or the lowest court in the land, it is equally worthless. No one is bound to obey it. The oath of all officers, executive, legislative or judicial, compels them to disregard it. A few cases hold that want of jurisdiction over the person does not make the judgment of a superior court void;<sup>8</sup> but they are out of line, and wrong on principle.

1. *Etter v. Curtis*, 7 Watts & S. 170.

2. *Grignon's Lessee v. Astor*, 2 How. 110.

319, 340.

3. *City of Ft. Wayne v. Cody*, 43 Ind.

197.

4. *Perry v. Morse*, 57 Vt. 509, 512.

5. *Hyatt v. Bates*, 35 Barb. 308.

6. *Chambers v. Hodges*, 23 Tex. 104.

7. *Wilson v. Montgomery*, 22 Miss.

(14 Sm. & M.) 205, 207.

8. *Gay v. Smith*, 38 N. H. 171, 174.

*Dictum* in *Kimball v. Fisk*, 39 N. H. 110, 116 (75 Am. D. 213).

§ 17. **Collateral attack distinguished from *res judicata*.**—Much confusion has resulted and many titles have been sacrificed by applying the doctrine of *res judicata* to cases of collateral attack. The use of a prior adjudication as evidence in a new action, involves either the doctrine of collateral attack or that of *res judicata*. If the two actions concern the *same* subject-matter, or if the prior adjudication tends to establish a link in the chain of title to the subject-matter embraced in the new action, an objection to its competency is a collateral attack; but if the actions involve *different* subject-matters, an objection raises the question of *res judicata*. The doctrine of collateral attack denies any validity whatever to the former adjudication, while that of *res judicata* admits its entire validity and simply denies the scope claimed for it. There is little similarity between the two doctrines. Collateral attack involves the jurisdiction of the court, and denies its power to act at all, while *res judicata* merely involves the question concerning what was actually contested and decided on the trial. The doctrine of collateral attack has nothing to do with the issues or the matters contested on the trial. A judgment on default, without any issue joined or contest made, is just as invulnerable against a collateral attack as one rendered on issue joined after a contest. On the contrary, the doctrine of *res judicata* cannot arise except by virtue of some issue joined and actually contested on the trial. Right here, on the question of issues, is where many decisions have gone astray in deciding cases of collateral attack—holding the defendant not concluded on some matter because no issue or direct allegation was made about it, and failing to notice that the absence of an allegation or a defective one merely made the plaintiff's complaint or petition bad on demurrer, and that the defendant was called upon to bring forward any and all defenses he might have, either of law or fact, and that a judgment against him necessarily barred all his rights *in the subject-matter then in suit*. A person claiming to be the administrator of an estate files a petition to sell land to pay debts; duly notifies the heirs to appear and show cause against it; obtains an order to sell, by default, and sells and conveys and procures a confirmation. Years afterwards the heirs bring ejectment, and are permitted to recover upon showing that he was not the lawful administrator on account of some failure to qualify or give bond, or because his predecessor in the trust was not removed, or the like—the court simply saying that the validity of his appoint-

ment or qualification was not passed upon or decided by the probate court in granting the order to sell, and that the heirs have never had their day in court on those questions, and are entitled to have it now. The reader of this work will see that, upon such reasoning as this, which confounds the rules of *res judicata* and collateral attack, dishonest heirs have been permitted to defraud *bona fide* purchasers out of millions. The allegations of the petition were, either expressly, inferentially, or by way of recital, that he was the administrator of that estate; that the personal property was insufficient to pay the debts; and that a sale of the real estate was necessary to raise money for that purpose. If any of those allegations were not true in law or in fact, the heirs were called upon to show it—to show any cause that existed why *the petitioner* should not have the relief prayed for; and one good cause would have been that he was not the administrator. The granting of the relief prayed for necessarily adjudicated that he was the lawful administrator, and that all other matters necessary to warrant such relief existed. I refrain from citing and commenting on cases in point here, because it will be done in the proper place hereafter; but as this work does not treat of the doctrine of *res judicata*, a few cases to illustrate its principles, and to show the distinction between it and the doctrine of collateral attack, will now be given.

A person was sued in Michigan for an installment of rent due upon an alleged lease, and because he had not denied its execution upon oath, he was precluded from so doing on the trial, and a judgment was recovered against him. He refused to pay the second installment and was sued, and answered by denying the execution of the lease under oath. The trial court held that the first judgment necessarily determined that the lease was valid, and barred this defense; but the supreme court reversed the case, saying that “the execution of the lease was not denied in the former suit. No issue was made upon it, and the defendant, by not denying it, suffered a default in respect to it which left it wholly outside the issue made and actually passed upon.” . . . “In other words, where one is sued in respect to *one* subject-matter, must he bring forward all his defenses, at the peril, if he fails to do so, of being debarred of them in any subsequent litigation which may involve the same questions, though relating to a *different* subject-matter? We think not.”<sup>1</sup> Of course, if he

1. *Jacobson v. Miller*, 41 Mich. 90, 95 (1 N. W. Rep. 1013), *Cooley, J.*



had actually contested the execution of the lease in the first action and been defeated, that question would have been settled—*res judicata*—in all future actions; but as he did not, the former adjudication was not competent evidence for any purpose on the trial of the second action. From lack of a contest, no question of *res judicata* arose. The subject-matter of the first action was the alleged first installment of rent, and the subject-matter of the second action was the alleged second installment of rent. Now, suppose an execution to issue on the first judgment, and a horse to be seized and sold, and that the defendant replevies the horse and offers to show that he did not execute the lease sued upon in the first action, that would be a collateral attack on the first judgment, and could not succeed because he had the *opportunity to make that issue and to have it tried* in the first action. It is the *opportunity to make defense* which bars a collateral attack on the original judgment, while it is the *contest actually made and passed upon* which gives the successful party the right to use the judgment as a bar to the *same contest* in a new action on a different subject-matter. An English case, closely resembling the Michigan case in its facts, well illustrates the same doctrine. In an action on a lease for rent, the defendant answered that, on a certain day named, the lease had been canceled by mutual agreement, to which the plaintiff replied that, after the day named, he had sued the defendant on the lease for rent subsequently accruing, and had recovered judgment by default; but this reply was held bad. The court said that the answer was not inconsistent with any allegation in the former record; that “nobody ever heard of a defendant being precluded from setting up a defense in a second action because he did not avail himself of the opportunity of setting it up in the first action.”<sup>1</sup> A case in the Supreme Court of the United States was this: In an action on county bonds, the plaintiff sought to bar any defense by showing that he had formerly recovered a judgment by default on coupons attached to the same bonds, but his contention was denied because the validity of the bonds was not actually tried and determined in the first action. The court said that the first judgment was a bar to any further litigation concerning the coupons there sued upon, but that as the present action was upon a different claim or demand, the former judgment was a bar “only as to those matters in issue or points controverted, upon the determination of which

1. Howlett v. Tarte, 10 Com. Bench, N. S. 813 (100 E. C. L. 812).



the finding or verdict was rendered." . . . "It is not believed that there are any cases going to the extent that, because in the prior action a different question from that actually determined might have arisen and been litigated, therefore such possible question is to be considered as excluded from consideration in a second action between the same parties on a different demand, although loose remarks looking in that direction may be found in some opinions. On principle, a point not in litigation, in one action cannot be received as conclusively settled in any subsequent action *upon a different cause*, because it might have been determined in the first action."<sup>1</sup>

CRIMINAL AND CIVIL ACTION.—The probate of a will, although a proceeding *in rem*, is no evidence of its validity on an indictment for its forgery.<sup>2</sup> But where a person sued a city in Massachusetts for an alleged injury by reason of a defective street, which he never received, and by fraud and deception induced the city to allow a judgment to go, which it paid, this was held, by four judges against three, to be a bar to a prosecution for obtaining the money by false pretenses, because the judgment was conclusive of its own justness between the parties.<sup>3</sup> According to that case, if A should recover a judgment against B in a case where A and B were the only witnesses, A could not be prosecuted for perjury committed in the trial because the judgment would be conclusive, as against B, that he did not. The case assumes that there was a privity between the city and state. But the state had an independent cause of action against the defendant. He had injured the state by a wrong done to the city, and the city could not control or bargain away the rights of the state. Of course, where the state prosecutes a person civilly and is defeated, that will bar a criminal prosecution for the same cause.<sup>4</sup>

"INCIDENTALLY COGNIZABLE."—In the Duchess of Kingston's case,<sup>5</sup> it is said that matters collaterally and incidentally in issue are not concluded. This simply means that matters of evidence used to prove or disprove matters in issue, are not concluded. The "matters in issue" which are concluded may or may not be

1. *Cromwell v. County of Sac*, 94 U. S. 351, 353, 356.

2. *Rex v. Gibson*, R. & R. Cr. C. 342, 343 n.

3. *Com. v. Harkins*, 128 Mass. 79.

4. *Coffey v. United States*, 116 U. S. 436.

5. *Duchess of Kingston's Case*, 11 How. St. Tr. 261.

shown by the pleadings. If, by the practice of the court, all the pleadings are special, then such pleadings always show the "matters in issue" which the final judgment on the merits concludes. To illustrate: Take a suit to quiet title. The plaintiff's allegations are that he is the owner in fee of the premises, and in possession, and that the defendant falsely claims and asserts that he has some interest in or title to the premises, when, in fact, he has none; wherefore he prays to have his title quieted. If the defendant may prove his interest or title, under a simple denial of the plaintiff's allegations, then the record may not show all the matters really litigated and settled, and a resort to extrinsic evidence may be necessary. But if the parties must, by the practice of the court, plead their interests or titles specially, then the record will show just what matters were in issue, and which might have been contested and settled. If the answer is that the plaintiff executed a mortgage on the premises to John Doe to secure a note, and that the defendant purchased and still holds that note and mortgage, and the reply is that they were fully paid while in the hands of Doe, it is evident that the question of payment is the main issue in the case, and is not collateral or incidental to the question of title. But if, on the trial, the testimony of the plaintiff is that he paid Doe at a certain place, the whole contest may turn on the point whether or not the plaintiff was at that place. This is a matter incidentally in issue, and the finding that the plaintiff was or was not there, is no evidence of that fact in another case.

A person applied to the surrogate for letters of administration as a son of the decedent. Other relatives contested his right on the ground that he was illegitimate; but the surrogate, after hearing the evidence, decided that he was legitimate and granted letters to him. Subsequently, in a suit for distribution, the same relatives sought to prove that he was illegitimate and had no interest in the funds, and their contention was sustained in the court below—a circuit court of the United States—on the ground that the question of the legitimacy of the administrator was only "incidentally cognizable" before the surrogate, and that his decision thereon did not bind the parties; but this was reversed by the supreme court, saying: "They say the point was only cognizable incidentally; but how can this be, when the surrogate could not have done the thing he did do without deciding it?"<sup>1</sup>

1. *Caujolle v. Ferrie*, 13 Wall. 465, 469, 471.

“INFERRED BY ARGUMENT.”—It was also laid down in the Duchess of Kingston’s case, that matters to be inferred by argument were not concluded. This *dictum* has caused considerable confusion, because it is only correct when applied to questions of *res judicata*. The supreme court of Maryland, in speaking of the effect of granting letters of administration where there was a will which was not presented for probate, said:<sup>1</sup> “Judgments, however, prove only the matter decided, and are not evidence of other matters which may be inferred by argument from them, even though the inferences are necessary and inevitable.” It then quoted from Taylor on Evidence, and said: “The same author, in section 1520, states that it is an unquestionable rule of law that neither a judgment *in rem* nor a judgment *inter partes* is evidence of any matter which can be *inferred only by argument* from the judgment.” The inference drawn by the court was, that, as the question of will or no will was not directly presented to nor passed upon by the probate court, the granting of letters of administration could not, even collaterally; show that there was no will, because it would be only a matter of inference from the fact of inconsistency. But the Supreme Court of Massachusetts, in speaking of a question of *res judicata* in a divorce case, said: “The estoppel is not confined to the judgment, but extends to all facts involved in it as necessary steps or the ground-work upon which it must have been founded. It is allowable to reason back from a judgment to the basis on which it stands, upon the obvious principle that where a conclusion is indisputable, and could have been drawn only from certain premises, the premises are equally indisputable with the conclusion. But such an inference must be inevitable, or it cannot be drawn.”<sup>2</sup> So the Supreme Court of Indiana, in speaking of a question of collateral attack on a bankrupt’s discharge, said that the judgment was conclusive, not simply as to the fact of the discharge, but of the fact that he was entitled to the discharge.<sup>3</sup> The Maryland case just cited erroneously applied the doctrine of *res judicata* to a case of collateral attack, while the Massachusetts case applied the doctrine of collateral attack to a case of *res judicata*, and the Indiana case applied the rule correctly, but did not notice any distinction. In the Mary-

1. Emmert v. Stouffer, 64 Md. 543 (3 Atl. R. 293, and 6 id. 177).

2. Burlen v. Shannon, 99 Mass. 200 (96 Am. D. 733).

3. Boyd v. Olvey, 82 Ind. 294, 306; approved, Begein v. Brehm, 123 Ind. 160, 163 (23 N. E. R. 496).

land case, the order granting letters of administration, when assailed collaterally, was conclusive that no cause existed why it ought not to have been made. As the existence of a will was a cause of defense, it necessarily adjudged that it did not exist. In this sense—that is, in considering the effect of a judgment collaterally—the reasoning of the Massachusetts court is applicable. The judgment, in such cases, being conclusively rightful, it is permissible to reason back to the basis on which it stands, and as a necessary inference, all matters which would have barred its rendition are conclusively shown to have no existence, and the allegations which show that its rendition was lawful, are conclusively shown to be true. But in the Massachusetts case, the question was not one concerning any right or title derived through the first divorce proceeding, in which it would have been permissible to reason back, but was one in respect to what issues were contested and settled in the first divorce suit by the wife wherein she was defeated, in order that they could be used as evidence in a second divorce suit between the parties. As only the issues actually contested could be thus used, and as the judgment might have been the same whether there was any contest or not, it was, of course, impossible to determine what they were by “reasoning back” from the judgment.

IN REM.—The object of a proceeding *in rem*—the relief prayed for—is to fix the *status* or title of a thing as to all the world. As all persons are invited to appear and show cause against the relief sought, the relief granted necessarily concludes all persons. There is no difference in principle between the effect of the judgment in this proceeding and one *in personam*. The latter, the same as the former, concludes all persons who are lawfully invited to appear and show cause against the relief sought. But neither the judgment *in rem* nor *in personam* establishes the truth of anything alleged by the plaintiff so as to make it evidence in another proceeding, except as against those who put it in issue and contested it. The consequences which flow from both judgments are precisely the same—namely, they conclusively determine that the relief granted is right as to all persons who were given a lawful invitation and opportunity to show cause to the contrary. A late case in Massachusetts was this: A person made a deed on June 15, and on the following October 11, he made a will and died, and the will was probated. The residuary legatee brought a suit to set aside the deed of

June 15 on the ground that the decedent was then of unsound mind. The defendant sought to introduce in evidence the probate of the will, adjudging the decedent to have been of sound mind on October 11, as one of the steps in his defense, on the ground that it was a proceeding *in rem*, and therefore fixed the fact of his mental soundness at that time as against the world. The court admitted that the proceeding was *in rem*, but denied that it was evidence in favor of defendant, saying that he was a stranger to the proceeding, and that the sentences of prize courts only were evidence of facts on which they were founded for and against strangers, and that the defendant, having no right to be heard on the probate of the will, was not bound by any fact on which it was founded, and therefore could not use it in his favor.<sup>1</sup> The court reached a correct result, but not upon correct reasoning, in my opinion. There are no strangers to a proceeding *in rem*. The defendant did have the right to appear and allege that he had an interest in defeating the probate, and contest it, and the judgment admitting the will to probate concluded him as well as all the rest of the world that the plaintiff or proponent of the will was entitled to the relief sought and granted; and, like all other judgments, the consequences necessarily flowing therefrom—namely, the vesting of all the rights, titles and interests of the decedent in the persons named in the will—were likewise conclusive on him. But the question concerning the title of the decedent to any particular tract of land was no part of the cause of action in the probate court, and such a question was not and could not have been made nor heard in that court. The defendant attempted to apply the doctrine of *res judicata* to a question that was not adjudicated. The probate of the will was conclusive on the defendant that the plaintiff had succeeded to the rights of the alleged testator, and stood in his shoes, and had the same right to set aside the deed that he had. The case above cited from Michigan is exactly in point. The judgment rendered and the consequences flowing therefrom, were conclusive; but the allegations and evidentiary matters which might have been but were not contested, were not evidence in a contest about a different subject-matter. In Bigelow on Estoppel, it is said: "The decree of probate admitting a will to record conclusively establishes against all persons the fact that the will was executed according to the law of the country in which the

1. *Brigham v. Fayerweather*, 140 Mass. 411 (5 N. E. R. 265).

testator was domiciled, though it does not so establish his domicile, even if the fact be found. The finding of such fact is not necessary to the probate of a will. In establishing the testamentary character of an instrument offered for probate as a will the decree establishes *inter partes*, but not *inter omnes*, the capacity of the testator to make it, and *inter omnes* the genuineness of the instrument.”<sup>1</sup> That very excellent work draws no distinction between cases of *res judicata* and collateral attack. When the judgment of probate is used to sustain a right or title derived through it, it is conclusive not only as to the residence and signature of the testator but also as to the existence of any later will or any instrument of revocation, or any cause why it is not genuine. But when such a judgment is offered to prove any of those things in a contest over a different subject-matter, it is not admissible at all except as to those matters that were actually contested between the parties in the probate proceeding. In an old English case which was an action for the price of liquor, where the defense was that it was adulterated, it was held competent to prove the defense by a record showing its confiscation for adulteration at the suit of the government, on the ground that that was a proceeding *in rem* which bound the world.<sup>2</sup> This seems like a remarkable misapprehension of the law.

INTERLOCUTORY ORDERS.—Another material difference between the doctrines of *res judicata* and collateral attack consists in the force given to interlocutory orders. A judgment must be final<sup>3</sup> and on the merits,<sup>4</sup> in order to bar any matter as *res judicata*, while each and every step taken or order made in the proceeding, whether it concerns the merits or not, is just as impervious to collateral attack as the final judgment on the merits. An interlocutory order, no matter how erroneous, if not void, will justify or protect all persons as completely as the final judgment itself. An error therein no more than in a final judgment, is no excuse for disobedience. Thus, interlocutory orders made in administration proceedings are only *prima facie* correct in a direct proceeding to set them aside, but are conclusive collaterally in a suit on the administrator's bond.<sup>5</sup> So an order granting

1. Bigelow on Estoppel (4th ed.) 221.

2. Hart v. McNamara, 4 Price 154 n.

3. Black on Judgments, § 509, 695; Freeman on Judgments, § 251.

4. Black on Judgments, § 695; Freeman on Judgments, § 260, 267, 318.

5. Parsons v. Mulford, 67 Ind. 489, 499; Candy v. Hanmore, 76 Ind. 125, 128; State ex rel. Wiseman v. Wheeler, 127 Ind. 451 (26 N. E. R. 552).



a new trial is not void, and cannot be disregarded for errors not destroying the jurisdiction.<sup>1</sup>

LETTERS OF ADMINISTRATION.—There is some confusion in the cases concerning the effect of the order granting letters of administration, as evidence to prove the truth of the matters upon which it was based, which confusion results from a failure to distinguish between the doctrines under consideration. A petition is filed in the probate court alleging that, on a day named, A died in that county intestate, leaving assets therein, and debts, and giving the names of the heirs and showing that B is the next of kin, and praying that letters be issued to him. The proceeding being *in rem*, any person interested may appear and contest any allegation in the petition. If he does, and is defeated, the truthfulness of that allegation becomes *res judicata* as to him in all other judicial proceedings. But if he lets the matter go by default, or without an actual contest, the order finding the allegations of the petition to be true is no evidence of those facts in an action concerning a different subject matter. Thus, in an old English case, where the husband alone had the right to take out letters of administration on the deceased wife's estate, the issuing of letters to one person in the absence of a contest, was decided to be no proof, in a case involving a different subject-matter, that she was not married to another person.<sup>2</sup> In a contest in Iowa between the beneficiary in a life-insurance policy and the company, it was held that the letters of administration, issued upon default, were *prima facie*, though very weak, evidence of the death of the assured.<sup>3</sup> But the Supreme Court of the United States took a different view of the same case, holding that they were no evidence at all, saying: "The probate court has never adjudicated that Tisdale was dead. Death was not the *res* presented to it. Shall Mrs. Tisdale receive letters of administration, was the *res*; and upon that only has there been an adjudication."<sup>4</sup> A writer, commenting on this case in a law journal, drew the conclusion that the letters are no proof of the *fact* of death when that fact is not of the *substance of the issue*, but simply proof of the plaintiff's legal capacity to sue,<sup>5</sup> and the editor of the journal agrees with him. Decisions from which

1. State *ex rel.* Downard v. Templin, Co., 26 Iowa 170, 177, and 28 Iowa 122 Ind. 235 (23 N. E. R. 697). 12.

2. Blackham's Case, 1 Salkeld 290.

4. Mutual Benefit L. Ins. Co. v. Tis-

3. Tisdale v. Connecticut Mut. L. Ins. dale, 91 U. S. 238.

5. 3 Central Law Journal 169.



lawyers can draw no clearer conceptions than those must be somewhat confused. The death of the assured was alleged in the petition, and the court necessarily so adjudged, or it would not have issued letters; and, so far as the validity of any right or title based on that judgment was concerned, it was conclusive. But as the beneficiary and the company did not contest with each other the allegation of death, the adjudication that he was dead was no evidence of that fact in an action between them on a policy of insurance. The subject-matter in the probate court was an alleged estate of an alleged decedent, and the relief sought was the appointment of an administrator. All persons were called upon to show cause why that relief should not be granted. The subject-matter in the insurance case was the alleged life insurance policy, which was wholly different from that before the probate court. The petition in each case contained the allegation that Tisdale was dead, the same as the declarations in the Michigan cases contained an allegation that the defendant had executed the lease sued upon; but as the allegation of death was not contested, like the allegation of the execution of the lease, it did not become *res judicata*.

MARRIAGE AND DIVORCE.—There is some confusion in the books in respect to the effect of decrees concerning marriage and divorce. A woman married one Williams in Wisconsin, and afterwards sued one Jones for a divorce, alleging in her petition that they were “duly and lawfully married” in Wales, and that he had unlawfully deserted her. There was due personal service on Jones, and a default, and finding that all the allegations of her petition were true, and a decree of divorce. After her marriage with Williams, and before her divorce from Jones, Williams conveyed a parcel of land in which she did not join, and after his death, she claimed dower in that land. The purchaser denied that she was the widow of Williams, and contended that the judgment in the Jones divorce case conclusively showed that, at the time of the marriage with Williams, she was the lawful wife of Jones. Her contention was that she was never the lawful wife of Jones because he had another lawful wife living. It was held that the decree finding that she was “duly and lawfully married” to Jones, and granting a divorce for his desertion, did not bar her from showing that Jones had another lawful wife.<sup>1</sup> The opinion seems

1. Williams v. Williams, 63 Wis. 58 (23 N. W. R. 110, 116).

to rest upon the ground that the validity of the marriage with Jones was not put in issue and determined, but was assumed to be true by reason of the default. The opinion also says that it is difficult to see how Williams could have been bound by the Jones divorce. It also calls attention to the fact that the validity of the Williams marriage was not tried in the Jones divorce suit. The decision was right. As Jones allowed the case to go by default, the decree, in a contest over a different subject-matter, was no evidence even against him that they were ever married; and as Williams was not a party and did not contest the question, and had an adverse interest in her *status*, of course the decree did not affect him. Where a husband sued for divorce in Rhode Island on the ground of the wife's adultery, and was defeated after a contest on the merits, it was held that this did not bar him from showing that she was, in fact, guilty of adultery in order to defeat an action for necessities furnished her.<sup>1</sup> This case seems to me to be wrong. He refused to support the wife on account of her adultery. The judgment in the divorce suit conclusively determined, as between him and her, that she was not guilty. She then pledged his credit for necessities. The court had determined that she was still his lawful agent for that purpose. As the furnisher of the goods claimed through her, I cannot see why he could not stand on her rights. According to that case, the husband, although defeated in the divorce case, could still starve her out by litigating the grounds of his divorce with each person who aided her at his expense.

MOTIONS.—On the same principle that an erroneous interlocutory order is valid collaterally, the erroneous ruling on a motion is not void, and may shield a proceeding from collateral attack which would otherwise be void. Thus, where a judgment against one partner is void for want of service, and he appears specially and moves to vacate it for that reason, the denial of his motion makes the judgment valid collaterally.<sup>2</sup> His presentation of the motion gave the court jurisdiction to decide it, and the decision was not void, although erroneous; and, until set aside, it necessarily protects the void judgment from further attack. An order refusing to vacate a judgment on a petition showing a want of service, is conclusive on that question.<sup>3</sup> On this point many cases confuse

1. Gill v. Read, 5 R. I. 343.

3. Weber v. Tschetter, — S. D.—

2. Ferguson v. Millender, 32 W. Va. (46 N. W. R. 201).

30 (9 S. E. R. 38).

the two doctrines. Thus, a person appeared in the federal court and filed a petition to set aside proceedings in confiscation, which was denied. She then sued the purchaser of the property at the confiscation sale, in a state court of New York, and the court of appeals thinking the confiscation proceedings void, she was allowed to recover.<sup>1</sup> That learned court failed to perceive that, concerning the validity of the confiscation proceedings, she had had her day in a competent court, and that overhauling the decision of the federal court on her petition was simply usurpation.

**PLEADING FORMER ADJUDICATION, NECESSITY OF.**—A mortgage was foreclosed in Ohio, and a personal judgment by default rendered against a defendant as a joint maker on the two notes then due. When the third note, secured by the same mortgage, became due, the same defendant was sued on it as a joint maker, to which he answered that he was an indorser. The plaintiff, without replying former adjudication, introduced the record of the first suit in evidence to show that he was a joint maker. It was held competent for defendant to testify that he was an indorser and not a joint maker, upon the ground that as the record had not been pleaded, it was simply matter of evidence subject to contradiction.<sup>2</sup> This ground is not tenable. The question then in controversy not having been contested in the first suit, the record was not competent evidence to prove the point.

**“WHAT MIGHT HAVE BEEN DECIDED.”**—There is some confusion in the cases in the application of this old and well-settled rule, that a judgment, in certain cases, concludes and forever sets at rest not only all matters that were actually contested and decided, but also all matters that “might have been decided.” This rule is founded upon the maxim that “No person shall be twice vexed by suit for one and the same cause of action,” and it simply means that the plaintiff must not split or divide his cause of action into parts; and that if he does do so, the defendant is at liberty to plead the adjudication on the first part in bar to a suit on the second. An old case from Indiana furnishes a good illustration. A woman sued her husband and procured a divorce without claiming or obtaining alimony, for which she afterwards brought a new suit. The court held that public policy

1. *Chapman v. Phoenix National Bank*, 85 N. Y. 437, *reversing*, 44 N. E. R. 656).  
Y. Super. (12 *Jones and Spencer*) 340.

2. *Meiss v. Gill*, 44 O. St. 253 (6 N.

demanding that all matters of difference between the husband and wife should have been settled in the divorce suit; or, in other words, that her right to a divorce and to alimony constituted but one cause of action; and that, having split that cause into two parts, and obtained a judgment on the one part, public policy estopped her from proceeding anew on the second.<sup>1</sup> If A sells two horses to B at one time for \$100 each, upon the same credit, he has but one cause of action against B for \$200; and if he sues B for the one horse and a judgment goes either way on the merits, B can plead this judgment in bar of a suit for the other horse, because that matter "might have been decided" in the first suit, which means that it *ought* to have been included in the first. It will be seen that this rule has nothing to do with the doctrine of *res judicata*, and has only an indirect or negative relation to the doctrine of collateral attack. In the case last supposed, when B pleads the first judgment in bar, A may reply that it is void for want of jurisdiction. The books abound with cases of the misapplication of the rule under consideration, but as an example, I select a late case from the appellate court of Indiana. A person brought an action of replevin for shocks of wheat, alleging that he was the owner and entitled to the possession. A trial was had on the merits, and it was adjudged that the plaintiff take nothing and pay costs. The defendant in the replevin action then sued the plaintiff for the value of the wheat, alleging that he did not return it, and the answer was that the right to the possession was the only question litigated, and that the question of ownership was not adjudicated. This answer was held bad upon the doctrine that the judgment concluded all questions that "might have been decided."<sup>2</sup> As no one would claim that the right of possession and the right of ownership of property necessarily constitute but one cause of action in Indiana, it seems quite evident that the case misapplied the rule. If the defendant in the replevin case had caused an execution to issue for the costs upon which the plaintiff's property had been sold, any suit by him to regain it on account of judicial errors, would have been a collateral attack on the judgment for costs; and if in any other suit between the parties concerning the right to the possession of other property, the defendant in the replevin action would plead that the

1. *Fischli v. Fischli*, 1 Blackford 360.

2. *Fromlet v. Poor*, — Ind. App. — (29 N. E. R. 1081).

right to its possession depended upon the identical matters and things contested and decided in his favor concerning the possession of the wheat in the action of replevin, that would invoke the doctrine of *res judicata*; and, if in the case last supposed, the defendant would plead facts showing that the plaintiff's right to the possession of the wheat in the replevin action and of the property in the present action constituted but one cause of action, that would invoke the rule of "What might have been decided."

**RULE IN COLLATERAL ATTACK.** — Jurisdiction existing, *any order or judgment* is conclusive in respect to its own validity in a dispute concerning any right or title derived through it, or anything done by virtue of its authority.

**RULE IN RES JUDICATA.** — Jurisdiction existing, a *final judgment on the merits* conclusively settles the entire cause of action sued upon and all causes of defense, whether brought forward or not; and also settles all matters in issue actually contested and decided, so as to make them conclusive evidence in any other judicial proceeding between the same parties.

## CHAPTER II.

### THE TRIBUNAL—CONSTITUTIONAL INFIRMITIES IN ITS ORGANIZATION.

SCOPE OF CHAPTER II, . . . . .	§ 18
PART I.—CORPORATE ORGANIZATION OF THE TRIBUNAL, . . . .	19-21
PART II.—THE JUDGE—CONSTITUTIONAL INFIRMITIES OF, . . .	22-25

§ 18. **Scope of Chapter II.**—This chapter treats of the effect which constitutional vices and infirmities in the organization of judicial tribunals have upon their judgments when assailed collaterally. If the constitution either prohibits or does not authorize the organization of a certain judicial tribunal, or if it is organized in an extra-constitutional manner, or if its presiding officer lacks some constitutional qualification, or has been commissioned or qualified in an unconstitutional manner, it is evident that serious questions may arise in regard to the validity of rights and titles founded upon its judgments. We will now examine the cases on this point so far as they touch the organization of the tribunal, in PART I, and so far as they touch the qualifications of the judge in PART II.

#### PART I.

##### CORPORATE ORGANIZATION OF THE TRIBUNAL.

§ 19. Government unconstitutional or revolutionary.	§ 20. Tribunal not lawfully organized under the constitution.
	21. Comments on section 20.

§ 19. **Government unconstitutional or revolutionary.**—It is evident that if the authority which organizes a judicial tribunal be itself illegal or unconstitutional, serious questions may arise in regard to its judgments collaterally. The government authorizing it to exist must be something more than a mob or mere usurping body. It must, at least, be a government *de facto*, or all its proceedings are void. The government of the late “Confederate

States of America" was organized in violation of the Constitution of the United States. As that was purely a political question, it could not be debated in the courts. There, at least, the question was not even *colorable*. They appealed to the sword. That they made a most desperate and heroic struggle, and only succumbed because of superior force, all who took part therein have a vivid recollection. But they were never recognized as a nation by us nor by any foreign government. They never had possession of the Capital of the Nation, nor did they expel the authorities of the Nation from power, as Cromwell did King Charles, nor did they ever become a *de facto* revolutionary government of a part of the Nation for the reason that they did not succeed. When they failed, all their judicial proceedings, so far at least as they were hostile to our laws, perished with them.<sup>1</sup> As their courts never had any legal existence, a conviction therein for treason in giving aid and comfort to the United States,<sup>2</sup> and a decree confiscating property of a person because of loyalty to the United States, were utterly void.<sup>3</sup> The same was true of any judgment in aid of the insurrection,<sup>4</sup> such as an order of a probate court for an executor to invest funds in the bonds of the Confederate States.<sup>5</sup> But a government extending over a million square miles comprising ten millions of people, with laws just in themselves, which it was able to enforce and did enforce for four years, was certainly a *de facto* one, so far as the people within its dominion were concerned, and that would shield its judicial proceedings in such matters from collateral assaults. The reconstructed supreme court of Alabama at first held all the judicial proceedings of the insurgent courts void,<sup>6</sup> and that a judge of a city court established by the insurgent legislature could not collect his salary because the law establishing the court was void.<sup>7</sup> But all these decisions were wrong, and were afterwards overruled.<sup>8</sup> The circuit court of the United States, sitting within Alabama, held that an order of a probate court of the insurgent state appointing a

1. Williams v. Bruffy, 96 U. S. 176 *affirmed*, Horn v. Lockhart, 17 Wall. and 102 U. S. 248; Stevens v. Griffith, 570.

111 U. S. 48.

2. Hickman v. Jones, 9 Wall. 197.

3. Dewing v. Perdicaries, 96 U. S. 193; Williams v. Bruffy, *supra*.

4. Texas v. White, 7 Wall. 700.

5. Lockhart v. Horn, 1 Woods 628;

6. *Ex parte Bibb*, 44 Ala. 140; Noble v. Cullom, 44 Ala. 554; Chisholm v. Coleman, 43 Ala. 204.

7. Perkins v. Corbin, 45 Ala. 103 (6 Am. R. 698).

8. Nelson v. Boynton, 54 Ala. 368.



guardian for a resident ward, was valid.<sup>1</sup> In so far as the validity of the judgments of the courts of the Confederate States hostile to the United States were concerned, the principle was settled in an early case in the Supreme Court of the United States, which held that a condemnation made by a Mexican prize court before the United States had recognized Mexico as a nation, was void.<sup>2</sup>

§ 20. **Tribunal not lawfully organized under the constitution.**—A statute of Tennessee erected an inferior court composed of five commissioners, and authorized it to subscribe for stock in a railway, which was done. It was afterwards held by the Supreme Court of the United States that the constitution of that state prohibited the formation of such a court, and that, no such *de jure* court being possible, the commissioners did not constitute a *de facto* one, and that the order subscribing for the stock was void collaterally.<sup>3</sup>

An unconstitutional statute of Kentucky created a court of last resort called the "Court of Appeals," consisting of four judges, who duly qualified and organized the court and proceeded to decide causes. All their acts were held to be void, on the ground that it needed a *de jure* office before it could be filled by *de facto* officers, and that there could be no such thing as a *de facto* office.<sup>4</sup>

A statute of New York incorporated a town in 1866, providing for seven trustees, and appointing them, four of whom were to act until 1868, and three until 1869, when successors were to be elected. These trustees met and appointed a police magistrate, who convicted a person. On *habeas corpus*, it was held that the appointment of the trustees was unconstitutional, and that their action in appointing a police magistrate was void, and that his judicial acts were void, and the prisoner was discharged.<sup>5</sup> Another New York statute created the office of justice of the peace for a village. This the constitution, as construed by the court, prohibited. Under this statute, a justice of the peace was elected and qualified, and convicted and imprisoned a person for four months. All this was done without any question of juris-

1. Van Epps v. Walsh, 1 Woods 598.

2. The Nueva Anna, 6 Wheaton 193.

3. Norton v. Shelby County, 118 U. S. 425 (6 S. C. R. 1121).

4. Hildreth's Heirs v. M'Intire's Devisee, 1 J. J. Marsh. 206 (19 Am. D. 61).

5. People *ex rel.* Brown v. Blake, 49 Barb. 9, 12. See page 36, note 5, *infra*.

diction being raised. After serving three months in prison, he was brought out on *habeas corpus* and released because there could be no such thing as a *de facto* office.<sup>1</sup> So a sentence by a police court established by a law not passed in a constitutional manner,<sup>2</sup> and the acts of a court organized under an unconstitutional statute,<sup>3</sup> were held void. On the contrary, it was held in Minnesota, that a court created by a statute, unconstitutional because not concurred in by two-thirds of the members of each house, was a court *de facto*, and that its proceedings were valid;<sup>4</sup> and where the constitution of Pennsylvania prohibited the erection of a single county into a judicial district, unless it contained forty thousand inhabitants, it was held that the erection of a county of less than that number of inhabitants into a judicial district did not affect the power of the court, and that private persons could not question its authority;<sup>5</sup> and the same ruling was made in a recent case in Missouri in respect to the organization of a criminal court in a county, which the constitution prohibited in counties containing less than fifty thousand inhabitants. It was decided that a person on trial before the court could not raise the question as to the number of inhabitants in the county.<sup>6</sup>

§ 21. **Comments on section 20.**—The foregoing are all the cases I have been able to find on the question involved in section 20, and it seems to me the cases from Minnesota and Pennsylvania are founded on the better reason. It is necessary, in order to guard the rights of the public, to hold the acts of an actual although unlawful incumbent of a judicial office valid, as being done by an officer *de facto*, then *a fortiori* is it necessary to hold an actual judicial tribunal, erected under the forms of law, sustained by the power of the state, and settling rights and titles, a *tribunal de facto*. But I would place its validity, when assailed collaterally, on a different ground. When a case is presented to an assumed judicial tribunal for decision, it has to decide, first, that a law exists authorizing the organization of such a tribunal; second, that

1. *People ex rel. Sinkler v. Terry*, 5 N. Y. St. Rep. 120, 123.

2. *People v. Toal*, 85 Cal. 333 (24 Pac. R. 603).

3. *Dictum* in *Walcott v. Wells*, — Nev. — (24 Pac. R. 367, 370).

4. *Burt v. Winona and St. Peter R. Co.*, 31 Minn. 472 (18 N. W. R. 285),

*Mitchell, J., dissenting. Accord, Comstock v. Tracey*, 46 Fed. R. 162, 168—

a case concerning the validity of the organization of a Minnesota court, and following the Minnesota case.

5. *Coyle v. Com.*, 104 Pa. St. 117.

6. *State v. Wiley*, — Mo. — (19 S. W. R. 197).

it has been organized, and third, that the persons present are its lawful officers. It is then ready to examine the plaintiff's alleged cause of action and to determine whether it has power to grant relief. All of these questions the tribunal is compelled to decide in the affirmative before it takes a single step. The question of the right to organize such a tribunal may be a very close and doubtful one, and all the lawyers in the state may agree that the right exists, and the tribunal may proceed to act for many years, and settle numerous rights and titles, when, by some new turn of the judicial or political wheel, a new rule of construction is applied to the constitution, and the court and all its acts declared void. The case from Kentucky is a remarkable one. The legislature provided for a new supreme court, and its judges were duly appointed and qualified and began to act and decide causes. It seems that all or nearly all the state officials recognized its authority, and transferred to it the new business, but the old supreme court held the old business, denying its authority, and both continued as *de facto* bodies, each claiming to be the *de jure* supreme court. Matters continued in this uncertain state until the legislature repealed the law organizing the new court, leaving the old one the undisputed master of the situation. The old court then held the statute organizing the new court unconstitutional, and all its decisions void. It is said with much plausibility that no court can pass upon the validity of its own organization. But that begs the question. Each court, at each step it takes, has to decide that it still has a lawful organization and the lawful right to proceed. Every legislature, convention, assembly or meeting has to decide the same question. There is no other power to refer to.

## PART II.

### THE JUDGE—CONSTITUTIONAL INFIRMITIES OF.

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| § 22. Judge, appointment or election of, invalid under the constitution.<br>23. Comments on section 22. | § 24. Judge personally disqualified by the constitution.<br>25. Judge residing in wrong place according to the constitution. |
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**§ 22. Judge, appointment or election of, invalid under the constitution.**—A judge was appointed and commissioned by virtue of an unconstitutional statute, and it was held that his acts were not void.<sup>1</sup> But where the regular judge appointed a special judge by

1. Taylor v. Skrine, 3 Brev. 516 and 2 Treadw. 696; *approved* in Creighton v. Piper, 14 Ind. 182, 184, and in Smurr v. State, 105 Ind. 125, 133 (4 N. E. R. 445).

virtue of an unconstitutional statute, it was held that all his acts were void. The court said that he was not even a judge *de facto* because he recognized the right of the regular judge to the office, and only claimed to exercise its functions under a delegation of power from the regular judge.<sup>1</sup> A police judge, appointed by the mayor by virtue of an unconstitutional statute, is a judge *de facto*, and a conviction by him is not void on *habeas corpus*.<sup>2</sup> The court, on page 618, said: "The true doctrine seems to be, that it is sufficient if the officer holds the office under some power having color of authority to appoint; and that a statute, though it should be found repugnant to the constitution, will give such color." And where the constitution vested the power of appointing judges in the governor, and a statute authorized the clerk, sheriff and auditor to appoint a special judge in case the regular judge could not attend, and they appointed one in violation of the constitution, when the regular judge had resigned, it was held that he was a judge *de facto* whose acts were not void.<sup>3</sup> So where a judge was elected under a law passed expressly for the purpose of his election, it was held that the validity of the law could not be raised on an appeal from his decision, as the law gave him *color* of right which could only be tested by a direct proceeding on behalf of the state.<sup>4</sup> And where an unconstitutional act legislated a judge out of office, and the new judge elected under that act forcibly ejected the old judge and took possession of the court, it was held that he was a judge *de facto* and his acts valid.<sup>5</sup> The constitution of Louisiana established a court with a number of judges, and provided that the judge to whom a cause was assigned should alone have the power of rendering judgment on the merits of the case, except in certain specified contingencies. A cause not within any of the excepted contingencies was decided on the merits by a judge to whom it had not been assigned, but this decision was held not void.<sup>6</sup>

A police judge appointed by a city council by virtue of an unconstitutional statute,<sup>7</sup> or by the legislature by an unconsti-

1. State v. Phillips, 27 La. Ann. 663; State v. Fritz, id. 689.

2. *Ex parte* Strang, 21 O. St. 610, 616; cited with approval in *In re* Ah Lee, 5 Fed. R. 899, 912.

3. Case v. State, 5 Ind. 1.

4. State v. Williams, 35 La. Ann. 742.

5. State v. Douglas, 50 Mo. 593.

6. State *ex rel.* Buisson v. Lazarus, 33 La. Ann. 1425.

7. Brown v. O'Connell, 36 Conn. 432; People v. White, 24 Wend. 520.

tutional vote, is a judge *de facto* and his acts are valid;<sup>1</sup> but where a counselor of the court, by virtue of an unconstitutional statute, was appointed special judge, his judgment was reversed for that reason alone, and was said to be void.<sup>2</sup> The constitution provided that "No judge of any court . . . shall, at any time, have a seat in the senate or house of representatives." A police judge was elected to the house of representatives, and took his seat, and afterwards convicted and imprisoned a person, who sought relief by *habeas corpus*. It was held that the conviction was by an officer *de facto* and not void;<sup>3</sup> but where the constitution declared that "No person holding or exercising any office of trust or profit under the United States . . . shall be eligible" to hold any state office, and a postmaster of the United States was elected and acted as a state justice of the peace, and rendered a judgment, and issued an execution on which property was seized, he was held to be a trespasser.<sup>4</sup> The case says that the constable was protected because the acts of the justice were not void, by which the court probably meant that the constable was not bound to know that the justice was incompetent. In holding the justice to be a trespasser, the case seems to me to be wrong. The constitution provided that judges of the circuit and supreme courts should be *elected*, but a statute authorized the governor to appoint them, which he did. It was held that they were judges *de facto* and their acts not void.<sup>5</sup>

So where an unconstitutional statute transferred a county from the district of one judge to that of another, the latter judge had such color of office as to make him a judge *de facto*, and his right to try a criminal case could not be questioned by the defendant.<sup>6</sup>

§ 23. **Comments on section 22.**—If a judge, acting under color of authority, is a judge *de facto*, and if an unconstitutional statute gives such color, as *Ex parte* Strang and *State v. Douglas* hold, then the cases of *State v. Phillips* and *State v. Fritz* are wrong, because the appointee was holding by virtue of a statutory appointment; but I do not think that an appointment under color

1. *Morris v. People*, 3 Denio 381.

2. *Van Slyke v. Trempeleau, etc.*, Ins. Co., 39 Wis. 390 (20 Am. R. 50)—*a dictum*.

3. *Sheehan's Case*, 122 Mass. 445 (23 Am. R. 374).

4. *Rodman v. Harcourt*, 4 B. Mon. 224, 230.

5. *In re Ah Lee*, 5 Fed. R. 899, 908, denying *People v. Albertson*, 8 How. Pr. 363, and *People ex rel. Brown v. Blake*, 49 Barb. 9. [§ 37<sup>2</sup>, *infra*.

6. *Clark v. Com.*, 29 Pa. St. 129. See

of authority is necessary. It is difficult to see any color of authority in Case v. State, yet I think that case well decided. It seems to me that the true rule must be this: When a person has an appointment to act as judge of a court, which he and the officers of the court adjudge to be valid, and he takes possession of the court and acts, supported by the power of the state, he is a judge *de facto*.

§ 24. Judge personally disqualified by the constitution.—When the Fourteenth Amendment to the Constitution of the United States came into force, it disqualified a state judge from further acting. But he continued to act, and convicted and imprisoned a person, who then applied to the circuit court of the United States to be discharged on *habeas corpus*; but the court held that his judgment was not void, and that the relief could not be granted;<sup>1</sup> and where the Constitution required a judge to be at least thirty years old, a person appointed of less than that age was held to be a judge *de facto* and his acts valid.<sup>2</sup>

The constitution of Pennsylvania provided that counties containing forty thousand inhabitants might be erected into separate judicial districts, and that such court should be presided over by one judge learned in the law, thus abolishing in such counties the offices of associate judges unlearned in the law. Such a county was erected into a judicial district, and the old associate judges continued to sit with the regular judge and to hold the court when a person was convicted of arson. It was held that the associate judges were acting under color of office and were judges *de facto*, and that their right to sit could not be questioned on writ of error from the judgment of conviction, because that was a collateral attack on their official character.<sup>3</sup>

A Kansas statute conferred judicial powers on the county attorney, authorizing him to summon witnesses before him and to examine them in regard to sales of intoxicating liquors, and to commit any witness refusing to answer. A witness was committed in such a proceeding, and applied to the federal court to be released on *habeas corpus*. That court held that the statute combined the functions of judge and prosecutor in one person whose interest it was to procure evidence that would convict, and that his interest in the proceeding made his judgment void

1. Griffin's Case, Chase's Dec. 364, 411; Matter of Griffin, 25 Tex. 623.

2. Blackburn v. State, 40 Tenn. (3 Head) 689. [See § 51<sup>3</sup>, *infra*.

3. Campbell v. Com., 96 Pa. St. 344.

for want of jurisdiction, and that his warrant of commitment was not "due process of law," and was in violation of the Fourteenth Amendment of the Constitution of the United States, and the prisoner was discharged.<sup>1</sup> If this case is law, then all criminal proceedings before justices of the peace and police courts in Indiana are void, because no fees or costs are taxed for the justice, jury or any other person, unless there is a conviction. The state pays nothing. If the principle announced in this case is correct, then all proceedings before a disqualified judge, or before the wrong court, or a court defectively organized, are wanting in "due process of law" and void. Such a discovery seems to have come rather late when it is remembered that many states have always had a clause in their constitutions guaranteeing "due process of law" in the courts.

So where the Texas constitution provided that "No judge shall sit where he shall have been counsel in the case," his judgment in such a case was held void;<sup>2</sup> but the contrary was held by the supreme court of Tennessee in a case of relationship,<sup>3</sup> and this seems to me the better view.

§ 25. Judge residing in wrong place according to the constitution.—The Ohio constitution required the associate judge to reside within the county where his court was held. The legislature changed the boundaries of Huron county so as to leave the two associate judges residing outside of the county. The county elected two new judges, but the old ones refused to vacate, and held the office wrongfully,<sup>4</sup> and acted. It was held that they were officers *de facto*, and that their acts were valid.<sup>5</sup>

The Wisconsin constitution, as construed by the supreme court, forbade the enacting of a statute giving a court commissioner jurisdiction in any county in which he did not reside. A village was located in two counties, and a statute authorized a commissioner residing therein to act in either county. But his action in supplemental proceedings on a judgment of the county in which he did not reside, was held void.<sup>6</sup> It seems to me that the Ohio case is right and the Wisconsin case wrong.

1. *In re Ziebold*, 23 Fed. R. 791—  
Foster, J.

2. *Newcome v. Light*, 58 Tex. 141  
(44 Am. R. 604). See section 43 *infra*,  
for abstract of this case.

3. *Holmes v. Eason*, 8 Lea (76 Tenn.)

754, 760. See Section 43 *infra*, for  
abstract of this case.

4. *State v. Choate*, 11 O. 511.

5. *State ex rel. Whitbeck v. Alling*,  
12 O. 16.

6. *Fenelon v. Butts*, 49 Wis. 342 (5  
N. W. R. 784).



## CHAPTER III.

### THE TRIBUNAL—STATUTORY AND COMMON-LAW INFIRMITIES IN ITS ORGANIZATION.

SCOPE OF CHAPTER III, . . . . .	§ 26
PART I.—CORPORATE ORGANIZATION OF THE TRIBUNAL, . . .	27-33
PART II.—THE JUDGE—STATUTORY AND COMMON-LAW INFIRMI- TIES OF, . . . . .	34-57

§ 26. **Scope of Chapter III.**—PART I of this chapter treats of the validity of rights and titles derived through the judicial proceedings of a tribunal laboring under some statutory or common-law infirmity in its corporate organization, and PART II treats of the same matters where the infirmity attaches to the judge.

#### PART I.

##### CORPORATE ORGANIZATION OF THE TRIBUNAL.

§ 27. Place where held, unlawful.	§ 30. Time when court held, unlawful
28. Place where held, unlawful—Acts void.	—Principle involved.
29. Statute authorizing tribunal to be organized, not yet in force, or repealed.	31. Time unlawful—Acts not void.
	32. Time unlawful—Acts void.
	33. Time unlawful—Sundays and holidays.

§ 27. **Place where held, unlawful.**—For the reasons given in section 30, *infra*, I think that a court held at a place unauthorized or forbidden by law is a court *de facto*, and that its proceedings are not void. In a Missouri case it was said: “The very fact of holding the court there necessarily implied a judicial assertion of the right to hold it. It was a *de facto* court, and its proceedings were not void, even should it be conceded that its session was at a place unauthorized by law;”<sup>1</sup> and in a case in Texas where the location of the county seat was in dispute, the court said that the decision of the trial court, for the time being, made it the county seat *de facto*, and that the question of the proper location could not be raised by a person there convicted.<sup>2</sup> And where it was

1. Bouldin v. Ewart, 63 Mo. 330, as quoted in 19 Pac. R. 442; accord, State v. Peyton, 32 Mo. App. 522, 528. 2. Watts v. State, 22 Tex. App. 572 (3 S. W. R. 769).

unsafe and impossible to hold court at the county seat because of incursions of the public enemy, letters of administration granted in another part of the county were held not void.<sup>1</sup>

The entry of a person's name on the justice's docket as stay of execution operated as a judgment confessed, and in order to be regular, had to be entered on the record in the justice's office; but a stay entered by the justice on an oral authority of the stayor given 150 yards from his office, in the absence of the record, is not void.<sup>2</sup> So where a justice of the peace, by consent, adjourned a cause from the court room to his own office;<sup>3</sup> and where a justice of one township, by consent,<sup>4</sup> or without consent,<sup>5</sup> sat and tried a case in another township, the judgments were held not void; and the judgment of a justice rendered four miles away from his office, but within his jurisdiction, is valid.<sup>6</sup> The supreme court of Maine had jurisdiction over the entire state; but the statute provided that, in partition, if an answer were filed, the trial should be in the county where the land lay. A trial in such a case in another county was held not void.<sup>7</sup> An order for the removal of a pauper from one town to another was signed by two justices, separately, in different counties—one acting outside of his county. This order was held erroneous but not void.<sup>8</sup> So in Nebraska, it was held erroneous for a justice to have his office outside of his precinct (within the county over which his jurisdiction extended), but that his acts were not void for that reason.<sup>9</sup> A sentence of a prize court organized by the capturing power and sitting within the territory of a neutral state, is void.<sup>10</sup>

§ 28. Place where held, unlawful—Acts void.—The proceedings of a court baron held out of the manor;<sup>11</sup> an order to an administrator to lease land made by the judge while in another county, as shown by the record;<sup>12</sup> judicial acts done by a judge

1. Sevier v. Teal, 16 Tex. 371.

2. Reams v. McNail, 28 Tenn. (9 Humph.) 542.

3. Price v. Peters, 15 Abb.Pr. 197, 200.

4. Rogers v. Loop, 51 Iowa 41 — Adams, J., *dissenting*.

5. Gregory v. Bovier, 77 Cal. 121 (19 Pac. R. 232); Gregory v. Allison, — Cal. — (19 Pac. R. 233).

6. Cheatham v. Brien, 3 Head (40 Tenn.) 552.

7. Sewall v. Ridlon, 5 Me. (5 Greenl.) 458.

8. The King v. Inhabitants of Stotfold, 4 T. R. 596.

9. Jones v. Church of the Holy Trinity, 15 Neb. 81 (17 N. W. R. 362). See Section 28<sup>13</sup>.

10. Havelock v. Rockwoods, 8 T. R. 268; Glass v. Sloop Betsey, 3 Dallas 6.

11. Doe *ex dem.* Leach v. Whitaker, 5 B. & Ad. 409, 425 (27 E. C. L. 176, 184).

12. Capper v. Sibley, 65 Iowa 754 (23 N. W. R. 153).

outside of his territorial jurisdiction ;<sup>1</sup> an order probating a will made at a private house ;<sup>2</sup> and a tax levy made by a board of commissioners at a session held out of the State,<sup>3</sup> were held void. So a confession received by a justice on the street,<sup>4</sup> or elsewhere than at his office, although he rendered judgment at his office ;<sup>5</sup> and a judgment rendered by him at a court held outside of his township,<sup>6</sup> were held void. A trial conducted by a justice in a city over which his jurisdiction did not extend, although it extended over the balance of the county in which the city was located, was held void, and that a witness could not be prosecuted for perjury for testimony given therein.<sup>7</sup> The Georgia statute required justices to fix some central and convenient place in their districts to hold their courts, and provided that judgments rendered at any other place should be "void." Under this statute it was held that a judgment rendered at any other place ;<sup>8</sup> or at his house,<sup>9</sup> was void collaterally. So where a case was begun before a justice of district 716, and by agreement of the parties, the justice sat and tried the case in district 564, the judgment was held void.<sup>10</sup>

An unorganized county, Hamilton, was attached to an organized county, Ford, for judicial purposes, which made Hamilton county a township of Ford county. A justice of the peace of a certain township of Ford county went into Hamilton county, 115 miles from his office, and there held an examining court in regard to certain felonies, and imprisoned certain persons. His acts were held void. The court compared several sections of the constitution and several statutes, and reached the conclusion that the justice could only hold his court in his own township, although he might issue his warrants to other townships.<sup>11</sup> But the justice was compelled to compare the same laws, and when he reached

1. Langwith v. Dawson, 30 U. C. C. P. 375, 379.

2. White v. Riggs, 27 Me. 114.

3. Commissioners v. Barker, 25 Kan. 258. The action of the commissioners in this case was outside of the pale of any law, and was clearly void if their record showed the facts.

4. Tenny v. Filer, 8 Wend. 569.

5. King v. King, 1 Pa. (1 P. & W.) 15; *contra*, Krueger v. Beckham, 35 Kan. 400 (11 Pac. R. 158).

6. Phillips v. Thralls, 26 Kan. 780.

7. Reg. v. Row, 14 U. C. C. P. 307.

8. Borzeman v. Singer Mfg. Co., 70 Ga. 685.

9. Reed v. Thomas, 66 Ga. 595.

10. Block v. Henderson, 82 Ga. 23 (8 S. E. R. 877).

11. Atchison, Topeka and Santa Fé R. Co. v. Rice, 36 Kan. 593 (14 Pac. R. 229).

the conclusion that he could sit in any township in the county, his oath bound him to take jurisdiction. His decision being one he was compelled to make upon a debatable question of law, was not void because erroneous. See Chapters V and VI, *infra*. The precise point was ruled to the contrary in Nebraska.<sup>1</sup>

§ 29. **Statute authorizing tribunal to be organized, not yet in force, or repealed.**—A judgment by confession was entered by the clerk of the supreme court in a county to which the power of the court did not yet extend because the county had no legal existence in respect to the jurisdiction of the court, and it was held void.<sup>2</sup> By the repeal of a section of an act the supreme court held that a certain township was destroyed, and a conviction after the repeal by a justice of that township was held void on *habeas corpus*.<sup>3</sup> For the reasons given in Chapter VI—namely, that the question of the existence of the law was debatable—I think both these decisions wrong.

§ 30. **Time when court held, unlawful—Principle involved.**—Whether or not the proceedings of a judicial tribunal held at a time not fixed by law are void collaterally, the decisions somewhat conflict. The majority in number hold them void, while a small minority hold otherwise. On principle I think the minority right. It does not seem to me to be a question of statutory construction or of color of right, but a question of the *de facto* organization of the tribunal. The statute may fix the time so plainly and unequivocally that all contention in regard to its meaning is out of the question. It may simply be overlooked and a term held in violation of it. Yet the tribunal is in existence. The judge and all the officers are present. They actually set the judicial wheels in motion, and have the power of the state at their command to enforce obedience. They have the reputation of being what they assume to be, and the power to enforce their assumption, and that makes a *de facto* tribunal under the best approved definition.<sup>4</sup>

**PRESUMPTIONS.**—If a judgment was rendered at a time when the court might lawfully have been in session, the presumption is in its favor.<sup>5</sup> The record of a special session of the board of county commissioners read: “The board met in special session to

1. See section 27, p. 41<sup>3</sup>.

2. Lanning v. Carpenter, 23 Barb. 1 Ld. Raym. 658.

402. See p. 51<sup>9</sup>, *infra*.

3. *In re Hinkle*, 31, 51<sup>9</sup> Kan. 712.

4. Lord Raymond in Parker v. Kett,

5. Reed v. Higgins, 86 Ind. 143, 147.

complete the unfinished business of the regular session." The presumption was held to be, collaterally, that the board was duly called to meet in special session.<sup>1</sup>

§ 31. **Time unlawful—Acts not void.**—Where the time fixed for holding an adjourned term was unlawful, being that allotted to another court in the circuit, the court said: "If a judge not legally elected or qualified may, if acting under color of authority, pronounce valid judgments, it cannot be doubted that, upon the same principle, judgments pronounced at a term not legally held, but yet held by the duly qualified judge under color of law, must be valid. The reason for the rule is stronger and clearer where the judge *de jure* holds a term of court at an improper time but under color of authority; yet the law is quite well settled that the acts of a judge who is only such *de facto* are not void."<sup>2</sup>

So where the board of county commissioners, without the notice required by statute, met in special session and made an order in a cause, the court said: "The board of commissioners passed upon their right to sit and transact business, and made an order in the case, and such order so made cannot be attacked in a collateral proceeding."<sup>3</sup> And where the court was held at a time not authorized by law (occasioned by a change in the statute), a judgment then rendered was compared to the acts of a judge *de facto*, and held not void;<sup>4</sup> and in two later cases in the same state are *dicta* to the same effect;<sup>5</sup> and where the statute required notice for a special term of court to be "posted up at the court house door ten days before its commencement," a special term held on eight days' notice was held not void, and that a judgment of conviction in a criminal case would not be reversed for that reason. The statute was said to be *directory*.<sup>6</sup>

**ORGANIZED AT WRONG TIME.**—The statute required the order constituting a court-martial to be issued on or before the first day of June, but it was not done until July. This was held not to make the acts of the court void—that the statute was *directory*.<sup>7</sup>

1. Torr v. State *ex rel.* Corcoran, 115 Ind. 188, 190 (17 N. E. R. 286).

2. Smurr v. State, 105 Ind. 125, 132 (4 N. E. R. 445).

3. Anderson v. Claman, 123 Ind. 471, 476 (24 N. E. R. 175, 177).

4. Venable v. Curd, 2 Head (39 Tenn.) 582.

5. Cheek v. Merchants' N. Bk., 9 Heisk. (56 Tenn.) 489; Brewer v. State, 6 Lea (74 Tenn.) 198, 203.

6. Blimm v. Com., 7 Bush 320, 322.

7. People v. Allen, 6 Wend. 486.

§ 32. **Time unlawful—Acts void.**—The cases holding that all the proceedings of a judicial tribunal are void when its sessions are held at a time not authorized by law, are quite numerous.<sup>1</sup> Much trouble has been caused by irregular and unauthorized special sessions. Thus, in an early and quite lengthy case in Arkansas, a person was convicted of murder at a special term of court and appealed to the supreme court. The record (presumably complete) did not show a written order of the judge for holding the special term. The court held that this omission made the special term unlawful, and that the trial was a nullity and did not put the defendant in jeopardy.<sup>2</sup> Proceedings by the court of commissioners at a special term unauthorized by law,<sup>3</sup> and an order of the county court made at a special term when the law did not authorize special terms, are void.<sup>4</sup> The law authorized the board of supervisors to continue its sittings for six days, and to call special sessions on five days' notice. The board met and adjourned to a time more than six days distant, at which time a party voluntarily appeared and had a cause heard, and a judgment was given against him. This was held to be void.<sup>5</sup>

Where the legislature changed the time of holding the court, all proceedings at a term held according to the former statute, in ignorance of the change, are void.<sup>6</sup> A conviction for contempt rendered in vacation,<sup>7</sup> and a judgment in vacation upon a stipulation of the parties that it should be rendered as the judgment of the court,<sup>8</sup> are void. An order removing an administrator was void because made at an irregular term, and an order made

1. *Grimmett v. Askew*, 48 Ark. 151 (2 S. W. R. 707); *Brumley v. State*, 20 Ark. 77; *Freeman v. Gaither*, 76 Ga. 741; *Sellars v. Cheney*, 70 Ga. 790; *dictum* in *Galusha v. Butterfield*, 3 Ill. (2 Scam.) 227; *McDonald v. Bunn*, 3 Denio 45, 49; *Hodges v. Ware*, 1 Tex. 244; *In re Millington*, 24 Kan. 214; *dicta* in *Earls v. Earls*, 27 Kan. 538, and *Packard v. Packard*, 34 Kan. 53 (7 Pac. R. 628).

2. *Dunn v. State*, 2 Ark. 229 (35 Am. Dec. 54). One cannot read this decision without feeling that the judge was anxious to show his learning.

3. *Wightman v. Karsner*, 20 Ala. 446, 451.

4. *Chaplin v. Holmes*, 27 Ark. 414, 418.

5. *Grimmett v. Askew*, 48 Ark. 151 (2 S. W. R. 707). In *Butler v. Williams*, 48 Ark. 227 (2 S. W. R. 843) a term was adjourned to a time fixed by law for another court in the circuit, but its proceedings were stopped by writ of prohibition—a direct proceeding.

6. *Dictum* in *Robinson v. Ferguson*, 78 Ill. 538, 541; *Campbell v. Chandler*, 37 Tex. 32.

7. *Ex parte Ireland*, 38 Tex. 344.

8. *Wicks v. Ludwig*, 9 Cal. 173; and *dicta* in *Norwood v. Kenfield*, 34 Cal. 329, 333, and *Bates v. Gage*, 40 id. 183, and *Domingues v. Domingues*, 4 id. 186.

at the same time appointing an administrator *de bonis non* is also void;<sup>1</sup> and where a county court had jurisdiction to render judgments at its quarterly term only, a judgment rendered at its monthly term is void.<sup>2</sup>

The statute provided that court should commence on the first Monday in June. The judge did not appear until June 22, and then, over the objection of a defendant, tried and convicted him of a crime and sentenced him to ten years' imprisonment. On appeal, this cause was reversed and the conviction said to be void.<sup>3</sup> Before this reversal, the defendant had escaped from prison and was recaptured and tried for such escape in another court, and sentenced to one year in prison, "such term of imprisonment to commence upon the *expiration* of any term or terms of imprisonment which you may now be undergoing in said state prison." At the time of the reversal of the first judgment, he had already been in prison more than one year since his second conviction. He then brought *habeas corpus*, and it was held that the first sentence was void because the court was held at a time not prescribed by law, and that time on the second sentence began to run either at the time it was pronounced or was void for uncertainty, and he was released.<sup>4</sup> By statute in Iowa, the county court "was always open;" but for business requiring notice, it held stated terms. On an administrator's petition to sell land, a notice was issued and served on the heirs requiring their appearance at a day not in term. It was held that a sale based thereon was void.<sup>5</sup>

§ 33. **Time unlawful—Sundays and holidays.**—The statutes generally prohibit the holding of court on Sunday and certain named legal holidays. The decisions uniformly hold that all judicial proceedings appearing to have been had on those days are void collaterally. Thus, judgments,<sup>6</sup> or awards,<sup>7</sup> given on Sunday, or on a legal holiday<sup>8</sup> when the statute forbids, are void. A writ of

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| <p>1. McDowell v. Jones, 58 Ala. 25, 35.<br/>         2. Withers v. Fuller, 30 Gratt. 547, 551.<br/>         3. State v. Roberts, 8 Neb. 239.<br/>         4. <i>Ex parte</i> Roberts, 9 Nev. 44.<br/>         5. Haws v. Clark, 37 Iowa 355.<br/>         6. Allen v. Godfrey, 44 N. Y. 433; <i>dictum</i> in Ecker v. First N. Bank, 64 Md. 292, 294; <i>dictum</i> in Baxter v. People, 8 Ill. (3 Gilm.) 368, 384; <i>Ex parte</i></p> | <p>White, 15 Neb. 146 (37 Am. R. 466); Chapman v. State, 5 Blackf. 111; <i>dictum</i> in Shearman v. State, 1 Tex. App. 215 (28 Am. R. 402). A Sunday judgment was void at common law. <i>Dictum</i> in Blood v. Bates, 31 Vt. 147, 151.<br/>         7. Story v. Elliott, 8 Cow. 27 (18 Am. D. 423).<br/>         8. Hemmens v. Bentley, 32 Mich. 89; <i>Re</i> Sitting of a Circuit Court. 1</p> |
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attachment was issued on Sunday by a justice of the peace, and the defendant appeared and took a change of venue to another justice, and then let a judgment go by default. It was held that the attachment was void, and nullified the whole proceeding, and made the justice a trespasser.<sup>1</sup> For the reason given in section 30, *supra*, I think all these decisions wrong on principle. I think the doubt of Mr. Justice Richmond in the New Zealand case well founded. A Maryland case<sup>2</sup> holds that a judgment dated on Sunday is not void where the entire record shows such date to be a mistake.

## PART II.

### THE JUDGE—STATUTORY AND COMMON-LAW INFIRMITIES OF

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| <p>§ 34. Principle involved in part II.</p> <p>35. Judge appointed or selected by wrong officer, body or person.</p> <p>36. Judge appointed irregularly.</p> <p>37. Judge <i>de facto</i>—Principle involved.</p> <p>38. Judge <i>de facto</i>—What constitutes.</p> <p>39. Judge <i>de facto</i>—What constitutes. Principles discussed in Kansas cases.</p> <p>40. Judge <i>de facto</i> by holding over—Old and new both acting—Another person of same name qualifying.</p> <p>41. Judge <i>de facto</i>—What does not constitute.</p> <p>42. Judge disqualified by common law or by statute.</p> <p>43. Judge disqualified by having been counsel.</p> <p>44. Judge disqualified by interest—Principle involved.</p> | <p>§ 45. Judge disqualified by interest—Acts not void.</p> <p>46. Judge disqualified by interest—Acts void.</p> <p>47. Judge disqualified by indirect interest.</p> <p>48. Judge disqualified personally.</p> <p>49. Judge disqualified by relationship—Acts not void.</p> <p>50. Judge disqualified by relationship—Acts void.</p> <p>51. Judge, oath of, irregular or wanting.</p> <p>52. Judges—One, illegal.</p> <p>53. Judge — Presumptions concerning.</p> <p>54. Judge qualified, but absent — Clerk's entries.</p> <p>55. Judges, quorum absent as shown by the record—Quorum absent, but record reciting their presence.</p> <p>56. Judge—Resignation or rotation.</p> <p>57. Judge—Wrong one acting.</p> |
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§ 34. Principle involved in part II.—One of the questions which each judicial tribunal has to decide at each step it takes is, that the proper and necessary officers, including the judge or presiding officer, are present. On this point, as on all others, the tribunal

New Zealand Ct. of Appeals, 329, 331, Richmond, J., *doubting*; *Estes v. Mitchell*, 14 Allen 156; *dictum* in *Lampe v. Manning*, 38 Wis. 673.

1. *Thomas v. Hinsdale*, 78 Ill. 259.

2. *Ecker v. First Nat. Bank*, 64 Md. 292 (1 Atl. R. 849).

may err. The court of appeals of Virginia, speaking on this question, said: "When the court is about to lay the county levy, the *first question to be determined* is, whether the justices have all been summoned, or, if they have not been summoned, whether a majority of them is present. And when the court proceeds to lay the levy, it in effect determines these questions, and decides that the justices have been summoned, or that a majority of them is present. The propriety of that decision cannot be called in question in any collateral proceeding."<sup>1</sup>

§ 35. Judge appointed or selected by wrong officer, body or person—A justice of the peace was appointed by a body who had no lawful authority to do so, but the governor commissioned him and he acted. He was held to be a justice *de facto*, and that his judgments were not void;<sup>2</sup> but where the Texas statute authorized the *parties* to select a proper person to act as judge when the regular judge was disqualified, and the record in such a case showed that the *plaintiff* selected the judge and took judgment by default, it was held void.<sup>3</sup> A Tennessee statute authorized the members of the bar, in case of the disqualification of the judge, to elect a special judge. In such a case, the counsel for the state and the prisoner agreed on a special judge, who tried the case. On appeal, the court said the entire proceeding was a nullity, and that the prisoner had never been in jeopardy.<sup>4</sup> A Massachusetts court-martial consisted of a president, judge-advocate, a marshal, and at least three members. The statute authorized the major-general to appoint a judge-advocate *pro tempore* in case of the *inability* of the judge-advocate, or in case of any legal impediment to his acting. The office of judge-advocate was vacant, and in that case the major-general had no power to appoint, but he did so, and the court was thus organized. It was held that all its acts were void.<sup>5</sup> A Maryland statute organized a judicial commission of nine persons to determine disputed boundaries, and allowed the parties, or their guardians, to select not less than three commissioners out of these nine to determine the true boundary. In such a case, the plaintiff, and one representing himself as guardian of the minor defendant, made the selection of the commissioners, who pro-

1. Ballard v. Thomas, 19 Gratt. 14, 20.

2. Mallett v. Uncle Sam, etc., Co., 1 Nev. 188, 196 (90 Am. D. 484).

3. Mitchell v. Adams, Texas Unreported Cases, 117, 120.

4. Glasgow v. State, 9 Baxter (68 Tenn.) 485.

5. Brooks v. Adams, 11 Pick. 441.

ceeded to act. Afterwards they discovered that the alleged ward was of age, and fined the guardian for his illegal conduct, but proceeded to fix the boundary. It was held that they were not properly organized, and that their proceedings were void.<sup>1</sup> The poor-debtor statute of Maine gave the debtor and creditor each the right to select one justice; and where the record showed that the debtor, over the objection of the creditor, selected both justices, and that they gave him a discharge, this was held void.<sup>2</sup> So, where the record was silent as to the selection of the justices, the creditor was allowed to show that the debtor selected both justices in order to show the discharge void.<sup>3</sup> A decree confirming an administrator's sale, made by a person acting as special judge by consent of parties, instead of by an election by the members of the bar, as provided by statute, is void.<sup>4</sup> Three justices of a town, under an old statute, appointed a justice of the peace to fill a vacancy, while under the new statute the appointment ought to have been made by the governor. It was held that he had no color of title to the office, and that all his proceedings were void.<sup>5</sup> According to the cases cited in Sections 37, 38 and 39, *infra*, I think all the judges mentioned in this section were *de facto* officers and their acts valid.

§ 36. Judge, appointed irregularly.— This section treats of the collateral validity of judgments rendered by a judge whose *mode* of appointment was irregular. On principle, it would not seem that such irregularity ought to make his judgments void; still the cases differ. Thus, a Virginia judge, being disqualified, had authority to appoint another judge by an entry on the record, but he made simply an oral appointment, and the acts of the new judge were held void.<sup>6</sup> Precisely the reverse was held in Indiana.<sup>7</sup> And where the regular judge in Indiana signed a blank for the appointment of a special judge, and afterwards a person inserted his own name in the blank and qualified and held the court, his proceedings were held not void; and it was also held that, as the record appeared regular on its face, it

1. Wickes v. Caulk, 5 Har. & J. 36, 42.

2. Barnard v. Bryant, 21 Me. 206.

3. Bunker v. Hall, 23 Me. 26.

4. Dansby v. Beard, 39 Ark. 254; Trotter v. Neal, 50 Ark. 340 (7 S. W. R. 384).

5. People v. Albertson, 8 How. Pr. 363. See p. 36<sup>b</sup>, *supra*.

6. Gresham v. Ewell, 84 Va. 784 (6 S. E. R. 700)—Lewis, P., *dissenting*.

7. Littleton v. Smith, 119 Ind. 230 (21 N. E. R. 886).

could not be shown that the blank was not filled up before being signed by the judge.<sup>1</sup>

§ 37. *Judge de facto*—Principle involved.—All the cases agree, that if the judge is a *de facto* officer his acts are not void,<sup>2</sup> yet they disagree widely as to what makes such an officer. It is a mistake to suppose that some color of right or title is necessary in order to make such a judge. A stranger enters a court room in a large city. He sees a person on the bench acting as judge. Numerous lawyers address him as such. Clerks and reporters are recording his orders, and numerous ushers and bailiffs are in attendance. If he were to attempt to examine and inquire into the qualifications, appointment or commission of the apparent judge before taking any step, the probabilities would be that some officer would take him in charge as an escaped lunatic.

§ 38. *Judge de facto*—What constitutes.—A case in South Carolina holds that no color of right or title is necessary to constitute an officer *de facto*; that a person finding one in possession of an office, exercising its functions, is not bound to inquire into his title, but may safely assume him to be what he appears to be and what the public generally regard him to be.<sup>3</sup> In a case in Massachusetts, it was said: "Third persons, from the nature of the case, cannot always investigate the right of one assuming to hold an important office, even so far as to see that he has color of title to it by virtue of some appointment or election."<sup>4</sup> This seems to overrule an earlier case where it was said: "The exact distinction between an usurper or intruder and an officer *de facto*, is this: the former has no *color of title* to the office; the latter has, by virtue of some appointment or election."<sup>5</sup> A case in Connecticut held that no color of right derived from an election or appointment was necessary in order to constitute an officer *de facto*.<sup>6</sup> The definition of an officer *de facto* given by Lord

1. *Rogers v. Beauchamp*, 102 Ind. 33 (1 N. E. R. 185).

2. *Ex parte Strahl*, 16 Iowa 369; *Turney v. Dibrell*, 3 Baxt. (62 Tenn.) 235; *People ex rel. Norfleet v. Staton*, 73 N. C. 546 (21 Am. R. 479, 481), holding that a clerk appointed by an irregular judge could not be ousted from office by the regular judge after the ouster of the irregular judge.

*Ex parte Johnson*, 15 Neb. 512 (19 N. W. R. 594), which holds that his

right to act cannot be tried on *habeas corpus* by a person convicted before him. See p. 36<sup>6</sup>, *supra*.

3. *Cromer v. Boinest*, 27 S. C. 436 (3 S. E. R. 849).

4. *Petersilea v. Stone*, 119 Mass. 465 (20 Am. R. 335).

5. *Fitchburg R. R. Co. v. Grand Junction R. R. and D. Co.*, 1 Allen 552, 557.

6. *State v. Carroll*, 38 Conn. 449 (9 Am. R. 409).

Raymond was that "he is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law."<sup>1</sup> A judge appointed by the governor without lawful authority to do so;<sup>2</sup> a justice of the peace elected under a void statute,<sup>3</sup> or by the voters of a village and town when he was only a village officer;<sup>4</sup> and a justice who actually and intentionally changed his residence to another county, which disqualified him, but who pretended to retain his old residence and acted officially,<sup>5</sup> are officers *de facto*, and their acts are valid. So also a justice, disqualified for the office by reason of being postmaster,<sup>6</sup> or holding another office;<sup>7</sup> or a judge disqualified for the same reason,<sup>8</sup> are officers *de facto*, and the question of their competency to act cannot be raised in any proceeding before them.<sup>9</sup> A Wisconsin statute provided for a new court, and for the election of a judge on the first Tuesday in April, 1889, "to hold his office for the term of four years from the first Monday in January next succeeding his election," and also that when a vacancy should happen the governor should appoint a judge to fill it. A person was duly elected judge at the day fixed, and two days thereafter the governor appointed him to fill the vacancy supposed to exist until his term commenced in January, and he organized the court and convicted a person. The court held that the office was in existence, and that he was judge *de facto*, and his acts not void.<sup>10</sup> The acts of a justice of the peace appointed by the board of county commissioners in Indiana, are not void because no legal vacancy existed.<sup>11</sup> So the erroneous appointment of a special judge to try a cause, is not

1. Parker v. Kett, 1 Ld. Raymond 658.

2. State v. Bloom, 17 Wis. 521; *contra*, People v. Carter, 29 Barb. 208, 211.

3. Town of Lewiston v. Proctor, 23 Ill. 533 (483).

4. Baker v. State, 69 Wis. 32 (33 N. W. R. 52).

5. Lexington and Harrodsburgh Turnpike Co. v. McMurtry, 6 B. Mon. 214, 218.

6. McGregor v. Balch, 14 Vt. 428, 436.

7. Mayor, etc., v. Thompson, 80

Tenn. (12 Lea) 344, 347; *dictum* in Com. v. Kirby, 2 Cush. 577, 581.

8. Com. v. Tabor, 123 Mass. 253.

9. McGregor v. Balch, 14 Vt. 428, 436; Mayor, etc., v. Thompson, 80 Tenn. (12 Lea) 344, 347; Beard v. Cameron, 3 Murphy, 181. This case decides that he has to assume to be the lawful judge—the point in dispute—before he can hear the plea.

10. *In re* Burke, 76 Wis. 357 (45 N. W. R. 24); *In re* Manning, 76 Wis. 365 (45 N. W. R. 26); Baker v. State, — Wis. — (50 N. W. R. 518).

11. Baker v. Wambaugh, 99 Ind. 312, 316.

void.<sup>1</sup> And where a special judge was appointed, generally, to hold a term, and by virtue thereof assumed to act at the next term, such action is not void;<sup>2</sup> and where the statute authorized the judge when "unable to attend and preside" to appoint a special judge, the acts of such special judge are not void because the regular judge was able to attend and preside.<sup>3</sup> The *de facto* character of the officer is not impaired because he was appointed by virtue of a void statute. Thus, a judge appointed by the governor,<sup>4</sup> or a city council,<sup>5</sup> or transferred to another district;<sup>6</sup> or a probate clerk,<sup>7</sup> or district attorney,<sup>8</sup> appointed by authority of an unconstitutional statute; and county officers elected in a new county before the law organizing it could take effect,<sup>9</sup> are all officers *de facto*.

§ 39. Judge *de facto*—What constitutes. Principles discussed in **Kansas cases**.—An Alabama statute provided that, "When any judge of the circuit court is incompetent to try any case standing for trial, by reason of relationship to parties, or of having been engaged as counsel in the cause, or for any other reason, the parties to the suit must, when the same is reached for trial, nominate some attorney present in the court who must preside as judge for the trial of such cause during that term; and if the parties fail promptly to make such selection, the clerk of the court must nominate the attorney who shall preside over and try the cause at that term." The transcript of an Alabama judgment sued upon in Kansas recited: "The presiding judge, being incompetent to try this cause, and the parties failing to agree upon any one to preside in his place, John Gill Shorter was selected by the clerk to try the cause." It then showed a judgment by default. The defendant in Kansas contended that the judgment failed to show any specific disqualification of the regular judge or that Shorter was an attorney, or present in court. The court said: "Suppose that the regular judge of the circuit court of Alabama was entirely competent in every respect to try the cause, and suppose that John Gill Shorter was not an

1. Powell v. Powell, 104 Ind. 18, 29 (3 N. E. R. 639).

2. State *ex rel.* Cropper v. Murdock, 86 Ind. 124, 129.

3. *Id.* 124, 127. See p. 52<sup>1</sup>, *infra*.

4. Taylor v. Skrine, 3 Brev. 516 (2 Treadway 696).

5. People v. White, 24 Wend. 520.

6. Clark v. Com., 29 Pa. St. 129.

7. Cocke v. Halsey, 16 Peters 71.

8. Com. v. McCombs, 56 Pa. St. 436.

9. Carleton v. People, 10 Mich. 250.

The last six cases are all cited and commented upon in State v. Carroll, 38 Conn. 449, 474.

attorney present in court, then is the judgment void? Is it a nullity, when attacked collaterally, as in this case? We think not. The laws of Alabama, as admitted by the parties, provide for such an officer as a special judge *pro tem.* John Gill Shorter was regularly selected and regularly installed as such officer for the trial of the cause. He took possession and control of the office for that purpose. He was duly recognized by all the officers of the court, the parties present in court, and others, as such officer. A record of his proceedings was regularly kept and preserved as in other causes, and such record was, at the time it was made, and still is, recognized as a part of the records of the court. . . . John Gill Shorter was, in fact, beyond all doubt, a special judge *de facto* of the court. And as such judge *de facto*, we do not think his proceedings can be attacked in this collateral manner.”<sup>1</sup>

In another Kansas case the record showed, on error, that the regular judge was present and not disqualified to hear the cause, but that the parties by consent tried it before a judge *pro tempore*. The court said: “But suppose the regular judge were present and competent to hear and determine the case, still he did not do it, but allowed a judge *pro tem.* to do so. The district court was in session. No question is raised as to the jurisdiction of the court over the subject-matter of the action and of the parties to the suit. The case came regularly on for trial; a judge *pro tem.* tried it; the constitution and laws recognize such an officer; and whether the judge *pro tem.* was regularly and legally filling the office or not, still he did fill the office, and was therefore an officer *de facto*; and his acts are therefore not void; but, like the acts and proceedings of all other officers *de facto*, are valid and binding. Of course his proceedings could not be attacked collaterally.”<sup>2</sup>

**§ 40. Judge de facto by holding over—Old and new both acting—Another person of same name qualifying.**—All the cases agree that if a judge or justice holds over after the expiration of his term or commission,<sup>3</sup> or after his successor is elected and qualified,<sup>4</sup> his acts are not void. Where the statute authorized the county court to appoint three justices of the peace to grant injunctions

1. Hunter's Adm'r v. Ferguson's Adm'r, 13 Kan. 462, 470.

2. Higby v. Ayres, 14 Kan. 331, 337. See p. 51<sup>8</sup>, *supra*.

3. Read v. City of Buffalo, 4 Abb. App. Dec. 22.

4. Hamlin v. Kassafer, 15 Or. 456 (15 Pac. R. 778); Carli v. Rhener, 27 Minn. 292 (7 N. W. R. 139).



and to hold office for one year, an injunction granted by them after the end of the year, is not void.<sup>1</sup>

One Falls was elected justice of the peace for two years and until his successor should be duly commissioned and qualified. At the expiration of two years, there having been no election, the governor commissioned one Keller to act as justice, and he qualified and began to act. Afterwards a person was convicted and imprisoned by Falls, and brought *habeas corpus* and attempted to show that Falls had no authority, but it was held that he could not do so. The court said: "It is sufficient that the prisoner was committed and is held by the authority of one who was duly elected, commissioned and qualified, and who has continued unmolested, under color of office, at least, in the discharge of the functions of a committing magistrate, presiding over a tribunal of recognized legal existence and competency."<sup>2</sup>

PERSON OF SAME NAME.—William Barnes was a justice of the peace, but died shortly before his term expired. In ignorance of his death, the governor and council reappointed him and sent his commission to him by mail. This commission was received by another William Barnes, who, in good faith, qualified and acted. It was held that his acts were not void, and that a cause tried before him could not be dismissed on appeal.<sup>3</sup>

A judge, by agreement, made a decision in a chancery cause in vacation, and expressed it to the clerk before, but it did not reach him until after the judge's term had expired;<sup>4</sup> and in another case the judge made an order in writing and delivered it to the attorney, but it was not filed with the clerk until after the judge's term had expired.<sup>5</sup> These decisions were held valid collaterally. A federal judge of one district was appointed to hold court in another district during the sickness of the judge. He held the court until the judge died, and continued to do so afterwards; but he was held to be a judge *de facto*, and his acts valid.<sup>6</sup> A successor to a justice of the peace was duly elected and qualified and made demand for the books and papers of his office, but the former justice refused to comply and did not do so until he was ousted by *quo warranto*. It was decided that judgments

1. *Stevenson v. Miller*, 2 Litt. 306, 311.

2. *State ex rel. Williams v. Pertsdorf*, 33 La. Ann. 1411.

3. *Coolidge v. Brigham*, 1 Allen 333.

4. *Babcock v. Wolf*, 70 Iowa 676 (28 N. W. R. 490).

5. *Guthrie v. Guthrie*, 71 Iowa 744 (30 N. W. R. 779).

6. *Ball v. United States*, 140 U. S. 118, 129 (11 S. C. R. 761).

rendered by him while he wrongfully held the office were not void.<sup>1</sup>

§ 41. **Judge de facto—What does not constitute.**—In a Kansas case it was held that the acts of a justice in a township that had been abolished by implication were void because there could not be a *de facto* office.<sup>2</sup> Why there could not, the court did not point out. And where a member of the bar by agreement of the parties, acted as judge, no statute so authorizing, he was held not to be a judge *de facto*, and for that reason a writ of error from his judgment was dismissed.<sup>3</sup> So where the statute authorizes a special judge to hold court at a regular term, but not at a special term, a special term held by him is a nullity;<sup>4</sup> and where the statute authorized the members of the bar to elect a special judge to preside until the regular judge appeared, it was held that a trial before a special judge, by consent, after the appearance of the regular judge was void.<sup>5</sup> A person was elected justice of the peace for two years to begin the first *Monday* of January. On the first *day* of January, not being Monday, the old justice delivered his docket and papers to the new one, who filed his bond but took no oath of office, and proceeded to act judicially. It was held that he was not a justice *de facto*, and that his acts were void; that no one had any right to believe him to be a justice.<sup>6</sup> This case seems to be wrong. He possessed all the outward indicia of power which no one was questioning. A statute of New York consolidated certain towns with a city and provided that the terms of the town and city officers should expire on a day named. After that time a justice within the city resigned and the governor appointed a person to fill the vacancy. This was held to be illegal because the justice was a county and not a city officer, and that the appointee was not an officer *de facto*, and that his acts were void.<sup>7</sup> All the cases in this section are contrary to those cited in Sections 38, 39 and 40, *supra*, and seem to me to be wrong on principle.

§ 42. **Judge disqualified by common law or by statute.**—Some cases hold that while a common-law disqualification of the judge only renders his decision erroneous, a statutory disqualification renders

1. Morton v. Lee, 28 Kan. 286.

2. *In re* Hinkle, 31 Kan. 712, 715.

3. Hoagland v. Creed, 81 Ill. 506;  
Andrews v. Beck, 23 Tex. 455, holds  
such a judgment void.

4. Brown v. Fleming, 3 Ark. 284.

5. Hyllis v. State, 45 Ark. 478.

6. Dabney v. Hudson, — Miss. —  
(8 S. R. 545).

7. People v. Carter, 29 Barb. 208.

it void. But no reason has ever been assigned for this distinction. The mandate of the common law is just as imperative to the courts as the mandate of the statute. Each is to be obeyed implicitly, and each bears with equal weight on the conscience of the court. They each make a part of the law of the land which the court is to enforce. Why a different consequence should flow from a disregard of the one than from a disregard of the other, is difficult to discover. The cases directly holding this distinction,<sup>1</sup> and directly holding to the contrary,<sup>2</sup> are cited in the foot-note.

§ 43. **Judge disqualified by having been counsel.**—As to whether or not the acts of a judge in a cause wherein he has been counsel, are void, the decisions differ. In Texas, where both the constitution and the statute, it seems, provide that “No judge shall sit where he shall have been counsel in the case,” such judgments are held void. Thus, a wife brought a suit for divorce for cruel treatment. An attorney filed an answer for the husband, and she dismissed her case. After that, the attorney for the husband became the judge of the court. The husband then brought a suit for divorce against the wife for abandonment, and recovered a judgment by default before his former attorney as judge. It was held that the two causes were the same because the abandonment charged by the husband would have been justified by the cruel treatment, and that the decree was void.<sup>3</sup> But where the judge had been counsel for other plaintiffs in another cause against defendant arising out of the same transaction, he was not disqualified as having “been counsel in the cause;”<sup>4</sup> and where an attorney had been employed to collect a note and brought a suit and dismissed it, and then became judge of the county court where suit was brought on the same note, and judgment rendered, this was held not void because the two causes were not the same.<sup>5</sup> A decree of a surrogate in New York in a matter wherein he had been counsel was held void.<sup>6</sup> A statute of Maine

1. *Frevert v. Swift*, 19 Nev. 363 (11 Pac. R. 273); *Newcome v. Light*, 58 Tex. 141 (44 Am. R. 604); *Fechheimer v. Washington*, 77 Ind. 366; *Heydenfeldt v. Towns*, 27 Ala. 423 (*overruled*, 79 Ala. 505).

2. *Floyd County v. Cheney*, 57 Iowa 160 (10 N. W. R. 324); *Koger v. Frank-*

*lin*, 79 Ala. 505, 507; *Plowman v. Henderson*, 59 Ala. 559.

3. *Newcome v. Light*, 58 Tex. 141 (44 Am. R. 604).

4. *King v. Sapp*, 66 Tex. 519 (2 S. W. R. 573).

5. *McMillan v. Nichols*, 62 Ga. 36.

6. *Wigand v. Dejonge*, 8 Abb. New Cas. 260, 273.

required justices to be "disinterested." One of the justices before whom a poor-debtor's oath was taken and discharge granted, had acted as his counsel in the matter, but this was held not to make the discharge void;<sup>1</sup> and where the judge of probate had counseled a person in reference to an estate, and then appointed him administrator, no statute forbidding, his appointment was held not void.<sup>2</sup> So where an Iowa statute forbade a judge to act in a case where he had been counsel, his action was decided not to be void.<sup>3</sup> It seems to me that in all such cases the judge is a *de facto* officer and that his decisions are not void. The cases holding to the contrary also violate the rule that a record must be tried solely by inspection.

§ 44. Judge disqualified by interest—Principle involved.—For a judge to decide a cause in which he has an interest, is wrong; and if he is conscious of that fact, his action is akin to corruption. But that fact does not make his decision void; and where it does not appear on the record, the question would not seem to be debatable, as that is an attempt to impeach a record fair on its face by evidence *aliunde*. And yet on all these points the decisions differ.

§ 45. Judge disqualified by interest—Acts not void.—In a late English case it is said: "As a rule the judgment of an interested judge is voidable, and liable to be set aside by prohibition, error, or appeal, as the case may be; but it is not absolutely void; and persons acting under the authority of such a judgment before it is set aside by competent authority would not be liable to be treated as trespassers."<sup>4</sup> A reference made to an auditor who was a creditor was erroneous, but it does not make the decree void;<sup>5</sup> nor is the judgment of a justice in a criminal case void because he contributed to the expense of procuring a witness against the defendant.<sup>6</sup> A court-martial was composed of ten officers. One of them acted as witness, prosecutor and judge, but that did not

1. *Lovering v. Lamson*, 50 Me. 334. v. *Grand Junction Canal Co.*, 16 Eng. L. & Eq. 63, 81 (3 H. L. Cas. 759; 17

2. *Stearns v. Wright*, 51 N. H. 600, 608, 610. Jur. 73), holds that a decree pronounced by an interested judge is voidable but

3. *Floyd County v. Cheney*, 57 Iowa 160 (10 N. W. R. 324). not void.

4. *Phillips v. Eyre*, L. R., 6 Q. B. 1, 22; *approved* in *Fowler v. Brooks*, 5. *Hartshorne v. Johnson*, 7 N. J. L. (2 Halst.) 108.

64 N. H. 423 (13 Atl. R. 417); *Dimes* 6. *Foreman v. Hunter*, 59 Iowa 550 (13 N. W. R. 659).

make the sentence void.<sup>1</sup> The county court was composed of three justices, and it took all three to make a quorum to do business. The court appointed one of the justices guardian, and he gave bond and qualified. In a suit on the bond, the surety was held; and in reference to holding judgments void because the judge was disqualified, the court said: "But in all the cases cited to illustrate this proposition, which I have been able to find, the question has occurred between the original parties to the judgment, or their privies. Obviously, the same reasons would not apply, or, at least, would not apply with equal force, when innocent third persons had acquired rights under the judgment."<sup>2</sup> The orphans' court was held by two judges, and the court appointed one of them guardian. In a suit on his bond, the court said: "And, secondly, with respect to the appointment of Owen Dorsey as the guardian, he being present and sitting as one of the judges of the court, supposing it to be so, yet being the act of a court of competent jurisdiction, whether that act was correct and regular or not, still it was the judgment, the act, of that court, the correctness or regularity of which it is not for this court, collaterally, to inquire into."<sup>3</sup> Where the statute authorized confessions of judgment to be entered by the clerk, a confession entered by him against himself is not void;<sup>4</sup> and where the county court, consisting of three judges, approved an administrator's sale in which one of the judges was interested, it was presumed that he was absent.<sup>5</sup>

**§ 46. Judge disqualified by interest—Acts void.**—The plaintiff's attorney drew up and signed the complaint and filed it before a justice of the peace from whom the defendant took a change of venue. The plaintiff's attorney also being a justice of the peace, the first justice sent the case to him for trial. The defendant appeared specially and pleaded those matters in abatement to his jurisdiction, which plea he overruled, whereupon the defendant withdrew and a judgment was rendered for the plaintiff which was held void.<sup>6</sup> And where the statute forbade a judge

1. *Keyes v. United States*, 109 U. S. 336 (3 S. C. R. 202).

2. *State ex rel. Barnes v. Lewis*, 73 N. C. 138.

3. *Fridge v. State*, 3 Gill & J. 103 (20 Am. D. 473, 467).

4. *Smith v. Mayo*, 83 Va. 910 (5 S. E. R. 276); *accord* where the confes-

sion was by himself as administrator. *Davidson v. Thornton*, 7 Pa. St. 128.

5. *Price v. Springfield Real Estate Association*, 101 Mo. 107 (14 S. W. R. 57).

6. *Chicago, etc., Ry. Co. v. Summers*, 113 Ind. 10 (14 N. E. R. 733). There is no statute in Indiana forbid-

to sit where he was interested, a search warrant issued by him for his own property upon the affidavit of another;<sup>1</sup> a confession on a note before a justice who was the real owner, although in the name of another;<sup>2</sup> a judgment entered by agreement in open court on a claim wherein the judge had been counsel and was to receive half the judgment as a fee;<sup>3</sup> and an order made by a probate judge in an estate wherein he was a creditor,<sup>4</sup> were all held void. A justice of the peace in Rhode Island rendered a judgment in favor of another upon a promissory note, by default, after due service. The defendant sued the justice in Connecticut for false imprisonment, and was allowed to recover upon satisfying a jury that his record was false and that he was the real owner of the note.<sup>5</sup> So a justice who had rendered a judgment in Vermont in a cause wherein he was interested, was held liable in trespass in New Hampshire.<sup>6</sup> And where the court of sessions was composed of the county judge and two justices, and the record showed that one of the justices was interested in an order made that a person should support his pauper mother at his own house, this was held void.<sup>7</sup> During the pendency of proceedings to contest a will in New York, the effects of the decedent, by agreement, were paid over to the surrogate to await the further order of the court. The surrogate having probated the will and died, his successor held that the payment to him of the effects gave him a pecuniary interest in the cause, and made his decree void, and this was affirmed by the supreme court;<sup>8</sup> but both decisions were reversed in the court of appeals, which held that he was a mere custodian having no interest.<sup>9</sup> In the good old times they had a more summary way of dealing with judges who sat in causes where they were interested. The king's bench attached, fined and imprisoned them.<sup>10</sup> A foreign judgment, rendered in their

ding an interested person from sitting as judge.

1. *Jordan v. Henry*, 22 Minn. 245.

2. *Bates v. Thompson*, 2 D. Chip. (Vt.) 96, 99.

3. *Chambers v. Hodges*, 23 Tex. 104, 112.

4. *Burks v. Bennett*, 62 Tex. 277, 279; *Bedell v. Bailey*, 58 N. H. 62.

5. *Dyer v. Smith*, 12 Conn. 384, 391.

6. *Russell v. Perry*, 14 N. H. 152, 155.

7. *Baldwin v. McArthur*, 17 Barb.

414, 421; *dictum* in *Converse v. McArthur*, 17 Barb. 410, 411; *The case of State ex rel. Claunch v. Castleberry*, 23 Ala. 85, holds that a judgment rendered by an interested judge is void; but this case is overruled in *Koger v. Franklin*, 79 Ala. 505.

8. 27 Hun 78.

9. *Matter of Probate of Hancock's Will*, 91 N. Y. 284.

10. *Wright v. Crump*, 2 Ld. Raym. 766; *Anon.* 1 Salk. 396.

own favor by judges interested in the cause of action, as shown by the record, was said to have "no effect" in England.<sup>1</sup> So where the record showed that the judges were unduly influenced, as where the selectmen in laying out a highway were governed by the instructions of the town and not by their own judgment, their decision was held void collaterally, in an indictment against the town for non-repair.<sup>2</sup> For the reasons given in Sections 42 and 43, *supra*, I think all the cases in this section are wrong.

§ 47. **Judge disqualified by indirect interest.**—If the direct pecuniary interest of the judge does not make his decision void, *a fortiori* his indirect interest ought not to do so. But on this point the cases differ. A town in which a justice resided was summoned before him as trustee, and it was held that his interest in the case as one of the inhabitants of the town made his action in taking a recognizance void;<sup>3</sup> and a judgment rendered by him in such a case was held to make him a trespasser.<sup>4</sup> And where the judge of probate had a claim against an estate, it was held that his appointment of an administrator was void, and that the question could be raised on appeal from partition proceedings.<sup>5</sup> So an administrator, when sued for a *devastavit*, was allowed to show, by way of defense, that the judge who appointed him was a creditor of the estate;<sup>6</sup> and a discharge granted to an insolvent by a commissioner, who was a creditor, was also held void.<sup>7</sup> So, where the statute prohibited a town from suing before a justice residing therein, it was decided that a judgment in such a suit was void—comparing it to a suit for slander over which he had no jurisdiction.<sup>8</sup> It seems quite plain that the only defect was the interest of the justice. But where one of the justices of the court of sessions was interested in locating a line between two towns, the judgment of location was held valid collaterally.<sup>9</sup> So, where

1. Price v. Dewhurst, 8 Sim. 279, (32 Am. D. 248); *dictum* in Sigourney v. Sibley, 22 Pick. 507 (33 Am. D. 305).

2. State v. Newmarket, 20 N. H. 519, 522, 762), a direct attack on appeal.

3. Clark v. Lamb, 2 Allen 396.

6. Coffin v. Cottle, 9 Pick. 287; *dictum* in Gay v. Minot, 3 Cush. 352, a direct attack.

4. Hush v. Sherman, 2 Allen 596; *accord*, where one-half the judgment went to the town. Pearce v. Atwood,

7. Blanchard v. Young, 11 Cush. 341, 345.

13 Mass. 324, 340; *contra*, State v. Severance, — Me. — (4 Atl. R. 560).

8. Heagle v. Wheeland, 64 Ill. 423, 424.

9. Gorrill v. Whittier, 3 N. H. 265,

5. Sigourney v. Sibley, 21 Pick. 101 269.



a person arrested before a justice in a bastardy proceeding knew that the justice was disqualified by reason of being a tax-payer of the town, but made no objection until the cause reached the common pleas, his objection came too late.<sup>1</sup>

§ 48. **Judge disqualified personally.**—A bachelor of law was appointed commissary to the bishop of London, and, as such, granted letters of administration. It was held that these letters were not void, because no one but a doctor of law could lawfully be appointed as commissary.<sup>2</sup> So the fact that a judge is ineligible as a foreigner,<sup>3</sup> or is of insufficient age<sup>4</sup>—being under thirty years—does not make his judgments void.

**OCCUPANT OF OFFICE.**—The statute forbade any person to act as justice in the trial of any civil action in which the writ or declaration had been filled up by any person occupying the same office with him, unless the defendant waived such disqualification in writing. In such a case, the defendant, knowing the facts, went to trial without objection and judgment was entered against him. This was held void.<sup>5</sup>

**INFANT JUSTICE.**—An affidavit for surety of the peace was made before a justice of the peace; a warrant was issued and the accused was arrested and brought before another justice, and examined and imprisoned for failure to give a recognizance. He brought *habeas corpus*, and then showed that the justice before whom the affidavit was made was an infant, and the court held that that made the affidavit illegal and the trial and judgment of the other justice void, and released him.<sup>6</sup> It is probable that, under the New Hampshire statute, this was not regarded as a collateral attack on the justice's proceedings; but, conceding that it was not, I do not see why the infant was not a justice *de facto*, and why his acts were not valid and binding.

§ 49. **Judge disqualified by relationship—Acts not void.**—The statutes almost universally declare that "no judge shall sit in any case where he is related to any party" within certain degrees, or use other language of like import; and as to whether or not a judgment rendered in violation of those statutes is void, the cases

1. Warren v. Glynn, 37 N. H. 340, 342.

2. Pratt v. Stocke, Cro. Eliz. (36 Eliz.) 315.

3. Fancher v. Stearns, 61 Vt. 616 (18 Atl. R. 455).

4. Blackburn v. State, 3 Head (40 Tenn.) 689.

5. Keeler v. Stead, 56 Conn. 501 (16 Atl. R. 552).

6. Golding's Petition, 57 N. H. 146 (24 Am. R. 66).

differ. My opinion is, that they are not void. That such a judgment is not void where the relationship does not appear of record, was held in an able opinion by the supreme court of Tennessee. The case was this: The constitution provided that no judge should preside on the trial of any cause wherein he was related to either of the parties within certain degrees; but a justice of the peace did render a judgment in such a cause. On *certiorari* to quash an execution on the ground that the judgment was void, the court said: "A void judgment is, in legal effect, no judgment. It neither binds nor bars any one. All acts performed under it, and all claims derived from it, are void. Parties attempting to enforce it are trespassers. . . . No action is required to revoke it; it is null in itself. The nullity ought, therefore, to appear on its face. If it be necessary to resort to evidence *aliunde* to impeach it, the judgment may more properly be said to be voidable, not void."<sup>1</sup> So, it was held that the appointment by a probate judge of his son-in-law,<sup>2</sup> or his father-in-law,<sup>3</sup> or his son,<sup>4</sup> as administrator was not void. And the action of a related judge in filing and verifying a claim against an estate,<sup>5</sup> or in approving an administrator's final account,<sup>6</sup> or in making an order to sell land,<sup>7</sup> is not void. In the last case the court said: "If the parties submit to the action of the judge at the time, the incompetency is considered waived, and not available on a collateral attack on the judgment."

§ 50. Judge disqualified by relationship — Acts void. — The cases holding the acts of a related judge void are numerous;<sup>8</sup> but, in my opinion, they are wrong on principle. The court of appeals

1. *Holmes v. Eason*, 8 Lea (76 Tenn.) 754, 760, *overruling* *Pierce v. Bowers*, 8 Baxter 353, and *Smith v. Pearce*, 6 Baxter 72; *accord* *Eastwood v. Buel*, 1 Ind. 434; *Rogers v. Felcher*, 77 Ga. 46; *Fowler v. Brooks*, 64 N. H. 423 (13 Atl. R. 417).

2. *Koger v. Franklin*, 79 Ala. 505, 506, *overruling* *State v. Castleberry*, 23 Ala. 85, and *Wilson v. Wilson*, 36 Ala. 665.

3. *Hine v. Hussey*, 45 Ala. 496.

4. *Plowman v. Henderson*, 59 Ala. 559.

5. *Hayes v. Collier*, 47 Ala. 726.

6. *Trawick v. Trawick*, 67 Ala. 271;

the Alabama statute authorized a disqualified judge to sit by consent.

7. *Posey v. Eaton*, 9 Lea (77 Tenn.) 500, 503.

8. *Dawson v. Wells*, 3 Ind. 398, relying on *Hill v. Wait*, 5 Vt. 124. *Ware v. Jackson*, 24 Me. 166; *Hall v. Thayer*, 105 Mass. 219, 224 (7 Am. R. 513); *Sanborn v. Fellows*, 22 N. H. (2 Foster) 473, 490—being the decision of a related fence-viewer who acted judicially; *Schoonmaker v. Clearwater*, 41 Barb. 200; *Chambers v. Clearwater*, 1 Abb. App. Dec. 341, 344 (1 Keyes 310), *affirming* last case.

of New York held such a judgment void, even though the parties tried the case on the merits, with knowledge and without objection;<sup>1</sup> but the supreme court of New Hampshire said, in such a case, that the objection would be waived.<sup>2</sup> So, where the record showed the relationship, it was held void in California;<sup>3</sup> and where the judge was a nephew by marriage to the plaintiff, the supreme court of Michigan said: "This statute, mandatory in its terms, voices the universal sentiment of mankind excluding judges from sitting in cases where they are parties or are interested. . . . No judge can sit in his own cause. Should he do so a decree rendered by him *in his own favor* would be utterly void. If he cannot sit, his seat in a judicial sense is vacant, and his acts are without judicial sanction."<sup>4</sup> The New York cases go to extreme lengths. They hold that all judgments are void where the judge is related to the real party in interest, although not to any party of record. The principle they establish is this: A's land has once been sold at a judicial sale, and the purchaser has been put in possession. Years afterwards B, being about to purchase it, examines the record and finds the judgment to be founded on a note payable to bearer, and rendered after due personal service, by a judge in nowise related to the plaintiff or defendant, and the whole record fair on its face. He then purchases and takes possession. Now A brings ejectment against him, and is allowed to recover on showing that the plaintiff in the action did not, but that some relative of the judge did, own the note. If there is any such rule in the law governing collateral attack on judgments, I am at a loss to know what it is. Thus, where a justice was related to the real though not nominal plaintiff;<sup>5</sup> and where one of the assignors of a claim was related to the justice, though not a party to the record,<sup>6</sup> the judgments were held void. And where an overseer of the poor, in his official capacity, commenced bastardy proceedings before his son-in-law, who tried and committed the defendant, it was held that the overseer was a party, the judgment void, and the justice a trespasser;<sup>7</sup> but where the judge was related to the stockholders of a

1. Chambers v. Clearwater, 1 Abb. App. Dec. 341, 344 (1 Keyes 310).

2. Gear v. Smith, 9 N. H. 63, 66.

3. People v. José Ramon de la Guerra, 27 Cal. 73, 77.

4. Horton v. Howard, 79 Mich. 642 (44 N. W. R. 1112).

5. Foot v. Morgan, 1 Hill 654.

6. Birdsall v. Fuller, 11 Hun 204.

7. Rivenburgh v. Henness, 4 Lans. 208.

corporation, and appointed a receiver for it, and then assessed the stockholders, such assessment was held erroneous, but not void.<sup>1</sup> The action of a probate judge in Massachusetts in appointing his wife's brother administrator of an estate in which her father was principal creditor, was held void, and no bar to a second petition for an appointment.<sup>2</sup>

§ 51. **Judge, oath of, irregular or wanting.**—Nearly all the cases agree that if the judge is competent and lawfully commissioned, his failure to qualify or take the oath prescribed by law, or to take it in the manner provided by law, does not make his judgments void. Thus, in an early English case, it was held that the failure of a judge of an inferior court to take the oath of office did not make his judgments void.<sup>3</sup> So the failure of a justice of the peace,<sup>4</sup> or a special judge,<sup>5</sup> or commissioners appointed to assess damages for the opening of a new street,<sup>6</sup> to take the oath of office; and the taking of such oath by arbitrators before a notary public instead of a justice of the peace, as prescribed by statute;<sup>7</sup> or the failure of a judge to take any oath of office;<sup>8</sup> or the taking of an oath to support the "constitution of the Confederate States,"<sup>9</sup> does not make the proceedings void. A village appointed commissioners to assess benefits and damages for improving a street. The statute required them, before entering upon their duties, to take an oath "faithfully and impartially to discharge the duties" of the office, while the oath each took was to perform his duties "to the best of his ability." For this defect the assessment was held void, and its collection enjoined.<sup>10</sup> This case refers to five cases as authorities, but they were all direct proceedings by appeal or *certiorari*, and are not authority in a collateral proceeding. This case is in conflict

1. *Dictum* in *Matter of Dodge and Stevenson Mfg. Co.*, 14 Hun 440.

2. *Hall v. Thayer*, 105 Mass. 219 (7 Am. R. 513).

3. *Denning v. Norris*, 2 Lev. 243. Holt, Ch. J., in speaking of this case in *Andrews v. Linton*, 2 Ld. Raym. 884, 885, said that he was counsel, and that the court there held that, since the defendant had admitted the person presiding to be a judge by a plea to the action, he was estopped afterwards to say that he was not a judge. And in the latter case it was held that it could

not be assigned as error that the one who sat was not judge. See § 24<sup>3</sup>, *supra*.

4. *Weeks v. Ellis*, 2 Barb. 320, 324.

5. *Grant v. Holmes*, 75 Mo. 109; *Littleton v. Smith*, 119 Ind. 230 (21 N. E. R. 886).

6. *Caskey v. City of Greensburgh*, 78 Ind. 233, 238.

7. *Weir v. West*, 27 Kan. 650, 653.

8. *Pepin v. Lachenmeyer*, 45 N. Y. 27, 32.

9. *Id.*

10. *Merritt v. Village of Port Chester*, 71 N. Y. 309, 312.

with the Indiana case,<sup>1</sup> above cited, and I do not think it is sound.

§ 52. **Judges—One, illegal.**—In bastardy proceedings the New York statute required the justice issuing the warrant to associate with him another justice for the trial, and authorized them to adjourn from time to time. In such a case the magistrate who issued the warrant called in another justice, and an adjournment was had. On the adjourned day the associate justice could not attend, and the original justice called in a new justice to aid him. Before this court the defendant refused to appear, and his bond was forfeited and suit brought thereon. It was held that the suit could not be maintained because of the illegal organization of the court.<sup>2</sup>

**CONSENT OF PARTIES.**—A poor debtor's examination was begun before two justices and adjourned before completion. On the adjourned day, one of the justices was absent, and by consent, another justice was called in to complete the examination. This was held void because the parties could not give the new justice jurisdiction by consent.<sup>3</sup> So where the parties agreed that a justice from another precinct should come and sit with the local justice and try the case, which was done, and the judgment duly entered on the docket of the local justice, who signed his own name thereto as the judgment of the other justice, this was held void.<sup>4</sup> Where a court to try criminal cases was composed of three justices of the peace, or, in certain specified cases, of two justices and the judge of the county court, it was held that the court, when composed of the judge of the county court and two justices, where the law required it to be held by three justices, had no jurisdiction to proceed; and that a witness was not liable to a prosecution for perjury for corrupt swearing at the trial.<sup>5</sup> So where the statute required the court for the discharge of a poor debtor to be organized by two justices of "the quorum," it was held that a discharge granted by two justices, only one of whom was of "the quorum," was void.<sup>6</sup> And where a court was composed of three justices of the peace, but was held by two justices of the inferior court and one justice

1. *Caskey v. City of Greensburgh*, 78 Ind. 233, 238.

2. *People v. Boardman*, 24 How. Pr. 512.

3. *Cushing v. Briggs*, 2 R. I. 139, 143.

4. *Foster v. McAdams*, 9 Tex. 542.

5. *People v. Tracy*, 9 Wend. 265.

6. *Williams v. Turner*, 19 Me. 454.

of the peace, all its acts were held void.<sup>1</sup> I think all these cases are wrong. In the first, it was a question of law for the court to decide as to what should be done when the justice failed to appear; and in the others, the illegal justice made a court *de facto*.

§ 53. Judge—Presumptions concerning.—All presumptions, in the absence of anything to the contrary, are in favor of the authority of a judge *pro tempore*;<sup>2</sup> and where the record in a criminal case showed that the judge of another court presided, it was presumed, collaterally, that he was duly appointed;<sup>3</sup> and where the circuit judge sat in the probate court, the record being silent, the same presumption was indulged.<sup>4</sup> One person was judge both of the county court and probate court. The probate court alone had power to probate wills, issue letters of administration, etc. Letters testamentary showed that the will was proved “before the judge of the county court, in and for the county of Crawford and letters testamentary granted.” This was held void, because he was not designated as “judge of the probate court.”<sup>5</sup> This Arkansas case I do not think can be sustained on principle. It mattered not how he was designated, if his identity were plain. In Louisiana, a public administrator had sold land by order of the probate court, but in the deed he had designated himself as “curator” instead of “administrator.” The court said: “The point to be determined would be, not the title by which he designates himself, but the power which he had to represent the succession; and whether the deed comes from one who calls himself curator or administrator is of little consequence.”<sup>6</sup> So where the record shows that the judge was present, it will be presumed, collaterally, that the other officers were present also.<sup>7</sup>

§ 54. Judge qualified, but absent—Clerk's entries.—The Supreme Court of New York said: “The clerk, as a ministerial officer of the court, in obedience to the law, which specifically prescribes the judgment and dispenses with a special application to the court in such cases, enters the judgment of the court. The judgment is, by law, a judicial act of the court recorded by its clerk.”<sup>8</sup> But in California, where the statute authorizes the

1. Vickery v. Scott, 20 Ga. 795.

2. Higby v. Ayres, 14 Kan. 331, 337.

3. Myers v. State, 92 Ind. 390, 396.

4. Landon v. Cornet, 62 Mich. 80 (28 N. W. R. 788).

5. Hynds v. Imboden, 5 Ark. 385, 387.

6. Morgan v. Locke, 28 La. Ann. 806.

7. Dukes v. Rowley, 24 Ill. 210, 221.

8. Lanning v. Carpenter, 23 Barb. 402, 405.

clerk to enter judgment against defendants served where all were not served, a judgment entered by him against one where both were served, is void.<sup>1</sup> If the New York case states the principle correctly, the California case is wrong, as it was simply a mistake in practice.

STRANGER WRITING RECORD.—The judgment of a justice of the peace is not void because another person wrote it and signed the justice's name to it under his personal supervision.<sup>2</sup>

§ 55. *Judges, quorum absent as shown by the record.*—Judicial tribunals frequently comprise several judges with a certain number necessary in order to constitute a quorum. According to the cases cited and principles laid down in Sections 35–38, *supra*, a session held by less than a quorum would make a *de facto* tribunal whose acts would not be void. So also, if a court composed of too many judges is a *de facto* one whose acts are valid, as was held in Pennsylvania,<sup>3</sup> I am unable to see why a court composed of too few judges is not also a *de facto* one. But the decisions are nearly all the other way. None of them give any reasons, but assume that all the proceedings are void because the statute was disregarded. If it were true that any violation or disregard of a statute in the organization of a judicial tribunal always made its proceedings void, such assumption would be correct. But that is not true. In that case there could be no such thing as a judge *de facto*; for that assumes that he is holding in violation of law. The cases stand thus: The court of oyer and terminer was held by two commissioners. On the return of a verdict in a criminal case only one commissioner was present. This was held to be irregular but not to make the sentence void on *habeas corpus*.<sup>4</sup> A tribunal consisted of three justices of the peace, but one was disqualified because sitting outside of his territorial jurisdiction. This was held not to make the proceeding void.<sup>5</sup> On the other hand, it was held that a judgment of the county court was void where the record showed the absence of a quorum of justices.<sup>6</sup> And where two justices composed the examining court in cases of felony, the action of

1. Stearns v. Aguirre, 7 Cal. 443, 449.

2. Reeves v. Davis, 80 N. C. 209.

3. Campbell v. Com., 96 Pa. St. 344. See § 24<sup>3</sup>, *supra*, for an abstract of this case.

4. Rex v. Carlile, 4 C. & P. 415, 422 (19 E. C. L. 580, 584).

5. Boynton v. State, 77 Ala. 29, 32.

6. Ferguson v. Crittenden County, 6 Ark. (1 Eng.) 479; *accord* Fitzhugh v. Custer, 4 Tex. 391 (51 Am. D. 728, 734).



one was held void.<sup>1</sup> So where two justices composed the court for the relief of poor debtors, one justice met and adjourned to await the other, and this was held to make the action of both void when they afterwards met.<sup>2</sup> The statute required the board of commissioners for the assessment of swamp lands, jointly to view the lands to be assessed; an assessment made on a view of two out of the three commissioners was decided to be void.<sup>3</sup> And where a board of tax assessors was composed of three persons, two of whom constituted a quorum, an assessment made by one alone was held void.<sup>4</sup> A statute, as construed by the supreme court required unanimity among the five justices of a court in order to convict a slave of a certain crime. A conviction and imprisonment in such a case, where the record showed one justice dissenting, was held void on *habeas corpus*.<sup>5</sup> The criminal court was composed of three judges, and a verdict was duly returned against a prisoner. Before the sentence, the law was repealed and a new one enacted making the court to consist of one judge; but it had a *proviso* that all pending actions "must be conducted in the same manner as if this code had not been passed." The criminal court held that the court, as organized at the time of the verdict, with its three judges, must pass sentence, and it was so done. The court of appeals, holding that the *proviso* did not apply to the organization of the court but only to the procedure therein, declared the sentence void.<sup>6</sup> Conceding that too many judges sat in the court, they were *de facto* officers and their proceedings were not void.<sup>7</sup> Besides the trial court was just as competent to construe the statute as the court of appeals, and an error therein did not make its sentence void. But where a court was composed of three judges, and all were necessary in order to constitute a quorum, a conviction was decided not to be void because one of the judges was erroneously used as a witness.<sup>8</sup>

QUORUM ABSENT, BUT RECORD RECITING THEIR PRESENCE.—  
A court of petty sessions was composed of seven magistrates,

1. *Revill v. Pettit*, 3 Met. (Ky.) 283 (314).

2. *Hovey v. Hamilton*, 24 Me. 451.

3. *People v. Coghill*, 47 Cal. 361.

4. *Matter of Metcalf v. Messenger*, 46 Barb. 325, 329.

5. *Elvira, a slave*, 16 Gratt. 561.

6. *People v. Bork*, 96 N. Y. 188, 197, reversing 38 N. Y. Supr. (31 Hun) 360, 363, Barker, J., dissenting.

7. *Campbell v. Com.*, 96 Pa. St. 344.

8. *People v. Dohring*, 59 N. Y. 374, 376.

and they appointed two overseers of the poor, who fixed a rate and caused the plaintiff's goods to be seized. He brought trespass, and offered to show that the appointment of the overseers was made by three of the magistrates over the objection or without the consent of the other four; but it was decided that he could not so contradict the record.<sup>1</sup>

Two justices had made an order of removal of a pauper from one parish to another, and an appeal was taken to the quarter sessions, where the justices were equally divided; but, through a mistake of the clerk in reckoning the numbers, a judgment was entered quashing the order and sustaining the appeal. On an application for a *mandamus* to the king's bench to compel the justices to continue the matter to the next term, and then to hear and determine it, that court held that the order was valid as long as the quarter sessions allowed it to stand, and that the record could not be contradicted collaterally.<sup>2</sup>

A statute of New York required a police court to be held by three justices. A person was sentenced to imprisonment by that court—the record showing that all three justices were present. The defendant was allowed to show, orally, on *habeas corpus*, that only two justices were present, and was discharged.<sup>3</sup> According to this case any judgment could at any time be sworn off the record. A similar ruling was made in California, where the statute required the members of the board of commissioners to assess swamp land, jointly to view the land to be assessed. In such a case their report of an assessment showed that they jointly viewed the land, but it was held that it might be shown as a defense to a suit to recover the assessment, that they did not jointly view the land, upon the ground that the statute did not require them to report on that fact.<sup>4</sup> But the fact of assuming to make a report was a judicial assertion of the right to do so, and necessarily barred any contradiction collaterally.

**§ 56. Judge—Resignation or rotation.**—A Massachusetts statute provided that if any judge of insolvency “shall, from sickness, absence or other cause, be unable to perform the duties required of him in any case arising within his jurisdiction,” such duties should be performed by the judge of an adjoining county. On the

1. *Penney v. Slade*, 7 Scott 285, 300.

3. *Matter of Divine*, 21 How. Pr.

2. *The King v. Justices of Leicester-shire*, 1 M. & S. 442, 445.

80.

4. *People v. Hagar*, 49 Cal. 229.

*resignation* of such a judge, a judge of an adjoining county was called upon and presided, and committed a person to jail. This was held void on *habeas corpus*.<sup>1</sup> But where the statute provided that the circuit judges "shall so alternate that no one judge shall hold the courts of the same circuit for two courts in succession," it was held that a second term held in violation of this statute was not void.<sup>2</sup> I think the Massachusetts case is wrong. What was to be done under the circumstances was a question of law for the court to decide. See section 22,<sup>3</sup> *supra*.

§ 57. Judge—Wrong one acting—CHANGING CIRCUITS.—Sometimes serious questions arise collaterally because of the acts of some duly qualified but usurping judge. Thus a statute authorized judges to exchange circuits, but it had been repealed. Afterwards two circuit judges exchanged circuits, and their judgments, on error, were said to be void.<sup>4</sup>

DISQUALIFICATIONS—NONE EXISTING.—A Wisconsin statute provided that when the probate judge was disqualified to act, he should transfer the matter to the circuit judge. The statutory disqualifications were relationship and interest in the estate as a creditor; but the fact that the judge had been of counsel to any of the parties was not made a disqualification. The probate judge, for the latter reason, transferred an administrator's application to sell land to the circuit judge, who made an order to sell. This was held void for want of power in the circuit judge.<sup>4</sup> But the conduct of the probate judge was eminently proper; and as the statute did not say that a transfer should be made for no other cause, he was called upon to decide whether it was exclusive, and, at the utmost, his decision was only erroneous.

1. *Stone v. Carter*, 13 Gray 575.

3. *Blackmore v. Bank of the State*, 3

2. *Spradling v. State*, 17 Ala. 440, Ark. 309.

445.

4. *Morgan v. Hammett*, 23 Wis. 30, 40.

opinions in the books is by Mr. Justice Johnson, of the court of appeals of New York, wherein he says: "Jurisdiction does not relate to the right of the parties, as between each other, but to the power of the court. The question of its existence is an abstract inquiry, not involving the existence of an equity [right] to be enforced, nor the right to avail himself of it if it exists. It precedes these questions, and a decision upholding the jurisdiction of the court is entirely consistent with a denial of any equity [right] either in the plaintiff or in any one else. . . . Have the plaintiffs shown a right to the relief which they seek? and has the court authority to determine whether or not they have shown such a right? A wrongful determination of the question first stated is error, but can be re-examined only on appeal. The other question is the question of jurisdiction."<sup>1</sup>

Other definitions of jurisdiction given are: "Any movement in a cause;"<sup>2</sup> "authority to move in a cause, even to determine that there is authority;"<sup>3</sup> "where the law confers the power to render a judgment or decree;"<sup>4</sup> "the power to act upon a given state of facts, and likewise to decide when they exist;"<sup>5</sup> "lawful authority to hear and determine the cause upon the allegations made;"<sup>6</sup> "authority to render a judgment for the cause of action set forth in the complaint;"<sup>7</sup> "where the allegations are so made that the tribunal has authority to proceed and try them, and to render judgment according to its finding;"<sup>8</sup> "power to inquire into the fact, to apply the law and declare the judgment in a regular course of judicial proceeding;"<sup>9</sup> "the authority to decide the question at all;"<sup>10</sup> "the power to hear and determine the *ex parte* application of a poor debtor for leave to issue a second citation to his creditor."<sup>11</sup>

1. *People v. Sturtevant*, 9 N. Y. 263, 269.

2. *Rhode Island v. Massachusetts*, 12 Peters 657, 718; *Ney v. Swinney*, 36 Ind. 454, 456; *Dequindre v. Williams*, 31 Ind. 444; *Cunningham v. Jacobs*, 120 Ind. 306, 309 (22 N. E. R. 335).

3. *Quarl v. Abbett*, 102 Ind. 233, 239 (52 Am. R. 662, 1 N. E. R. 476).

4. *Rhode Island v. Massachusetts*, 12 Peters 657, 718.

5. *Dixon, C. J.*, in *Pollard v. Wegener*, 13 Wis. 569, 573.

6. *Sitzman v. Pacquette*, 13 Wis. 291, 303.

7. *Wanzer v. Howland*, 10 Wis. 8, 14.

8. *Wanzer v. Howland*, 10 Wis. 8, 17.

9. *The King v. Lee Fook*, 7 Hawaiian R. 249, 253, *quoting* from *Shaw, C. J.*, in *Hopkins v. Com.*, 3 Metc. 460, 462.

10. *Babb v. Bruere*, 23 Mo. App. 604, 607, *quoting* from *Chase v. Christianson*, 41 Cal. 253.

11. *Angell v. Robbins*, 4 R. I. 493, 502.

§ 59. **Jurisdiction over subject-matter — What is.** — Mr. Justice Folger, of the court of appeals of New York, said: "Jurisdiction of the subject-matter is power to adjudge concerning the general question involved."<sup>1</sup> Again he said: "It is the power to act upon the general, and, so to speak, the abstract question, and to determine and adjudge whether the particular facts presented call for the exercise of the abstract power." The supreme court of Missouri said that jurisdiction over the subject-matter is the right to grant the relief prayed for.<sup>2</sup> The court of appeals of Virginia said that, in a proceeding to appoint an administrator, the subject-matter "is the appointment of a personal representative to a decedent who has none."<sup>3</sup> A superior court in New York had jurisdiction over causes of action arising in the state; and it was held that where the cause arose out of the state, there was no jurisdiction over the subject-matter.<sup>4</sup> The supreme court of Wisconsin said: "It appears to follow, that if a court cannot restore its own jurisdiction, lost by statutory limit, the parties cannot restore it by consent; for it is not jurisdiction of the person but of the proceeding. And we are unable to comprehend how that could be done by implied consent or waiver which cannot by express consent."<sup>5</sup> The foregoing cases are given to show that it is not easy to separate the subject-matter from the person. The question as to what constitutes the subject-matter runs through almost this entire work. The definition given by Judge Folger is about as correct and intelligible as it can be made.

Where a resident of Wisconsin there obtained a judgment against a Massachusetts insurance company, it was held that a judgment against him in Illinois, garnishing the company upon service made upon one of its agents in that state and constructive service upon the owner of the judgment, was void, and no protection to the company in Wisconsin.<sup>6</sup>

§ 60. **Jurisdiction, allegations give.**—Jurisdiction always depends upon the allegations and never upon the facts. When a party appears before a judicial tribunal and alleges that a certain right is denied him, and the law has given the tribunal the power to

1. *Dictum* in Hunt v. Hunt, 72 N. Y. 217, 229.

2. *Id.*, page 230.

3. Hope v. Blair, 105 Mo. 85 (16 S. W. R. 595, 597).

4. *Dictum* in Andrews v. Avory, 14 Gratt. 229 (73 Am. D. 355).

5. Harriott v. New Jersey R. R. & T. Co., 2 Hilton 262.

6. Herrick v. Racine W. & D. Co., 43 Wis. 93.

7. Renier v. Hurlbut, — Wis. —

(50 N. W. R. 783).

enforce that right—his adversary being notified—it must proceed to determine the truth or falsity of his allegations. The truth of the allegations does not constitute jurisdiction. The tribunal must have jurisdiction before it can take any adverse step. Its jurisdiction, necessarily, has to be determined from the allegations, assuming them to be true. This point is so important, and will be referred to so often hereafter, that I feel justified in quoting extensively from some well-considered cases.

In an English case, Lord Chief Justice Denman said: "Magistrates cannot, as is often said, give themselves jurisdiction, merely by their own affirmation of it. But it is obvious that this may have two senses; in the one it is true; in the other, on sound principle and on the best-considered authority, it will be found untrue. Where the charge laid before the magistrates, *as stated in the information*, does not amount in law to the offense over which the statute gives him jurisdiction, his finding the party guilty by his conviction in the very terms of the statute would not avail to give him jurisdiction; the conviction would be bad on the face of the proceedings, all being returned before us. . . . But, where a charge has been well laid before a magistrate, on its face bringing itself within his jurisdiction, *he is bound to commence the inquiry*; in so doing he undoubtedly acts within his jurisdiction; but in the course of the inquiry, evidence being offered for and against the charge, the proper, or, it may be, irresistible conclusion to be drawn may be that the offense has not been committed, and so that the case, in one sense, was not within the jurisdiction. Now to receive affidavits for the purpose of showing this is, clearly, in effect, to show that the magistrate's decision was wrong if he affirms the charge, and not to show that he acted without jurisdiction; for they would admit that, in every stage of the inquiry up to the conclusion, he could not but have proceeded, and that if he had come to a different conclusion his judgment of acquittal would have been a binding judgment, and barred another proceeding for the same offense. . . . *The question of jurisdiction does not depend upon the truth or falsehood of the charge, but upon its nature: it is determinable on the commencement, not at the conclusion, of the inquiry.*"<sup>1</sup>

In a late case, Mr. Justice Brewer, now on the Supreme Bench of the United States, in an exceptionally able opinion, thus states

1. Reg. v. Bolton, 1 Ad. & El. N. S. 66, 72 (41 E. C. L. 439, 442).

the law on the point under consideration : "A justice of the peace . . . has no jurisdiction to try a man for felony, or to sentence to the penitentiary. That is a subject-matter which is entirely outside of his jurisdiction. If he assumes to try a man for manslaughter, and sentences him to the penitentiary, he is proceeding in a direction which is entirely outside of the scope of his jurisdiction. On the other hand, he may have jurisdiction over assaults and batteries, and does in most states. Suppose he proceeds to try a man charged with assault and battery, and suppose, in fact, the assault and battery was committed outside of the county over which his jurisdiction extends; then, although his judgment would be erroneous, and in excess of his jurisdiction, yet, having jurisdiction of the subject-matter of assault and battery, and of the person of the defendant, it lies with him to determine whether such particular assault and battery comes within his jurisdiction; and his determination, though erroneous, ought not to subject him to an action for damages. He has jurisdiction of the subject-matter, and it is for him to determine whether the case is within his jurisdiction. He has the right to determine the question; and although he may determine wrongly, and although it may be a case which does not come within the limitation of his jurisdiction, and although he may have exceeded his authority, yet he had the power and the right to determine whether or no he had that jurisdiction, and it cannot be said to be a case wherein the entire subject-matter was outside of his jurisdiction." <sup>1</sup>

When the plaintiff files his declaration and applies for a summons, that gives the court jurisdiction over him and over the subject-matter, and it then "becomes the duty of the court to commence and carry on the power to bring the defendant into court," that the case may be heard.<sup>2</sup> The allegations of an administrator's petition to sell land, and not their truth, confer jurisdiction,<sup>3</sup> and if those allegations are sufficient, all other questions are concluded collaterally.<sup>4</sup> An allegation of citizenship of another state gives the federal court jurisdiction, and the

1. *Cooke v. Bangs*, 31 Fed. R. 640, 644; this case expressly disapproves *Rutherford v. Holmes*, 66 N. Y. 368, and *Vaughn v. Congdon*, 56 Vt. 111 (48 Am. R. 758).

2. *Schroeder v. Merchants & Mech. Ins. Co.*, 104 Ill. 71, 75.

3. *Stuart v. Allen*, 16 Cal. 474, 501 (76 Am. D. 551); *Richardson v. Butler*, — Cal. — (23 Pac. R. 9, 11).

4. *Poor v. Boyce*, 12 Tex. 440, 449.



falsity of such allegation does not make the judgment void.<sup>1</sup> The presentation of a petition to the board of county commissioners to lay out a highway gives the board jurisdiction to determine whether or not due notice has been given that such presentation would be made.<sup>2</sup>

So where the jurisdiction of the court to lay out a highway depended upon the refusal of the selectmen so to do, a judgment laying it out is not void because the petition was false on that point;<sup>3</sup> and where the court had jurisdiction to lay out a highway in one town, but none where it was a continuation of a highway from another town, a judgment laying one out, upon a petition alleging it to be in one town, is not void because it was a continuation from another town.<sup>4</sup> And the filing of a petition showing the existence of a debt of a lunatic, vests the court with jurisdiction to mortgage his land.<sup>5</sup> The jurisdiction of a magistrate to discharge an insolvent depends upon the filing of a petition *purporting* to be signed by himself and persons holding two-thirds of his debts.<sup>6</sup> The statute enacted that, upon the presentation of a certain prescribed petition to the board of county commissioners praying for aid to any railroad "then duly organized under the laws of this state," the board should order a vote to be taken on that subject. In such a case it was held that the order of the board granting the prayer of the petition was a conclusive adjudication, collaterally, that the railroad was duly organized under the laws of the state. The court said: "The *filing of the petition* calls into exercise the jurisdiction of the board, and authorizes that body to determine, not only whether the petition is properly signed by the requisite number of freeholders of the township, but every other fact necessary to the granting of the prayer of the petition, including the due organization, under the laws of this state, of the company in whose favor aid is asked. By making the order granting the prayer of the petition, the board must be taken to have decided that the company was such an one as was, under the statute, entitled to aid, and if, in this respect, it has committed an error,

1. *Erwin v. Lowry*, 7 How. 172, 178, *White v. Landaff*, id. 128, 132; *Looby reversing Lowry v. Erwin*, 6 Rob. v. Austin, 19 Ill. App. 325. (La.) 203.

2. *Heagy v. Black*, 90 Ind. 534, 543. 96 N. Y. 525, 531.

3. *Huntress v. Effingham*, 17 N. H. 584.

4. *State v. Rye*, 35 N. H. 368, 377;

5. *Agricultural Ins. Co. v. Barnard*,

6. *Betts v. Bagley*, 12 Pick. 572; *Friedlander v. Loucks*, 34 Cal. 18—

allegations of petition give jurisdiction.

the decision is, nevertheless, binding and conclusive, unless appealed from, and cannot be attacked collaterally, as by injunction, upon the collection of the tax.”<sup>1</sup> A person was summoned before a county judge in Wisconsin to be examined in regard to his property for purposes of taxation. He claimed that, on account of his residence being in another state, he was not liable to be taxed, and applied for a writ of prohibition on the ground that the judge had no jurisdiction. But the court said that the jurisdiction “depended wholly on the making and presentation to the judge of the affidavit and other papers required by the statute,” and not upon the facts.<sup>2</sup> So, in a proceeding to foreclose an alleged tax-lien on service by publication, the jurisdiction depends upon the allegations of the petition and not on the fact that the land was legally assessed or that the taxes were unpaid.<sup>3</sup> In a court of limited jurisdiction in regard to value of property, if the alleged value is within the limit, the court will have jurisdiction although the actual value may exceed the limit; and the court may determine that the value is too great, but after that fact is determined, the court simply loses jurisdiction to proceed further. It does not lose it from the beginning so as to make all parties trespassers, as it would if its jurisdiction depended upon the fact of value. Thus, a Wisconsin statute fixed the limit of the justice’s jurisdiction in replevin at \$200. The affidavit alleged the value at less than \$200, but on trial it was found to exceed \$200. The court said: “If the affidavit on which the writ of replevin issued had not stated the value of the chattels, or had stated it over \$200, the justice would have taken no jurisdiction, whatever the value might be in fact; and the whole proceeding would have been *coram non judice*. But because the affidavit stated the value under \$200, it gave the justice jurisdiction to issue the writ and to entertain the action, whatever the value might be in fact. His jurisdiction of the action rested on the affidavit, independently of the value of the chattels in fact, until his judgment should determine the value. If that had found the value not to exceed \$200, the jurisdiction conferred by the affidavit would have continued for all purposes, whatever the value might be in

1. Board of Comrs. v. Hall, 70 Ind. 469, 474; approved in Faris v. Reynolds, 70 Ind. 359, 366.

2. State *ex rel.* Kellogg v. Gary, 33 Wis. 93, 102.

3. Jones v. Driskill, 94 Mo. 190 (7 S. W. R. 111).

fact. When that found the value to exceed \$200, the jurisdiction of the action, derived from the affidavit, ceased for all purposes except the statutory judgment of abatement, independently of the value in fact. But that determination ousted the jurisdiction only thenceforth; it did not operate to defeat the jurisdiction theretofore conferred by the affidavit, to issue the writ and to entertain the action. Further jurisdiction of the action on the merits ceased, not by the mere fact that the value exceeded \$200, but by the judicial determination of the fact. Until such determination, the value stated in the affidavit was conclusive of the jurisdiction." <sup>1</sup>

An English statute made it a felony to cut down trees of the value of one pound sterling or more, but no crime, if of less value. On an allegation that the value of a tree cut down exceeded that sum, it was held that a magistrate was justified in imprisoning a party to await an examination, although the value was, in fact, less than that sum.<sup>2</sup> So it was held in Maryland that where the allegations of a bill were sufficient to give jurisdiction, neither erroneous action of the court nor defective proofs could affect it.<sup>3</sup> And a case in the court of appeals of New York holds that jurisdiction, in special proceedings before a justice, attaches when the *proof* is made, however the fact may be, and that the defendant will be concluded unless he appears and takes his objection.<sup>4</sup>

In a later case in the same court, the facts were these: A petition alleged the recovery of a judgment against a corporation and the return of an execution unsatisfied, and asked for the appointment of a receiver, which, after service, was done, by default. In a suit by the receiver, the contention was that his appointment was void because the petitioner had no valid judgment against the corporation. The court said: "The petition alleged all the facts necessary to give the court jurisdiction. It alleged the recovery of a judgment against the corporation, and the return of an execution unsatisfied. The jurisdiction of the court to entertain the proceeding did not depend upon the truth of the facts alleged in the petition. The existence of a valid judgment against the corporation and the return of an execution unsatisfied was

1. *Darling v. Conklin*, 42 Wis. 478, 480—Ryan, C. J.

2. *Cave v. Mountain*, 1 M. & G. 257, 261 (39 E. C. L. 747, 750).

3. *Bolghiano v. Cooke*, 19 Md. 375, 394.

4. *Barnes v. Harris*, 4 N. Y. 374, 377.

properly averred and the court was called upon to decide whether the facts alleged were established ; and whether it decided rightly or not was not a matter affecting its jurisdiction.”<sup>1</sup>

§ 61. **Jurisdiction—Sufficiency of allegations to confer.**—In this section it is assumed that the court has the power to grant the relief sought in a proper case, and the question is, Do the allegations show such a case? The rule is this: *Can it be gathered from the allegations, either directly or inferentially, that the party was seeking the relief granted, or that he was entitled thereto?* If it can, the allegations will shield the judgment from collateral assault. All the cases agree that if the allegations tend to show, or colorably or inferentially show each material fact necessary to constitute a cause of action, they will uphold the judgment collaterally. And many cases draw the line there, and hold that if allegations are entirely wanting concerning any material fact, there is no jurisdiction. A case in New York holds that, in order to confer jurisdiction on a justice in attachment proceedings, the affidavit must have a legal tendency to make out a case in all its parts, and not be silent on any essential point.<sup>2</sup> The cases in New York and elsewhere holding the same rule are quite numerous. They all relate to special proceedings. But why any distinction should be made between special and general proceedings, I cannot understand. A right withheld is to be restored or compensated for by the court. The procedure used by it in so doing is a matter of no concern. The sacredness of the right has no connection therewith. The court is just as competent to decide what is directory or non-essential in a special as in a general proceeding. A statute of Michigan required an affidavit in attachment to state that the debt was due, and for an omission of that allegation the supreme court of that state held a judgment of the circuit court of the United States void ;<sup>3</sup> but its decision was reversed by the Supreme Court of the United States, which expressly held that the absence of that allegation did not make the proceeding void.<sup>4</sup> An examination of the cases cited in Chapter VIII, *infra*, will show that each allegation required, either by the common law or the statutes, in proceedings either special or general, has been held immaterial, collaterally, and that its

1. Whittlesey v. Frantz, 74 N. Y. 456, 461.

2. Schoonmaker v. Spencer, 54 N. Y. 366.

3. Mathews v. Densmore, 43 Mich. 461 (5 N. W. R. 669).

4. Matthews v. Densmore, 109 U. S. 216 (3 S. C. R. 126).

omission did not make the proceeding void. Thus they have all been eliminated. If the omission of one material allegation from the complaint, affidavit or petition, does not make the proceeding void, it is difficult to see why the omission of more than one, or all of them, should do so. Where the material allegations show affirmatively that no cause of action exists, they can all be struck out without injury, thus letting the cause stand on the immaterial allegations; and if a judgment rendered with such material allegations in the complaint is not void, as the cases show, one rendered in their absence cannot be void for that reason, as they add nothing to the pleading. The complaint may seek a specific enforcement of some contract or trust concerning real estate. It may show on its face that the contract was made or trust arose by parol and is barred by the Statute of Frauds; that it is barred by the Statute of Limitations; that the plaintiff is an administrator while the cause of action belongs to the heirs; that the defendant was disabled by law from making such a contract or becoming such a trustee; that no cause of action has yet arisen for want of a demand and refusal, and yet a decree specifically enforcing the same is not void, although no approach towards stating a cause of action is made. A judgment is not void because the cause of action sued upon was a justice's judgment, void because in excess of the possible power of the justice.<sup>1</sup> A large number of cases are cited in Chapter VIII, *infra*, where the judgment is not void although the affidavit, complaint or petition showed affirmatively that the plaintiff *had no cause of action whatever*. These illustrations show that there is no connection between jurisdiction and sufficient allegations. In other words, in order to "set the judicial mind in motion," or to "challenge the attention of the court," it is not necessary that any material allegation should be sufficient in law, or that it should even tend to show facts that are sufficient. If that were the rule, the absence of any material allegation would always make the judgment void, because it cannot be said that such a complaint has any tendency to show a cause of action. It will be seen from the cases about to be cited, that, when the allegations are sufficient to inform the defendant what relief the plaintiff demands—the court having power to grant it in a proper case—jurisdiction exists, and the defendant must defend himself. Thus, in Indiana, where a judgment of the board of county commissioners establishing a gravel road was attacked collaterally on

1. *Moore v. Martin*, 38 Cal. 428, 437; *Walker v. Lyon*, 3 Pa. (3 P. & W.) 98.

account of a defective petition, the court said: "If there was *any petition at all*, invoking the action of the commissioners, its sufficiency cannot be collaterally questioned."<sup>1</sup> A judgment declaring a person insane is not void when the whole proceeding shows enough to "fairly inform" the defendant and his friends that *the claim was that he was insane* and that an inquiry thereon was to be held.<sup>2</sup> "If the petition sets forth facts sufficient to challenge the attention of the court with regard to its merits, or to authorize the court to deliberate with respect thereto," its judgment will not be void.<sup>3</sup>

If a complaint to sell land for taxes is sufficient "to challenge the attention of the court," a judgment thereon is not void because the complaint would have been bad on demurrer.<sup>4</sup> In an early case, the supreme court of Illinois, in speaking of a collateral attack on a guardian's sale of land, said: "Enough must appear, either in the application or the order, or at least somewhere on the face of the proceeding, to call upon the court to proceed to act; and all agree that when that does appear, then the court has properly acquired jurisdiction, or, in other words, is properly set to work."<sup>5</sup> If enough appears "to call upon the court to proceed to act,"<sup>6</sup> or if the allegations were sufficient "to cause the judge to act,"<sup>7</sup> in a special proceeding, or if there was "something stated to amend by,"<sup>8</sup> the proceeding is not void collaterally. But in the cases above mentioned, where the allegations showed affirmatively that no cause of action existed, the attention of the court was not challenged, nor was it called upon to act, by any material allegation, nor was there any such allegation to amend by. Hence I conclude that allegations immaterial and wholly insufficient in law may be sufficient "to set the judicial mind in motion," and to give a wrongful but actual jurisdiction which will shield the proceedings from collateral attack. It seems to me that the Indiana case above cited<sup>9</sup>—which was a

1. Ricketts v. Spraker, 77 Ind. 371, 374.      bon v. Lake, 29 Ill. 165 (81 Am. D. 302).

2. *In re* Latta, 43 Kan. 533 (23 Pac. R. 655).      6. Mulford v. Stalzenback, 46 Ill. 303, 307.

3. Head v. Daniels, 38 Kan. 1 (15 Pac. R. 911, 914).      7. Galena and Chicago Union R. R. Co. v. Pound, 22 Ill. 399, 414.

4. McGregor v. Morrow, 40 Kan. 730 (21 Pac. R. 157).      8. Spoors v. Cowen, 44 O. St. 497 (9 N. E. R. 132, 135).

5. Young v. Lorain, 11 Ill. 624 (52 Am. D. 463, 468; *approved*, Fitzgib- 9. Ricketts v. Spraker, 77 Ind. 371, 374.



special statutory proceeding before a board of inferior and very limited judicial power—announces the true and only logical rule, namely, that if there is *any petition at all invoking the action of the court*, its judgment is not void. The courts of New York are not able to stand by their early rule that, where a single material allegation is omitted from a petition in a special proceeding, it is void. Thus, a fine for the violation of an ordinance was collaterally attacked because the board had no power to pass it. The court, assuming that to be true, said: “The justice of the peace had jurisdiction of the subject-matter of the action, being for the recovery of a penalty less than two hundred dollars. . . . The jurisdiction of the magistrate was not derived from and did not depend upon, the act which is challenged, but upon the general statutes of the State.”<sup>1</sup> In other words, having the defendant before him, and having jurisdiction to grant the relief demanded in a proper case, his judgment was not void, even though the allegations showed affirmatively that no cause of action existed in that case. This being a special statutory proceeding in restraint of personal liberty, how the logic on which this case rests can be reconciled with the earlier decisions it is difficult to understand. If a special proceeding is not void where the petition shows affirmatively that no cause of action exists, it would seem to follow as a necessary sequence, that the failure of the petition to show a cause of action on account of the absence of one or more material allegations would not make it void.

TESTS OF JURISDICTION.—“The test of jurisdiction . . . is whether the tribunal has power *to enter upon the inquiry*, and not whether its conclusions in the course of it were right or wrong.”<sup>2</sup> One test of jurisdiction is amendability. In a late case in Arkansas, it was said: “The very fact that the court can make the amendment shows, *ex vi termini*, that the proceedings are merely erroneous or irregular, and that the court has jurisdiction.”<sup>3</sup> But it does not show a want of jurisdiction because the petition is not amendable, for that is always the case where no cause of action

1. Hallock v. Dominy, 69 N. Y. 238, 240.

2. Colton v. Beardsley, 38 Barb. 29, 52; Otis v. The Rio Grande, 1 Woods 279, 282.

3. Sannoner v. Jacobson, 47 Ark. 31.

46 (14 S. W. R. 458), *quoting* from Hardin v. Lee, 51 Mo. 241, 245; *accord*, Rosenheim v. Hartsock, 90 Mo. 357 (2 S. W. R. 473); Spoors v. Cowen, 44 O. St. 497 (9 N. E. R. 132, 135).



exists. In a Wisconsin case the test of jurisdiction was said to be this: "Had the court or tribunal the power, *under any circumstances*, to make the order or perform the act? If this be answered in the affirmative, then its decision upon those circumstances becomes final and conclusive until reversed by a direct proceeding for that purpose."<sup>1</sup> This was said in a case where it was contended that a decree of partition was void because the interlocutory decree required by the statute, declaring and fixing the rights of the parties, was omitted, and would not be authority in this Section, were it not for the fact that, in a subsequent case, where the contention was that a judgment was void because the allegations were insufficient to constitute a cause of action, the court adopted the above quotation as applicable therein.<sup>2</sup> Under this test, the failure to allege any matter necessary to make a cause of action, or the allegation of matters which do not do so, when the object of the pleader is apparent and the relief sought is within the power of the court to grant, can never make the judgment void.

§ 62. *Jurisdiction—How and when adjudicated.*—The complete record is before the court in each case, and it is conclusively presumed to know its contents; and the law applicable thereto, it is sworn to apply to the best of its ability. Hence, any step taken is an application of the law to all the facts disclosed by the record, and necessarily implies an adjudication of the right to take that step. There is no difference in this respect between inferior and superior tribunals. The supreme court of California said: "The first point decided by any court, although it may not be in terms, is that the court has jurisdiction, otherwise it would not proceed to determine the rights of the parties."<sup>3</sup> The supreme court of Wisconsin having erroneously determined that it had jurisdiction—the case not showing the point—and rendered judgment, it was held not void, because the court had power to decide on its own jurisdiction.<sup>4</sup> It was well said in a Rhode Island case: "Where jurisdiction depends on the finding of a particular alleged fact, the exercise of jurisdiction implies the finding of that fact;"<sup>5</sup> and a late case in Indiana

1. Tallman v. McCarty, 11 Wis. 401.

4. State v. Waupaca County Bank,

2. Frankfurth v. Anderson, 61 Wis. 20 Wis. 640.

107 (20 N. W. R. 662).

5. Thornton v. Baker, 15 R. I. 553

3. Clary v. Hoagland, 6 Cal. 685, (10 Atl. R. 617, 618).

says: "The assumption of authority is an assertion of jurisdiction without any formal statement of the facts essential to give jurisdiction."<sup>1</sup> This was said in reference to a collateral attack on the judgment of the board of county commissioners, an inferior judicial tribunal. The same court also said: "Where a court of general jurisdiction assumes jurisdiction, the existence of all facts necessary to confer jurisdiction are presumed to exist."<sup>2</sup> So in Alabama, it is said that action of the court implies the previous ascertainment of the preliminary jurisdictional facts, and that its decision on those facts cannot be called in question, collaterally.<sup>3</sup> Judicial action is an adjudication not only of the facts actually determined, but equally so of all precedent matters which should have been determined.<sup>4</sup> An early Indiana case, speaking of a collateral attack on proceedings in partition, said that on the filing of the petition "it became the duty of the court to ascertain—first, whether the facts therein alleged were substantially such as to authorize the remedy petitioned for; secondly, whether the requisite notice had been given to the other owners; thirdly, whether the facts alleged were stated with sufficient form and precision; and, fourthly, whether the statements contained in the petition were true."<sup>5</sup> The Supreme Court of the United States, speaking of a collateral attack on an administrator's sale of land made in obedience to a private statute, said: "In making the order of sale, the court is presumed to have adjudged every question necessary to justify such order or decree—viz., the death of the owner; that the petitioner was his administrator; that the personal estate was insufficient to pay the debts of the deceased; that the private act of assembly, as to the manner of sale, was within the constitutional power of the legislature, and that all the provisions of the law, as to notices which are directory to the administrators have been complied with."<sup>6</sup> A judgment by default bars the parties as conclusively, collaterally, as though they had framed issues and had a trial and been defeated.<sup>7</sup> The assumption of jurisdiction and the exercise of authority is a

1. *Osborn v. Sutton*, 108 Ind. 443, 445 (9 N. E. R. 410).

2. *Jackson v. State*, 104 Ind. 516 (3 N. E. R. 863); *Sims v. Gay*, 109 Ind. 501, 503 (9 N. E. R. 120).

3. *Wyatt's Adm'r v. Steele*, 26 Ala. 639, 650; *accord*, *Vosler v. Brock*, 84 Mo. 574, 578.

4. *Ney v. Swinney*, 36 Ind. 454.

5. *Doe ex dem. Hain v. Smith*, 1 Ind. 451, 457.

6. *Florentine v. Barton*, 2 Wall. 210, 216.

7. *Goebel v. Iffla*, 55 N. Y. Supr. (48 Hun) 21 (15 N. Y. St. Rep'r 256, 260).

decision upon the question of notice without any formal entry declaring the notice sufficient.<sup>1</sup> So where an objection was made to the right of the circuit judge to sit in the probate court, his assuming to act, ignoring the objection, is an adjudication of his right to do so.<sup>2</sup> The granting of an order to an administrator, after approval of his final report, to make a conveyance impliedly determines that he is still administrator and that the approval did not discharge him.<sup>3</sup> Collaterally, an administrator's order to sell land is an implied and conclusive adjudication that the sale was necessary, and that notice was duly given;<sup>4</sup> and an order granting relief is an adjudication of every fact essential to the validity of the order.<sup>5</sup> Appointing a commissioner in a drainage proceeding,<sup>6</sup> and assuming to act in a highway proceeding,<sup>7</sup> are implied adjudications of the sufficiency of the notice; and an order appointing viewers on a gravel road petition, is an adjudication of its sufficiency.<sup>8</sup> A final judgment in favor of the plaintiff is always an implied adjudication that all his allegations, both express and implied,<sup>9</sup> are true. Thus, where a petition for a highway did not purport to be signed by freeholders, the granting of the petition by the board of supervisors is an implied adjudication that the signers were freeholders.<sup>10</sup> Several cases hold that judgments in special proceedings are void unless the record shows an express finding of each jurisdictional fact; but such cases are not, in my opinion, in accord with sound reasoning or public policy. No one has ever yet assigned any reason why a court is not just as competent to decide a special proceeding as a common one; nor why it should be presumed that the court did its duty in determining jurisdictional facts in a common proceeding but not in a special one. The duty and the power being the same in both, it seems to me the presumptions should be the same in both. In an early case in Ohio, the court of common pleas, a court of general jurisdiction appointed a guardian who

1. *Updegraff v. Palmer*, 107 Ind. 181, 182 (6 N. E. R. 353); *Jackson v. State*, 104 Ind. 516, 520 (3 N. E. R. 863).

2. *Landon v. Cornet*, 62 Mich. 80 (28 N. W. R. 788, 793).

3. *Ligon v. Ligon*, 84 Ala. 555 (4 S. R. 405).

4. *McDade v. Burch*, 7 Ga. 559 (50 Am. D. 407).

5. *Reynolds v. Faris*, 80 Ind. 14, 19; *Pendleton and Eden Turnpike Co. v. Barnard*, 40 Ind. 146; *English v.*

*Woodman*, 40 Kan. 752 (21 Pac. R. 283); *McGregor v. Morrow*, 40 Kan. 730 (21 Pac. R. 157).

6. *Young v. Wells*, 97 Ind. 410, 412.

7. *Adams v. Harrington*, 114 Ind. 66, 71 (14 N. E. R. 603).

8. *Stoddard v. Johnson*, 75 Ind. 20, 31.

9. *Plummer v. Waterville*, 32 Me. 566, 568.

10. *Humboldt County v. Dinsmore*, 75 Cal. 604 (17 Pac. R. 710)

sold the ward's land. In ejectment, because the record did not recite that the ward was found to be a resident of the county, it was held competent for him to show that he did not reside there, and thus avoid the appointment and sale.<sup>1</sup> In Nevada, the order of the county commissioners appointing a policeman for a town upon a petition duly presented, was held void collaterally, because there was no express finding that the petition was "signed by a majority of the resident electors" of the town.<sup>2</sup> So, in Tennessee, it was said that a judgment, upon motion, in favor of a surety, must recite all facts necessary to give jurisdiction,<sup>3</sup> and the same thing was decided also in reference to an administrator's sale.<sup>4</sup>

An English bankruptcy statute provided, that, when it should be discovered that a commission in bankruptcy had issued upon the petition of a creditor whose debt was insufficient in amount, any other creditor who had proved a debt of sufficient amount, incurred not anterior to that of the petitioning creditor, might apply to the chancellor to have the proceedings continued in force instead of being dismissed. In such a case, a creditor filed a petition, alleging that he had proved a debt, which was sufficient in amount, and which had been incurred not anterior to the debt of the petitioning creditor, and prayed that the commission might continue. Upon this, the chancellor made an order, reciting among other facts, that the debt of the petitioner had been proved, but not saying *when*, whether before or after the filing of his petition. For the want of this recital in the order, it was decided to be void collaterally; and it was also held that the petition could not be inspected to help out the order.<sup>5</sup> It is seldom that so many errors are found in one case. The petition was perfect. The granting of the order was necessarily an adjudication that all its allegations were true, and that they constituted sufficient cause therefor. The petition was a part of the record, and the court was bound to inspect and construe the whole record together. The court might as well have decided the validity of a will by inspecting the codicil as to do what it did.

1. Lessee of Maxson v. Sawyer, 12 O. 195, 208.

2. Johnson v. Eureka County, 12 Nev. 28, 30.

3. Jones v. Read, 20 Tenn. (1 Humph.) 334, 342.

4. Kindell v. Titus, 56 Tenn. (9 Heisk.) 727, 735.

5. Christie v. Unwin, 3 Perry & Davidson, 204, 208.

§ 63. **Jurisdictional facts adjudicated by an inferior court.**—There is an alleged rule concerning the jurisdiction of inferior courts, which the supreme court of Indiana formulated thus: “When the jurisdiction of an inferior court depends upon a fact which such court is required to ascertain and settle by its decision, such decision is conclusive, collaterally.”<sup>1</sup> This so-called rule assumes that there are cases where an inferior court is not required to determine all questions necessary in order to grant proper relief, which seems to be an absurdity. In order to grant proper relief, one of the essential things that must be determined by every judicial tribunal, from the lowest to the highest, is its right to act at all. That is the line between the lawful arbitrator supported by the majesty of the law and the power of the state, and the usurper, trespasser and law breaker, opposed and confronted by the same power. It is the sworn duty of every judicial tribunal not to cross that line, and that necessarily gives it the power to determine where it is. The attempt to draw the line between the jurisdictional matters which the inferior court adjudicates and settles and the “collateral” or “precedent” jurisdictional matters which it does not or cannot adjudicate and settle, has led to much confusion; and the more it is explained, the greater is the confusion. An English statute provided: “That if any timber . . . shall be laid *upon any highway* so as to be a nuisance, and shall not, after notice given by the surveyor . . . be forthwith removed, it shall and may be lawful for the surveyor, . . . by order in writing from any one justice, to clear the said highway by removing the said timber, . . . and to dispose of the same, and to apply the proceeds arising therefrom towards the repairs of the highway,” etc. In such an alleged case, the owner of the timber so taken and disposed of brought trespass to recover its value, and offered to prove that the place where it lay was not *upon the highway*, but the evidence was held inadmissible. The grounds of the decision cannot be made plainer than by a quotation from the argument of Mr. Bramwell, and the running comments of the court upon the motion for a new trial. Mr. Bramwell said: “The order of justices was not conclusive. The cases in which convictions have been held so, are not applicable. Here the statute does not call upon the justices to convict, but authorizes

1. *English v. Smock*, 34 Ind. 115, 134; *accord* *People v. Hagar*, 52 Cal. 171, 183, *quoting from* *Freem. Judg.*, § 523. See Section 246, *infra*.

them to make an order, under which the surveyor may remove the alleged nuisance. It does not even require that notice of the application for an order shall be given to the person whose property is to be affected. Such an order cannot be valid if the facts do not bear it out."

"In *Bramwell v. Penneck*, 7 B. & C. 536,<sup>1</sup> a man who had been left in possession of goods seized under a *fi. fa.*, laid an information against the attorney who had employed him for non-payment of his wages; the justice issued a summons, heard the complaint and answer, and made an order upon the attorney to pay; which, not being done, he issued a distress warrant against the attorney's goods, under stat. 20 Geo. II, ch. 19. This court held that the man in possession was not a servant within the statute, and that trespass lay against the magistrate; and they stated distinctly as a ground, not that the warrant failed to show jurisdiction, but that the magistrate had not jurisdiction in fact, because the informer was not a laborer within the statute." [Lord Denman, C. J.: I thought here that *Brittain v. Kinnaird*,<sup>2</sup> 1 B. & B. 432, was applicable, and that the justices had jurisdiction to try whether the place in question was a public highway or not.] "Bramwell v. Penneck, 7 B. & C. 536, is a later decision." [Coleridge, J., *Brittain v. Kinnaird*, has been oftener recognized than almost any modern case.] "In *Basten v. Carew*,<sup>3</sup> 3 B. & C. 649, which was cited at the trial, the justices had drawn up a record of proceedings had before them under stat. 11 Geo. II, ch. 19, § 16; and it was held that the entry so made by them as judges of record was conclusive. The order here is not entitled to the same weight, but may rather be compared to the order in *Welch v. Nash*,<sup>4</sup> 8 East 394, which was held not conclusive, the court saying that the magistrates could not make facts to give themselves jurisdiction. The distinction between a mere order and a conviction is pointed out in the observations made upon *Welch v. Nash*, by Burrough, J., in *Brittain v. Kinnaird*, and Bayley, J., in *Gray v. Cookson*,<sup>5</sup> 16 East 13, 23." [Coleridge, J.: The justices here had jurisdiction to inquire whether the ground was a highway or not; and, if they had, the conclusion they came to in the exercise of that jurisdiction cannot be questioned.] "In

1. *Bramwell v. Penneck*, 7 B. & C. 536.

2. *Brittain v. Kinnaird*, 1 Brod. & Bing. 432.

3. *Basten v. Carew*, 3 B. & C. 649.

4. *Welch v. Nash*, 8 East 394.

5. *Gray v. Cookson*, 16 East 13, 23.



Weaver v. Price,<sup>1</sup> 3 B. & Ad. 409, justices issued a distress warrant for a poor rate, reciting that W an occupier of land in the parish of Overton, was rated, etc., and, on demand, had refused to pay; and the justices were held liable in an action of trespass because it appeared on the trial that W did not occupy any land in Overton.” But the motion for a new trial was overruled,<sup>2</sup> Lord Denman, C. J., saying that the case could not be distinguished from Brittain v. Kinnaird, and that the justices were bound to exercise the power confided by the act; that “the party interested receives notice to attend and disprove all that can entitle them to adopt any measures against him; and their warrant is an adjudication of every material point. We were, however, rather disposed to doubt whether, as the seventy-third section gives this authority only where the obstruction is laid *on the highway*, the jurisdiction might not be disproved by showing to the jury’s satisfaction that the *locus in quo* was not part of the highway.” The court distinguishes the case before it from the rate cases cited by saying that the validity of the rate does not come before the magistrates, and that any inquiry by them into the question of the occupation of lands by the defendant within the parish would be “extra-judicial,” and that, therefore, their adjudication that he must pay the rate does not establish either the validity of the rate or the fact of the occupancy of lands within the parish by the defendant. It seems that Mr. Bramwell troubled the court much, and no wonder. It would bother any court to explain why a justice could conclusively adjudicate that a person’s timber was located in the highway, while he could not adjudicate that his residence was in the parish; or why he could adjudicate that a vessel was a boat, but could not adjudicate that an employé was a laborer. The allegation in the rate case was that the defendant resided in the parish, and in the case against the attorney, that the employé was a laborer. On the face of the papers, the justice had jurisdiction and was bound to proceed. But according to the decisions, he had no power to decide upon the truthfulness of one of the material allegations made before him. In the case cited from 8 East, the court said: “The justices cannot give themselves jurisdiction in a particular case by finding that as a fact which is not the fact. Suppose they had turned the road through a man’s grounds without his consent,

1. Weaver v. Price, 3 B. & Ad. 409.

2. Mould v. Williams, 5 Ad. & El. N. S. (48 E. C. L.) 469, 476.



would their finding the fact of his consent give them jurisdiction under this section when the act had given them none?"<sup>1</sup>

A case in the exchequer thus explains the point: "It is a general rule that no court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limit to its jurisdiction depends. . . . Then, to take the simplest case: Suppose a judge with jurisdiction limited to a particular hundred, and a matter is brought before him as having arisen within it, but the party charged contends that it arose in another hundred, this is clearly a collateral matter independent of the merits; on its being presented, the judge must not immediately forbear to proceed, but must inquire into its truth or falsehood, and for the time decide it, and either proceed or not with the principal subject-matter according as he finds on that point; but this decision must be open to question, and if he has improperly either forbore or proceeded on the main matter in consequence of an error, on this the court of queen's bench will issue its mandamus or prohibition to correct his mistake."<sup>2</sup> The quotation states the law correctly, because mandamus and prohibition are direct proceedings to correct jurisdictional errors; but the case misapplies it by holding that the judgment of a commission in relation to tithes would be void, if, in fact, the tithes on the land had been previously commuted or extinguished. This quotation is approved in a case in the Law Reports,<sup>3</sup> where cases holding that a claim of title to land ousts the jurisdiction of a magistrate, are cited as resting on the same principle; but they are precisely to the contrary in principle. It is the *allegation* of the defendant that he owns the title, not the fact of his ownership, which ousts the jurisdiction. It was said by the supreme court of Ohio that matters collateral to the merits and precedent to the exercise of jurisdiction by an inferior court are not concluded by the judgment, but remain open to inquiry collaterally. The court admits that such matters do not remain open if the statute requires the court to pass upon them.<sup>4</sup> But that court is in error in assuming that a statute which requires a court to be satisfied as to the truth of some material point, adds

1. Welch v. Nash, 8 East 394, 403 (A. D. 1807).

2. Bunbury v. Fuller, 9 Exch. 111, 140; *accord* Wells v. Brackett, 30 Me. 61, 64.

3. Colonial Bank of Australasia v. Willan, 5 L. R. P. C. 417, 444.

4. Anderson v. Commissioners, 12 O. St. 635, 645.

anything to the law. The common law was just as imperative as the statute. In fact, the court could not act otherwise without violating its sworn duty. In a late case in Rhode Island, a person died a resident of one county, and an administrator was appointed wrongfully in another. As the heirs did not appear and contest the allegations of the affidavit concerning the residence of the decedent, it was held that they could take out new letters in the county of his actual residence, and ignore the others as void.

The court generalized the rule thus: "We have come to the conclusion, after much consideration, that the rule applicable to courts of limited jurisdiction which is the better established on principle and authority is this: That where the jurisdiction depends on some collateral fact which can be decided without deciding the case on the merits, then the jurisdiction may be questioned collaterally and disproved, even though the jurisdictional fact be averred of record, and was actually found upon evidence by the court rendering judgment." . . . "But on the other hand, where the question of jurisdiction is involved in the question which is the gist of the suit, so that it cannot be decided without going into the latter question, there the judgment is collaterally conclusive, because the question of jurisdiction cannot be retried without retrying the case on its merits, which is not permissible in a collateral proceeding."<sup>1</sup> The court cites twenty-two cases in support of its conclusions. But with the greatest deference to that learned court, I submit that there are no cases where the question of the jurisdiction of the court can be split off and laid aside, and the merits of the case tried. The decision made the jurisdiction of the probate court rest on the fact of residence instead of the allegation concerning it. All persons interested had an opportunity to appear and controvert the allegations in regard to the death and residence of the deceased, and the final order granting the relief prayed for necessarily concluded all persons. In a later case in the same state, an administrator's sale of land was attacked collaterally, on the ground that no sale bond had been given. It was held that the attack must fail because the record recited "that the conditions of the sale thereof were made according to law," and because the court adjudged that the sale "is approved, and that the account aforesaid is received, allowed, and the same be recorded." The court said that the

1. *People's Savings Bank v. Wilcox*, 15 R. I. 258 (3 Atl. R. 211, 212).

question of jurisdiction was involved in the question which was the gist of the action, in accordance with the rule announced in the last case.<sup>1</sup> But just why a wrongful adjudication on the fact of residence should make the first proceeding void, and a wrongful adjudication on the fact of the existence of a sale bond should not make the second proceeding void, seems a little hazy. The first case shows, and the second one assumes, that if the heirs had appeared and made an issue on those questions of fact, an adverse decision would have barred further controversy. This confuses the doctrine of collateral attack with that of *res judicata*, as explained in Section 17, *supra*. The trouble with many cases is, that they draw distinctions which distinguish nothing and lay down definitions which define nothing; and that, in my opinion, is what ails all the cases which rely upon the supposed doctrine of "jurisdictional facts found." They attempt to draw a distinction between inferior and superior courts where none exists. They overlook the point that, in all courts, the allegations of the petition alone can be examined to determine the jurisdiction over the subject-matter, and that the allegations contained in the proof of service or recital of appearance alone can be examined to determine the jurisdiction over the person; and that the only difference between inferior and superior courts is one of presumption in regard to jurisdiction; and that when this is shown by the record of an inferior court, its adjudication is entitled to the same respect, collaterally, as that of a superior court.<sup>2</sup> They attempt to draw a line between the *facts* constituting the cause of action, and the *facts* constituting the jurisdiction of the court. But as neither the jurisdiction nor the cause of action depend upon *facts*, but upon *allegations*, as is shown in Section 60, *supra*, there is nothing to found the distinction upon.

A New York case drew another distinction. The case was this: In a proceeding to condemn land, the record recited that the parties could not agree as to the amount to be paid to the owner, and appraisers were duly appointed and an award made, and the owner appeared and opposed its confirmation "upon the ground of the inadequacy of the damages," in which he was sustained, and the matter was referred back to the appraisers, who made a new report which the owner unsuccessfully opposed, and

1. *Andrews v. Goff*, — R. I. — (21 Atl. R. 347).

2. *Boyer v. Schofield*, 2 *Keyes* (N. Y.) 628, 631.

his land was condemned and appropriated. He then brought ejectment and offered to prove that no attempt had been made to agree with him about the compensation, but the court held he could not do so, saying: "On examining the authorities respecting the conclusiveness of records on jurisdictional questions, there will be found great and irreconcilable diversity, and I shall place my opinion on this question on one single proposition, which is supported by several cases, and contradicted by none; and that is, that when the jurisdiction of a court of limited authority depends on a fact, which must be ascertained by that court, and such fact appears, and is stated in the record of its proceedings, a party to such proceedings, who had an opportunity to controvert the jurisdictional fact, but did not, and contested upon the merits, cannot afterwards, in a collateral action against his adversary in those proceedings, impeach the record, and show the jurisdictional fact therein stated to be untrue."<sup>1</sup> The subject-matter involved in this proceeding was the alleged right to condemn the defendant's land. An allegation that the parties could not agree concerning the amount of the compensation was necessary in order to constitute a cause of action, in the same sense that an allegation of consideration is necessary in an action on an unwritten promise. Without such an allegation, the complaint is bad on demurrer; but no court ever supposed its presence was necessary to shield the judgment from collateral attack. I am unable to conceive of any case where a party in court would not have the right to controvert the jurisdictional facts as well as the others. He is called into court to show any cause of defense he may have why that particular court should not grant the relief prayed for, and if he shows no cause, the granting of the relief is conclusive that he has none. If that were not so, then the validity of a judgment would depend on the volition of the defendant, who, instead of having his "day in court" would have two. An early case in New York decided that where a jurisdictional fact was put in issue and actually litigated and determined in favor of the jurisdiction, it was conclusive collaterally.<sup>2</sup> So in New Hampshire, where a police justice had power to sentence in larceny where the value did not exceed ten dollars, but power only to examine and bind over where the value exceeded that amount, it was held that his finding that the value

1. *Dyckman v. Mayor*, 5 N. Y. 434, 440.

2. *Wright v. Douglas*, 10 Barb. 97, 111.

exceeded ten dollars could not be contradicted in the common pleas to which the accused was bound.<sup>1</sup>

JURISDICTION.... {  
     BRANCH I. . { *Exercised by reason of a mistake of law.*  
     BRANCH II. { *Exercised by reason of a mistake of fact.*

§ 64. **Scope of these two branches of jurisdiction.**—When jurisdiction is wrongfully exercised, as it must be in order to authorize the proceedings to be assailed collaterally, it is necessarily so exercised by reason of a mistake of law or of fact. Branch I, where the jurisdiction is exercised by reason of a mistake of law, is discussed in the remaining sections of this chapter, and in Chapters V, VI, VII, VIII, IX, X, XI, XIII and XIV; and Branch II, where the jurisdiction is exercised by reason of a mistake of fact is discussed in Chapters XII, XIII and XIV. More particularly stated, Chapters V to XI, inclusive, cover cases where the jurisdiction is *taken in the first instance* by reason of a mistake of law, and Chapter XII covers cases where the jurisdiction is thus taken over the subject-matter by reason of a mistake of fact, and Chapter XIII covers cases where the jurisdiction is thus taken over the person by reason of a mistake of law or fact; while Chapter XIV covers cases where the jurisdiction has once existed, but afterwards been lost by reason of a mistake of law or of fact.

#### BRANCH I.

##### JURISDICTION EXERCISED BY REASON OF A MISTAKE OF LAW.

§ 65. **Principle involved in Branch I.**—The mistakes of law upon which jurisdiction is exercised naturally and logically divide themselves into three parts: 1. Concerning the abstract right to exercise jurisdiction in causes of the class presented, or the power to grant the relief sought in a proper cause; 2. Concerning the right to exercise jurisdiction in the particular cause presented, or the power to grant the relief sought in that particular cause when the want of power is too clear for controversy; 3. Concerning the right to exercise jurisdiction in the particular cause presented, or the power to grant the relief sought in that particular cause when the power to do so in a proper cause of that kind is undoubted. For instance: A petition is presented to a court for a

1. *State v. Arlin*, 27 N. H. (7 Foster) 116, 128

writ of garnishment against a city. The question involved in Part I would be this: Does the law give the court power to grant the relief of garnishment in a proper cause? That question must be determined from an examination or construction of the law, and it is discussed in Chapters V and VI, *infra*; and if the question is debatable or colorable, the mistake in assuming jurisdiction does not make the proceeding void. The question involved in Part II would be this: Suppose the law absolutely and positively prohibits the garnishment of cities, but nevertheless the court takes jurisdiction and issues the writ. This is not usurpation, but simply a mistaken exercise of power, and is not void, and the city must defend. This is discussed in Chapter VII, *infra*. The question involved in Part III would be this: Do the allegations of the petition, assuming them to be true, warrant the issuing of the writ? The rule in regard to this is laid down in Section 61, *supra*, and the questions involved are discussed in Chapter VIII, *infra*.

§ 66. Principle involved in Part I of Section 65.—When a claim is presented to a judicial tribunal and relief demanded, it is in duty bound to hear the plaintiff, at least, and determine whether or not the law authorizes it to grant the relief sought. This is purely a question of law. It may be very simple or very complicated. It may be easily and certainly determined by reference to a familiar section of the statute or principle of the common law, or it may remain in much doubt after the most laborious comparison of the common law, statutes and constitutions, both state and federal. But as long as there is anything to compare the comparison must be made; as long as there is a debatable question, it must be considered; and from such comparison and consideration, an erroneous conclusion may be reached; and as the tribunal was compelled by law thus to investigate, compare and consider, and to draw a conclusion of law therefrom, it necessarily follows that such conclusion, however erroneous, is not a nullity and void collaterally. So to hold, would be to punish the judges for want of brain and discrimination. It must also be remembered that the officer presiding over the tribunal may be quite ignorant of law, and not fully able to understand the fine distinctions made, yet the command of the law, that justice shall be done to parties in that particular case, rests as heavily on *his* conscience as on the conscience of the most eminent judge. Hence, although the error in assuming or declining jurisdiction.

may be too plain for debate before judges skilled in the law, that does not necessarily make his decision void. The true rule seems to be that if the question is *colorable*—such as a person unskilled in the law might mistake—it will shield the decision from collateral assault. It is hardly necessary to state that the same rule applies to the proceedings of all tribunals, without regard to grade or dignity. In fact, sometimes judges of eminence—especially if of a metaphysical turn of mind—make mistakes that a magistrate would not; and sometimes the judge before whom the collateral attack is made, may be so biased or bewildered, that a question correctly decided seems to him so grossly erroneous as scarcely to be debatable. Hence, the true rule as applied to the proceedings of any judicial tribunal when attacked collaterally, is, if the jurisdictional matters are *colorable*, the proceeding is not void. Under our system of jurisprudence no judicial tribunal can apply to any other for official advice. It must rely upon itself. And as it is its sworn duty to take jurisdiction of every matter presented, *if the law has authorized it to do so*, it must pass upon its own power in each case so presented, as is more particularly shown in Sections 58 to 63, *supra*.

GENERAL SUBJECT OR CLASS—PARTICULAR CASE.—Numerous cases hold, that where jurisdiction exists over a general subject-matter, or class of persons, a mistake in deciding that a particular case falls within such general subject-matter or class, does not make the proceeding void. These cases are correct as far as they go. The trouble with them is want of generalization. The great point in any science is to generalize. The vast, almost infinite, superiority of algebra over arithmetic lies in its generalization. The tribunal always deals with a particular case. The question is not, Does it fall within some general subject or class, but does the law of the land—constitutional, statutory or common—give the tribunal power to grant relief in that particular case? To determine that point, a comparison of all the various laws of the state and Nation may be necessary; and an error in holding jurisdiction over the general subject or class differs in degree only, not in principle, from an error in holding jurisdiction over a particular case.

TO ILLUSTRATE: If an affidavit is presented charging an alleged crime and a warrant demanded, whether or not the statute creating the crime is constitutional, or was lawfully



enacted, or whether that particular tribunal or some other has jurisdiction over it, or whether the affidavit presented is sufficient to give the court jurisdiction, conceding that it has jurisdiction on presentation of a proper one, are all questions of law, differing in degree only, and not in principle. Hence an error in holding jurisdiction over a general subject by a mistaken construction of doubtful law, is no more fatal than an error in holding that a particular case falls within a general subject over which jurisdiction is undoubted. In other words, the rule that judicial proceedings are void where there was no rightful jurisdiction over the general subject or class, does not apply to Part I of Branch I now under consideration. The rule is only applicable to Part II of Branch I, and the whole matter is discussed in Chapter VII, *infra*.

§ 67. Jurisdiction exercised under the constitution, the statutes and the common law.—Is a mistake of law in exercising jurisdiction in violation of the constitution more serious, collaterally, than when done in violation of a statute or the common law? On principle, it is difficult to see why it should be. The distinction has been made, but no very cogent reasons assigned therefor. It is said that an unconstitutional statute is nothing, and that no rights can be derived from judicial proceedings based thereon, because something cannot be made from nothing. But any complaint which fails to state a cause of action on the merits is nothing, *if the court understands the law*. But courts both of first and last resort are daily granting relief on such complaints, and such relief is not void. The constitution, the statutes and the common law together make up the law of the land. The constitution furnishes the general frame-work, the statutes furnish the particular frame-work, and the common law fills the interstices, and the whole constitutes the body of the law. In an early case in Arkansas, the court, in speaking of the right to amend an execution after a sale by affixing the signature of the clerk, said: "There can be no doubt that some of the former decisions of this court were made under an erroneous impression with regard to the effect which the constitution had upon the validity of the process; that as the constitution required the signing, etc., it could not be dispensed with, and, being a constitutional defect, is void. Now, upon a moment's reflection, it will at once be perceived that a directory enactment of the constitution is of no more validity as a law than a like enactment by

statute. Both are laws, though emanating from different law-making powers.”<sup>1</sup> In Kansas it was said: “The constitution is law—the fundamental law—and must as much be taken into consideration by a justice of the peace as any other tribunal. Where two laws apparently conflict, it is the duty of all courts to construe them. If the conflict is irreconcilable, they must decide which is to prevail, and the constitution is not an exception to this rule of construction.”<sup>2</sup> A justice of the peace in Nebraska fined a person for selling liquor without a license. On *habeas corpus* it was contended that the statute was unconstitutional and void. The court said: “If the validity of a statute is brought in question in an inferior court on the trial of a cause, that question must finally be determined in the same mode as other legal questions arising on the trial of causes in such court—that is, by proceedings in error or appeal, as may be most appropriate and allowable by law.”<sup>3</sup>

1. *Whiting v. Beebe*, 12 Ark. (7 Eng.) 421, 537.

2. *Mayberry v. Kelly*, 1 Kan. 116, 125.

3. *Ex parte Fisher*, 6 Neb. 309, 311.

## CHAPTER V.

### JURISDICTION TAKEN BY REASON OF A MISTAKE OF LAW IN CONSTRUING THE CONSTITUTION.

PRINCIPLE INVOLVED IN CHAPTER V, . . . . .	§ 68
PART I.—PROCEEDINGS WITHIN CHAPTER V NOT VOID, . . .	69-74
PART II.—PROCEEDINGS WITHIN CHAPTER V VOID, . . .	75-82
PART III.—CONSTITUTIONAL DEFENSES DISREGARDED, . . .	83-86
PART IV.—CONSTITUTIONAL PROCEDURE DISREGARDED, . . .	87-88

§ 68. **Principle involved in Chapter V.**—Is a judicial proceeding necessarily void because jurisdiction was taken by reason of an erroneous construction of the constitution? For the reasons given in Sections 65, 66 and 67, *supra*, I think not. Many cases decided by respectable courts hold that it is not.<sup>1</sup>

#### PART I.

##### PROCEEDINGS WITHIN CHAPTER V NOT VOID.

§ 69. Appeals.

70. Bills of credit.

71. Clerk's judicial acts—Fees.

72. Intoxicating liquors—Liquor license bond—Penalties.

§ 73. Tax assessments.

74. Criminal proceedings—Confiscation—*Ex post facto*, etc.

§ 69. **Appeals.**—The California statute authorizing an appeal from the county court to the district court was unconstitutional; but not having been so declared, such an appeal was taken to the district court, and from that court to the supreme court, which reversed both courts and ordered the county court to grant a new trial. On a second appeal—the law authorizing the appeal to the district court having, in the meantime, been declared unconstitutional—it was urged that the judgments of the district and supreme courts were void, leaving the original judgment of the county court unaffected; but the supreme court refused so to hold.<sup>2</sup>

1. Webster v. Reid, Morris (Iowa) 30 Mich. 502; Matter of Donahue, 1 467, 480; Arnold v. Booth, 14 Wis. Abb. New Cas. 1 (52 How. Pr. 251). 180, 185; Parker's Case, 5 Tex. App. To these must be added the three cases 579; *Ex parte* Boeninghausen, 91 Mo. cited in section 67, *supra*. 301 (1 S. W. R. 761); In Matter of 2. Clary v. Hoagland, 6 Cal. 685. Harris, 47 Mo. 164; *Ex parte* Boulter, See section 77, *infra*. 16 Mo. App. 14; Matter of Underwood,

An unconstitutional statute of Kentucky gave an appeal directly from a justice of the peace to the circuit court, instead of to the quarterly court and from there to the circuit court. It was held that where the appeal was direct to the circuit court, a trial there without objection waived the error, as the want of jurisdiction was to the person and not to the subject-matter.<sup>1</sup>

§ 70. **Bills of credit.**—A note was given for “bills of credit” issued by a state bank in violation of the Constitution of the United States, and a judgment was rendered thereon. To satisfy this judgment a new note was given. In a suit on this note, it was held not to lack consideration, as the judgment was not void.<sup>2</sup> In another case, a note and mortgage were given to a bank for like void “bills of credit,” which mortgage was foreclosed on service by publication, and the land sold to a stranger. The mortgagor then conveyed the land, and his vendee brought ejectment, but it was held that he could not recover; that the court had the power to decide all questions in the cause, and that its decision could not be impeached collaterally.<sup>3</sup>

§ 71. **Clerk's judicial acts.**—In an action to recover land in Texas, it was contended that the defendant's title, derived through proceedings in attachment, was void, because the clerk, instead of the court, had issued the attachment writ; but this contention was denied, for the reason that the court of appeals had affirmed that judgment.<sup>4</sup> The constitution of North Carolina authorized trials before the clerks in certain cases, but provided that “all issues of fact joined before them shall be transferred to the superior court for trial.” But in such a case, the clerk tried it himself and rendered judgment. The court held that the parties ought to have appealed, and that the judgment was not void.<sup>5</sup> It will be seen that the clerk, in the case before him, was denied all judicial power by the constitution, yet because he had power to grant that relief in a proper case, his judgment was not void.

**FEES.**—An unconstitutional statute reduced sheriffs' fees, but in obedience thereto the county auditor settled with that officer, allowing him the reduced fees, and made his report to the court

1. Hughes' Adm'r v. Hardesty, 13 Bush 364, 366.

2. Mitchell v. State Bank, 2 Ill. (1 Scam.) 526.

3. Buckmaster v. Carlin, 4 Ill. (3 Scam.) 104, 107.

4. Crane v. Blum, 56 Tex. 325.

5. Spencer v. Credle, 102 N. C. 68 (8 S. E. R. 901, 909).

of common pleas which became a judgment of that court from which an appeal would lie. After the act was declared unconstitutional, the sheriff sued the county to recover the balance due him under the old statute. It was held that the judgment of the common pleas was a bar.<sup>1</sup>

§ 72. **Intoxicating liquors.**—Where a person was convicted and imprisoned for violation of the prohibitory liquor statute of Iowa, which statute was valid as to all liquors not brought from other states and sold in the original packages, it was held incompetent for him to show on *habeas corpus* in the federal court that the evidence did not sustain the sentence because the liquor was brought from another state and sold in the original packages.<sup>2</sup>

**LIQUOR—LICENSE BOND.**—An unconstitutional statute required the retailers of intoxicating liquors to file bonds to pay damages. A judgment on one of these bonds was held not void. The court admitted that the bond had no consideration, but said that that was a defense which ought to have been made.<sup>3</sup> Under the pleading in Indiana the fact that the cause of action was based on the unconstitutional statute appeared on the face of the complaint.

**PENALTIES.**—A lawful statute in Kentucky gave justices of the peace power to render judgments for penalties not exceeding fifty dollars. An unconstitutional statute prohibited a certain thing under a penalty of fifty dollars, and it was held that a justice's judgment for a penalty for the violation of this statute was not void.<sup>4</sup> Chief Justice Robertson said: "A judgment, however erroneous, is not void merely because it was ordered on a void claim. It can never be void when the court which rendered it had jurisdiction over the suit brought to obtain it, and a right to decide whether the demand be legal and enforceable or not." The learned Chief Justice drew this distinction between unconstitutional statutes. He said: "If the magistrate would not, independently of that statute, have had jurisdiction to decide on a demand for fifty dollars, claimed as a penalty due from the defendants to the plaintiff in the warrant, there could be no doubt that he would have had no jurisdiction, because his only authority would have been a void statute,

1. Northampton County v. Herman, 119 Pa. St. 373 (13 Atl. R. 277).

3. Cassell v. Scott, 17 Ind. 514.

2. *In re* Jordan, 49 Fed. R. 238—Woolson, J.

4. Arnold v. Shields, 5 Dana 18 (30 Am. D. 669, 673).

which could confer no power. But if, without the statute, he had jurisdiction over a suit for debt, on a claim not exceeding fifty dollars, the fact that there was *no debt*, because the statute under the sanction of which alone it could exist, was void, could neither oust nor translate the jurisdiction to decide whether the debt, as claimed, was due or not." I do not agree with this *dictum*.

§ 73. **Tax assessments.**—The statute of New York required the stock of national banks to be taxed. The assessors, over the protest of the owner, assessed such stock. The statute was afterwards declared to be unconstitutional and void by the Supreme Court of the United States. This showed that the assessment was wrongful. In an action to recover it back, it was said: "The assessors had jurisdiction of the person of the plaintiff and of the subject-matter—to-wit, taxation—and of the property in question; and, although the assessment was clearly erroneous, it was not void."<sup>1</sup>

In this last case the decision appears to have been put on the ground that the tribunal had jurisdiction over the general subject of taxation, and that a mistake in holding a particular case to fall therein did not make the proceeding void; but that principle does not seem to me to be applicable. The statute under which the assessors were acting required them to tax the stock. It professed to give them jurisdiction, and they professed to act under it, and were compelled to determine its validity. It was not an exception to a general statute which was overlooked. The same court also held that a tax assessed upon stocks of the United States, in obedience to a state statute, but in violation of the Constitution of the United States, was not void.<sup>2</sup>

§ 74. **Criminal proceedings — Confiscation.**—Where a statute authorizing confiscation proceedings was impliedly repealed by the constitution afterwards adopted, it was held that a judgment subsequently rendered in such a proceeding was not void.<sup>3</sup>

EX POST FACTO.—In the same State, it was held that a sentence to imprisonment under a law unconstitutional because *ex post facto*, was not void, and that the prisoner would not be discharged on *habeas corpus*.<sup>4</sup>

1. Swift v. City of Poughkeepsie, 37 N. Y. 511, 512.

2. Bank of Commonwealth v. Mayor, 43 N. Y. 184, 187.

3. M'Neil v. Bright, 4 Mass. 282, 304.

4. Ross's Case, 2 Pick. 165, 172; Riley's Case, id. 172. See p. 110<sup>1</sup>, *infra*.

INTERNATIONAL LAW.—A sentence of a French prize court, under the Milan decree, was held not void because that decree was a flagrant violation of international law.<sup>1</sup> So where a person was given an indeterminate sentence in Wisconsin of from three to eight years, within the discretion of the prison board of control, according to a statute, it was held that the constitutionality of the statute could not be questioned on *habeas corpus*, because that was a question for the trial court;<sup>2</sup> and the same ruling was made in respect to testing the constitutionality of a statute concerning trials in criminal cases where the defense was insanity and the jury disagreed.<sup>3</sup>

## PART II.

### PROCEEDINGS WITHIN CHAPTER V VOID.

§ 75. The leading case.

76. Administrator, appointment of.

77. Appeals.

78. Crime created.

§ 79. Criminal jurisdiction.

80. Divorce.

81. Justice's jurisdiction.

82. Tax-assessment.

§ 75. The leading case, although not the original one, holding judicial proceedings void collaterally where jurisdiction was taken by reason of an unconstitutional statute, is *Ex parte Siebold*.<sup>4</sup> In that case, the petitioner for a writ of *habeas corpus* had been convicted and imprisoned for violation of a federal election law, and he prayed to be released on the ground that the statute was unconstitutional. The court said: "If this position is well taken, it affects the foundation of the whole proceedings. An unconstitutional law is void, and is as no law. An offense created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment." The opinion in this case was written by Mr. Justice Bradley, one of the very ablest jurists that

1. *Williams v. Armroyd*, 7 Cranch 423, 433.

2. *In re Pikulik*, — Wis. — (51 N. W. R. 261).

3. *In re French*, — Wis. — (51 N. W. R. 960).

4. *Ex parte Siebold*, 100 U. S. 371, 376. In accord with this case, holding that a conviction under an unconstitutional statute is void, and that the prisoner will be discharged on *habeas*

*corpus*, are *Ex parte Yarbrough*, 110 U. S. 651, 654 (4 S. C. R. 152); *Ex parte Royall*, 117 U. S. 241, 248 (6 S. C. R. 734); *Ex parte Gibson*, 89 Ala. 174 (7 S. R. 833); Andrew Jackson, *Ex parte*, 45 Ark. 158, 164; *Ex parte Mato*, 19 Tex. App. 112, overruling *Parker's Case*, 5 Tex. App. 579; *In re Barber*, 39 Fed. R. 641; *In re Wong Yung*, 6 Sawyer 237 (47 Fed. R. 717).



ever sat in that court, and if any reason had existed why the consequences of a mistake on a constitutional question should be more serious than a mistake on a statutory or common-law question, he would have stated it. The only reason he gives is that: "An unconstitutional law is void, and is as no law. An offense created by it is not a crime." According to this doctrine, the court of last resort is powerless, on a constitutional question, to protect its own officers. For if a person should be tried on an information and be sentenced to be hanged, and the sentence should be confirmed and carried out by order of that court, and then the court, on further reflection, or by change of members, should come to a different conclusion in another case, and hold that in all such cases the constitution required an indictment, all persons engaged in the taking off of the first person would be guilty of manslaughter, and liable for damages at the suit of his widow. I humbly submit to the profession that any doctrine which holds that a decision of a competent judicial tribunal, and especially that of the highest in the land, on a doubtful point of law, is void collaterally, and that all rights and titles founded thereon are void, whenever the court of last resort changes its rulings for any cause, is not correct on principle. I humbly submit that a right or title founded upon the judgment of any judicial tribunal based on a doubtful or debatable question of law, is not void; that to hold such a right or title void to the damage of innocent holders, is against sound public policy; that it tends to bring the courts into merited disrespect. When any court, with all the facts and all the law before it, deliberately orders some malefactor to be incarcerated, and compels the officers to carry out its sentence under pain of severe punishment upon refusal, and then as deliberately entertains an action by him against them for false imprisonment, because it has changed its mind on the law, it can hardly expect such officers or their friends to entertain a very high respect for it. In a later case, the same court said: "It is firmly established that, if the court which renders a judgment has not jurisdiction to render it, either because the proceedings or the law under which they are taken, are unconstitutional, . . . the judgment is void, and may be questioned collaterally."<sup>1</sup> In a late case in Massachusetts, it

<sup>1</sup> Hans Nielsen, Petitioner, 131 U. S. 176, 182 (9 S. C. R. 672), Bradley, J.

was said: "It is held in this State, and by good authorities elsewhere, that the constitutionality of a law which a court is attempting to apply, lies at the foundation of the jurisdiction under it, and may be called in question upon *habeas corpus*." <sup>1</sup> The same doctrine was held in an early case in Iowa.<sup>2</sup>

§ 76. **Administrator, appointment of.**—The supreme court of Alabama held that all appointments of administrators during the late civil war were the acts of a usurped power and void. A probate court, in accordance with this decision, appointed a new administrator for an estate, ignoring the old one. Afterwards the supreme court changed its rulings, holding appointments made during the war valid. It then held the second appointment void.<sup>3</sup> The doctrine established by this case is, that a decision of the supreme court on a constitutional question is void, and no protection to any one when the court afterwards changes its rulings.

§ 77. **Appeals.**—An unconstitutional statute gave an appeal from a justice's court to the district court, and such an appeal was taken to the district court, and from there to the supreme court, which decided the cause on the merits, and by virtue of its judgment land was sold. It being afterwards discovered that the statute was unconstitutional, it was then held that the judgments of the district and supreme courts were void, and that the sale of the land passed no title.<sup>4</sup> This identical question was decided the other way in California.<sup>5</sup>

**CLERK'S JUDICIAL ACTS.**—A Minnesota statute authorized the clerk to issue writs of attachment, while the constitution required it to be done by an order from the judge. In such a case the clerk issued a writ without an order, and the defendant appeared and contested the case on the merits without objection to the writ, and defeated the case. He then sued the plaintiff, and his attorney who caused the writ to issue, and the whole attachment proceeding was held void and no protection.<sup>6</sup> But, surely, a defense to the case on the merits was a waiver of any irregularity in the writ of attachment. This case is contrary to the cases cited in Section 71, *supra*.

1. Sennott's Case, 146 Mass. 489 (16 N. E. R. 448, 450).

2. Reed v. Wright, 2 G. Greene 15, 33-

3. Nelson v. Boynton, 54 Ala. 368, 374-

4. Horan v. Wahrensberger, 9 Tex. 313 (58 Am. D. 145).

5. Clary v. Hoagland, 6 Cal. 685. See Section 69 for abstract.

6. Merritt v. City of St. Paul, 11 Minn. 223, 231.

CONTEMPTS.—A sentence to jail for contempt in refusing to turn over property,<sup>1</sup> or to pay over money,<sup>2</sup> made by virtue of an unconstitutional statute, is void and the prisoner will be released on *habeas corpus*.

§ 78. Crime created.—A justice of the peace fined a person under an unconstitutional statute in Massachusetts, and he was held liable in trespass. The court said: "Under a government of limited and defined powers, where, by the provisions of the organic law, the rights and duties of the several departments of the government are carefully distributed and restricted, if any one of them exceeds the limits of its constitutional power, it acts wholly without authority itself, and can confer no authority upon others. The defendant could derive no power or jurisdiction from a void statute."<sup>3</sup>

COLORED PERSON.—An unconstitutional statute of Kentucky made it a crime for a free person of color to raise his hand in opposition to a white person, and a conviction under it was held to make the justice a trespasser.<sup>4</sup>

DRUNK.—The same ruling was made in Indiana in respect to a conviction for being found drunk.<sup>5</sup>

LARCENY.—A South Carolina statute made petit larceny a misdemeanor and gave trial justices jurisdiction, but no statute prescribed the punishment; nor did the common law prescribe any definite punishment. The constitution limited the jurisdiction of trial justices to offenses where the punishment could not exceed thirty days in jail and one hundred dollars fine. A trial in such a case was held void, and corrupt swearing therein no offense, because the punishment might have exceeded the constitutional limits of the justice's jurisdiction.<sup>6</sup>

LICENSE TO DO BUSINESS.—Where an unconstitutional statute made it a crime to solicit certain business without a license, a conviction was decided to be void.<sup>7</sup> And where a general criminal statute made it an offense to do business without a license where one was required by law, and gave the court jurisdiction

1. *Ex parte* Grace, 12 Iowa 208 (79 Am. D. 529).

2. *Ex parte* Hardy, 68 Ala. 303, 323, Brickell, C. J., *dissenting* on the ground that the statute was constitutional.

3. Kelly v. Bemis, 4 Gray, 83 (64 Am. D. 50).

4. Ely v. Thompson, 3 A. K. Marsh. 70, 76.

5. Sumner v. Beeler, 50 Ind. 341.

6. State v. Jenkins, 26 S. C. 121 (1 S. E. R. 437).

7. *Ex parte* Rosenblatt, 19 Nev. 439 (14 Pac. R. 298); *accord dictum* in *Ex parte* Davis, 21 Fed. R. 396 — Barr, J.

over all such offenses, and a new unconstitutional statute required a license to solicit orders for non-residents, a conviction under this statute was held void.<sup>1</sup>

**VAGRANT.**—Sentences to the reform school,<sup>2</sup> or to the industrial school,<sup>3</sup> under an unconstitutional statute, were held void.

§ 79. **Criminal jurisdiction.**—A valid statute of Alabama provided that where the defendant demanded a jury in a criminal case before the county court, he should be bound over to the circuit court for trial, and then an unconstitutional statute gave the county court power to try such a case; but a trial thereunder was decided to be void.<sup>4</sup> So a trial in Michigan in one county for a crime committed in another, by virtue of an unconstitutional statute, was held void.<sup>5</sup> The 17th section of the constitution of Texas provided that felonies should only be prosecuted upon indictment: "But all offenses of a less grade than a felony may be prosecuted upon complaint, under oath, by any peace officer or citizen, before any justice of the peace or other inferior tribunal that may be established by law." The 20th section provided that "Justices of the peace shall have such civil and criminal jurisdiction as *shall be provided by law*." The legislature gave justices jurisdiction where the "penalty, fine or forfeiture shall not exceed one hundred dollars." A person was prosecuted before a justice for an offense of a less grade than a felony, convicted and sentenced to imprisonment in jail. This was held void, because the constitution, by the words "as shall be provided by law," meant statutory law, and not the constitutional law mentioned in the 17th section above quoted.<sup>6</sup> But the justice, not without some show of reason, construed the word "law" to mean law of any kind.

A statute of New York gave a city recorder all the power of a judge of the supreme court in chambers, in certain cases, and he made an order for the arrest of a person in another county for contempt, which a judge of the supreme court could do; but this order was held void, because the statute, in so far as it gave him power to act beyond his county, was unconstitutional.<sup>7</sup>

1. *Asher v. Texas*, 128 U. S. 129 (9 S. C. R. 1).

2. *People ex rel. O'Connell v. Turner*, 55 Ill. 280 (8 Am. R. 645).

3. *State v. Ray*, 63 N. H. 406.

4. *Ex parte Gibson*, 89 Ala. 174 (7 S. R. 833).

5. *Hill v. Taylor*, 50 Mich. 549 (15 N. W. R. 899).

6. *Ex parte McGrew*, 40 Tex. 472, 474.

7. *Carroll v. Langan*, 18 N. Y. Supp. 290.

§ 80. **Divorce.**—A special statute of the State of Maine authorized the supreme judicial court, in its discretion, to decree a divorce to one Franklin Simonds, of Westbrook, in that State. The court heard the case and duly granted the divorce. This was held void in Massachusetts, because the statute was unconstitutional.<sup>1</sup>

**IMPRISONMENT IN A CIVIL CASE** by virtue of an unconstitutional statute,<sup>2</sup> or an order to imprison for the non-payment of money, in violation of the constitution,<sup>3</sup> is void.

**INJUNCTION.**—A circuit court of the United States restrained the attorney-general of a state from prosecuting an action on behalf of the state to collect certain taxes against aliens, on the ground that the statute under which he was proceeding was unconstitutional. He violated the injunction and was imprisoned. On *habeas corpus*, the supreme court held that the suit to restrain him was a suit against the state, and therefore a violation of the eleventh amendment to the Constitution of the United States, and that the whole proceeding against him was void, and he was released.<sup>4</sup> Whether or not the suit came within the prohibition of the eleventh amendment was a close question, and Mr. Justice Harlan dissented on this point. But the majority held that a mistake on a very close point of law made the proceedings void.

**INTERSTATE COMMERCE LAWS.**—A person was convicted and imprisoned in Kansas for the violation of the statute of the state in selling liquor in the original package as imported from another state. This law having been held unconstitutional, he was released on *habeas corpus*.<sup>5</sup> So where the state court, under the same statute, had enjoined a person from thus selling, the federal circuit court enjoined the plaintiff in the state court from attempting to enforce its decree.<sup>6</sup> A state statute made it a crime to sell any fresh meat unless the animal was first inspected in the state before being slaughtered. For a violation of this statute a person was convicted and imprisoned by a justice of the peace. On *habeas corpus*, the statute was held to violate the Constitution of the United States, and he was released.<sup>7</sup>

1. *Simonds v. Simonds*, 103 Mass. 572.

2. *Ex parte Rollins*, 80 Va. 314.

3. *In re Blair*, 4 Wis. 522, 534.

4. *In re Ayres*, 123 U. S. 443 (8 S. C. R. 164).

5. *In re Beine*, 42 Fed. R. 545—Caldwell, J.

6. *Tuchman v. Welch*, 42 Fed. R. 548—Foster and Phillips, JJ.

7. *Minnesota v. Barber*, 136 U. S. 313 (10 S. C. R. 862).

INTOXICATING LIQUORS.—A seizure of liquors on judicial process,<sup>1</sup> and a conviction for keeping them,<sup>2</sup> under an unconstitutional statute, were held void. The court said: "The law relied on for a justification being void, gave the magistrate no jurisdiction."

§ 81. Justice's jurisdiction.—An Illinois statute increasing the jurisdiction of justices of the peace from one hundred dollars to two hundred dollars was not passed in the senate by a constitutional majority, and a judgment for one hundred and eleven dollars and ninety-two cents by virtue thereof was held void.<sup>3</sup>

LIEN.—A decree foreclosing a lien for an unconstitutional tax in Arkansas was said to be void.<sup>4</sup>

MAYOR'S COURT.—Where jurisdiction was given to a mayor's court in Mississippi by an unconstitutional statute, a conviction was decided to be void and no bar to a prosecution in the circuit court.<sup>5</sup>

ORDINANCE.—An imprisonment,<sup>6</sup> or holding for trial,<sup>7</sup> under an unconstitutional ordinance, and a private road judicially established under an unconstitutional statute,<sup>8</sup> have been held void.

STATE LAW REPUGNANT TO CONSTITUTION OF UNITED STATES.—A person was convicted and imprisoned under a statute of Virginia. The United States circuit court, holding the statute to be repugnant to the Constitution of the United States, discharged him on *habeas corpus*;<sup>9</sup> but the Supreme Court of the United States, being of the contrary opinion, reversed the case, holding the judgment of the state court to be not even erroneous on this point.<sup>10</sup> A doctrine which leads eminent judges to commit such mistakes would not seem to commend itself very highly.

1. *Greene v. Briggs*, 1 Curtis 311; *Greene v. James*, 2 id. 187.

2. *Fisher v. McGirr*, 1 Gray 1, 46, 49.

3. *People ex rel. Reitz v. De Wolf*, 62 Ill. 253.

4. *Dictum* in *Williamson v. Mimms*, 49 Ark. 336 (5 S. W. R. 320, 326).

5. *Montross v. State*, 61 Miss. 429.

6. *In re Ah Jow*, 29 Fed. R. 181; *Ex parte Kieffer*, 40 id. 399; *Yick Wo*

*v. Hopkins*, 118 U. S. 356 (6 S. C. R. 1064).

7. *In re Lee Tong*, 18 Fed. R. 253; *Frazee In re*, 63 Mich. 396 (30 N. W. R. 72).

8. *Taylor v. Porter*, 4 Hill 140 (40 Am. D. 274); *accord*, *Wild v. Deig*, 43 Ind. 455.

9. *Ex parte McCready*, 1 Hughes 598.

10. *McCready v. Virginia*, 94 U. S. 391

EX POST FACTO STATE LAW.—A sentence to death under a State law which violated the Constitution of the United States because it was *ex post facto*, was held void and the prisoner was released on *habeas corpus*.<sup>1</sup>

§ 82. Tax-assessment.—An assessment for a street improvement, laid upon a lot by a board of supervisors under an unconstitutional statute, was held void.<sup>2</sup>

TERMS OF COURT.—A valid statute fixed the times for the terms of a court, but it was not yet in force. A new statute was then passed, declaring that the former statute should take effect immediately, and a term of court was held accordingly before the original statute could take effect of its own force. The new statute being unconstitutional, all business done at that term was held void.<sup>3</sup>

VESSEL, LIEN UPON.—It was held in Maine that a writ of attachment, issued under an unconstitutional state statute giving a lien on vessels for repairs, was void, and no protection to the officers for seizing the vessel.<sup>4</sup>

WITNESS COMPELLED TO CRIMINATE HIMSELF.—The fifth amendment to the Constitution of the United States declared that "No person . . . shall be compelled, in any criminal case, to be a witness against himself," and a statute provided that no evidence obtained from a witness by means of a judicial proceeding should be given in evidence, or used against him or his property or estate in any criminal proceeding, or for the enforcement of any penalty or forfeiture. A witness before the federal grand jury refused to answer certain questions, on the ground that the answers would tend to criminate him. The matter was reported to the court, and it being of the opinion that the statute secured to him the immunity guaranteed by the constitutional amendment, ordered him to answer. This he still

1. Medley, Petitioner, 134 U. S. 160 (10 S. C. R. 384); Savage, Petitioner, 134 U. S. 176 (10 S. C. R. 389).

In Jaehne v. New York, 128 U. S. 189 (9 S. C. R. 70), a petition was filed to release the prisoner on the ground that the statute under which he was convicted was *ex post facto*, but the court decided that the statute was not *ex post facto*, recognizing the right to treat the judgment as void for that

cause. So a punishment fixed by virtue of an unconstitutional statute is void. *In re Kemmler*, 7 N. Y. Supp. 145. See p. 102<sup>4</sup>, *supra*.

2. Horn v. Town of New Lots, 83 N. Y. 100.

3. Cain v. Goda, 84 Ind. 209.

4. Warren v. Kelly, 80 Me. 512 (15 Atl. R. 49)—the case does not show what became of the attachment proceedings.



refused to do, and he was fined and imprisoned for contempt. His petition to the federal circuit court to be discharged was denied.<sup>1</sup> The view taken by that court, that the statute which forbade the use of his evidence in any proceeding against himself for a crime, penalty or forfeiture, gave him all the immunity guaranteed by the fifth amendment, had been adopted by the supreme courts of Arkansas, California, Georgia, Indiana and North Carolina, and by several federal circuit decisions;<sup>2</sup> while the court of appeals of New York had decided that the provision of the constitution only applied in cases where the prosecution was against the witness, and gave him no immunity where he was called as a witness against another.<sup>3</sup> On appeal to the Supreme Court of the United States from the judgment refusing a discharge on *habeas corpus*, that court held that the statute did not afford him all the protection guaranteed by the fifth amendment, which could only be done by a statute prohibiting any prosecution against him for any crime which his evidence might tend to disclose, and the judgment was reversed and the witness discharged from custody upon the ground that the order of imprisonment was void.<sup>4</sup> This case demonstrates that where a constitutional question is involved, the judgment, even when affirmed by the court of last resort, furnishes no security for any right or title. The only value of such a decision is to enable the successful party to hold the right given him, if he can, until the Statute of Limitations comes to his aid.

### PART III.

#### CONSTITUTIONAL DEFENSES DISREGARDED.

§ 83. Jeopardy—placed in, twice, by splitting a cause.

84. Section 83, continued.

§ 85. Jeopardy—Placed in, twice, by discharge of jury—*Ex parte* Bigelow, 113 U. S. 328.

86. Section 85, continued.

§ 83. Jeopardy—Placed in, twice, by splitting a cause.—When a single crime is split up into several causes, it is a clear violation of the constitutional provision that “No person shall be put in

1. *In re Counselman*, 44 Fed. R. 268, —Gresham, J.

2. *State v. Quarles*, 13 Ark. 307; *Ex parte Rowe*, 7 Cal. 184; *Higdon v. Heard*, 14 Ga. 255; *Wilkins v. Malone*, 14 Ind. 153; *La Fountaine v. Southern Underwriters*, 83 N. C. 132; U. S.

*v. Brown*, 1 Sawyer 531; U. S. *v. McCarthy*, 18 Fed. R. 87; U. S. *v. Three Tons of Coal*, 6 Biss. 379.

3. *People v. Kelly*, 24 N. Y. 74.

4. *Counselman v. Hitchcock*, 142 U. S. 547.

jeopardy twice for the same offense." In speaking of such a case, the Supreme Court of the United States said that an unconstitutional conviction and punishment under a valid law was void; that it was not a mere error but a denial of a constitutional right. The case was this: The defendant was indicted and convicted for unlawful cohabitation with two women from October 15, 1885, to May 13, 1888, and punished therefor. He was also indicted for adultery committed with one of the women on May 14, 1888. To this indictment he pleaded the former indictment and conviction, alleging that the unlawful cohabitation with which he was charged in the first indictment continued without intermission up to the time of the finding of that indictment, covering the time within which the adultery was laid in the second indictment. A demurrer was sustained to this plea by the trial court; but, in the opinion of the supreme court, it showed that the adultery charged in the second indictment was an incident and part of the unlawful cohabitation charged in the first indictment, and that the second indictment and conviction was a second punishment for the same offense, and was, therefore, void.<sup>1</sup>

It will be seen that the first indictment for unlawful cohabitation laid the time from the 15th day of October, 1885, to the 13th day of May, 1888; and that the second indictment charged the adultery on the 14th day of May, 1888. The government attorney claimed, not only that the time included in the first was not included in the second, but also that it took different evidence to convict of adultery than to convict for unlawful cohabitation, relying on *Morey v. Commonwealth*,<sup>2</sup> in which it was held that a conviction for lewd and lascivious association and cohabitation did not bar a trial for adultery during the same time with the same woman, because the same evidence would not support both indictments, and that full proof of the facts alleged in either indictment would not support the other. He also relied on *State v. Elder*,<sup>3</sup> where it was held that, when the same facts constitute two or more offenses wherein the lesser offense is not necessarily involved in the greater, and the facts necessary to convict on a second prosecution would not necessarily have convicted on the first, the first prosecution would not be a bar to

1. *Hans Nielsen, Petitioner*, 131 U. S. 176, 182.

2. *Morey v. Com.*, 108 Mass. 433.

3. *State v. Elder*, 65 Ind. 282.

the second, although the offenses were both committed at the same time and by the same act.

The court commented on *Morey v. Commonwealth*, not denying its soundness, but distinguishing it from this case. The distinction is very fine. Here was a case depending upon a very close point of common law as to whether it was even erroneous—a point upon which able lawyers and learned judges would and did differ, and yet because the court below erred, its decision was held void collaterally, and the prisoner was released on *habeas corpus*. In an early case in Pennsylvania three persons were tried for forgery on an indictment of sixteen counts. They were acquitted on nine counts, and nothing said as to the others. This operated as an acquittal upon all, but the court remanded them to jail. This order was held not void and a discharge on *habeas corpus* was refused.<sup>1</sup>

§ 84. Section 83, continued.—Three indictments were presented against one Snow, charging unlawful cohabitation, respectively, from January 1, 1883, to December 31, 1883; January 1, 1884, to December 31, 1884; and January 1, 1885, to December 1, 1885. He was convicted on the last one, and pleaded that conviction in bar of the others, alleging that the offenses charged were but one continuous one. To this plea a demurrer was sustained, and he was convicted, and this conviction was held void.<sup>2</sup> It will be seen that, in these last two federal cases, there was no question about the jurisdiction over the person, for the accused was present in custody, nor about jurisdiction over the subject-matter, for the accused was properly charged by indictment of an offense which the court had power to try. The real point decided is, that the court lost jurisdiction by sustaining a demurrer to a good defense—by making an erroneous ruling on a point of law during the pendency of the proceeding. As a logical sequence, it would follow that, where a demurrer is sustained to a good plea in bar, or overruled to a complaint bad on the merits, jurisdiction is lost at that point, and that all parties proceed further at their peril. In all such cases, *to a court that knows the law*, the record would show on its face that the court made something out of nothing. The last case relies on *Crepps v. Durden*,<sup>3</sup> which was this: A statute pro-

1. Com. *ex rel.* Norton v. Deacon, 8 Serg. & Rawle 72.

2. *In re Snow*, 120 U. S. 274 (7 S. C. R. 556).

3. *Crepps v. Durden*, 2 Cowper 640.

hibited any person from "exercising his ordinary trade upon the Lord's Day," under a penalty of five shillings. A baker violated the statute by baking bread one day. For this he was sued in four cases, and four judgments of five shillings each were rendered against him, and executions issued and levied. It was held that the last three were void, because the statute only intended one penalty for one day's violation. But surely the first conviction was merely a defense to the last three, and had nothing to do with the jurisdiction. The defendant was in court on the second, third and fourth charges, and the question was whether or not there was any cause whatever why judgment should not go against him. One good cause was that he had already been convicted for the same offense. This was a matter not appearing in the record of either case, and no rule of law authorizes a record, fair on its face, to be overturned collaterally by evidence *aliunde*. The identical point arose in an early case in Connecticut,<sup>1</sup> and was decided the other way. In that case a justice had convicted a person several times for profanity uttered on the same day, and it was held that he could not show, collaterally, that the oaths were all uttered at the same time and constituted but one offense. With the utmost deference, I am unable to see how former jeopardy touches the jurisdiction. A plea of former jeopardy simply shows that the defendant is not guilty of the crime charged. It has the same force that a plea of payment does in a civil case, and no court would contend that a demurrer sustained to such a plea would render subsequent proceedings void. Where a justice of the peace in Wisconsin erroneously sustained a demurrer to a plea of former conviction, this error was held not to touch the jurisdiction, and to be no ground even to quash the proceeding on *certiorari*;<sup>2</sup> and the court of appeals of Texas held that a former conviction did not make a second prosecution and conviction void so that the accused could be released on *habeas corpus*.<sup>3</sup>

§ 85. Jeopardy—Placed in, twice, by discharge of jury—*Ex parte Bigelow*, 113 U. S. 328.—It seems to me that the cases cited in Sections 83 and 84, *supra*, are in conflict with *Ex parte Bigelow*.<sup>4</sup> Fourteen indictments were pending in the criminal court of the District of Columbia against Bigelow, and the court ordered

1. *Holcomb v. Cornish*, 8 Conn. 375, 380.

2. *Owens v. State*, 27 Wis. 456, 460.

3. *Griffin v. State*, 5 Tex. App. 457.

4. *Ex parte Bigelow*, 113 U. S. 328

(5 S. C. R. 542).

them to be consolidated under the statute and tried together. A jury was empaneled and sworn in the consolidated case, and the prosecuting attorney had stated his case, when the court concluded that the cases could not be well tried together, and discharged the jury, and rescinded the order of consolidation. The prisoner was then tried on one of the indictments and found guilty. All this was done over his objections and exceptions. Judgment was rendered against him and affirmed on appeal to the supreme court of the district. As he could not appeal thence to the Supreme Court of the United States, he made a motion in that court for leave to file a petition for a writ of *habeas corpus*. His contention was, that he was put in jeopardy in the consolidated case, and was therefore entitled to a discharge. The court said: "It is said, however, that the court below exceeded its jurisdiction, and that this court has the power, in such case and for that reason, to discharge the prisoner from confinement under a void sentence. The proposition itself is sound if the facts justify the conclusion that the court of the District was without authority in the matter. But that court had jurisdiction of the offense described in the indictment on which the prisoner was tried. It had jurisdiction of the prisoner, who was properly brought before the court. It had jurisdiction to hear the charge and the evidence against the prisoner. *It had jurisdiction to hear and to decide upon the defenses offered by him. The matter now presented was one of those defenses.* Whether it was a sufficient defense was a matter of law on which that court must pass so far as it was purely a question of law, and on which the jury under the instructions of the court must pass if we can suppose any of the facts were such as required submission to the jury. If the question had been one of former acquittal—a much stronger case than this—the court would have had jurisdiction to decide upon the record whether there had been a former acquittal for the same offense, and if the identity of the offense were in dispute, it might be necessary on such a plea to submit that question to the jury on the issue raised by the plea. The same principle would apply to a plea of a former conviction. Clearly, in these cases the court not only has jurisdiction to try and decide the question raised, but it is its imperative duty to do so. If the court makes a mistake on such trial it is error which may be corrected by the usual modes of correcting such errors, but that the court had jurisdiction to decide upon the matter raised by the

discharge because of former jeopardy being overruled, he was imprisoned. On *habeas corpus* in the federal court, it was held that due process of law had been denied him under the fourteenth amendment, and he was discharged.<sup>1</sup> The court held that the asserted indisposition of the state judge could not be regarded as the legal necessity impelling the discharge of the jury. It also animadverted on the taking up of the other trial in the midst of the Ulrich case, thus keeping the defendant "indefinitely on the rack, tortured with the natural anxiety and dread sense of uncertainty as to his fate." But the court held the judgment of the state court void because the jury was unlawfully discharged. Of course if the state judge was too ill to proceed with the trial, he could do nothing but discharge the jury. It is evident that the federal judge did not believe the "asserted indisposition" of the state judge to be true, and held that there was, in fact, no good cause for his failure to proceed with the trial. How the federal judge arrived at this conclusion does not appear. Certainly, he could not hear evidence concerning the health of the state judge, or to contradict his record on any matter of fact. I think this case wrong both on principle and authority. Since writing the foregoing criticism, this case was reversed by the circuit judge, who held, that whether or not the jury was unlawfully discharged was a question for the state court to decide.<sup>2</sup> The cases in this section involve this question, namely: Where the record shows that a prisoner is held by virtue of an order or sentence made in violation of a constitutional right, is such order or sentence void? I submit that they establish the principle that an erroneous denial of a doubtful or debatable constitutional right does not make the judgment void.

#### PART IV.

##### CONSTITUTIONAL PROCEDURE DISREGARDED.

§ 87. Affidavit instead of information. | § 88. Jury denied, and *vice versa*.

§ 87. **Affidavit instead of information.**—The constitution of Missouri required a certain crime to be prosecuted by information, but it was done by affidavit as authorized by a statute, and the conviction was held void.<sup>3</sup>

1. *Ex parte Ulrich*, 42 Fed. R. 587, 595—Philips, J.

2. *Ex parte Ulrich*, 43 Fed. R. 661, 664—Caldwell, J.

3. *State v. Briscoe*, 80 Mo. 643—an appeal upon which the defendant was discharged from custody.

INFORMATION INSTEAD OF INDICTMENT.—The fifth amendment to the Constitution of the United States provides that “No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury. . . .” A person was charged by information with the crime of having in his possession forged United States bonds with intent to sell, etc., and also with having passed the same, etc. He was tried, convicted and imprisoned for fifteen years at hard labor. He applied to the Supreme Court of the United States to be released on *habeas corpus*, upon the ground that the crime charged was “infamous” and could only be prosecuted on presentment or indictment by a grand jury. The circuit courts, in numerous cases, had held that a crime was not “infamous” unless a conviction would disqualify the person convicted from being a witness at common law. But the supreme court came to a contrary conclusion, holding that a crime was infamous when the punishment might be imprisonment in a state prison, and the prisoner was released.<sup>1</sup> The court does not say whether the want of jurisdiction was of the person or the subject-matter. The defendant was present in court, but no proper allegations were made against him. It will be noticed that the court did not hesitate to hold the numerous judgments of the circuit courts void and to turn a lot of malefactors loose, because the courts came to an erroneous conclusion on a close and doubtful question of law—a question they were competent to decide and were compelled to decide. So where a federal court sentenced a person to jail on a plea of guilty to an information for larceny, it was held void.<sup>2</sup> A corporation court had no grand jury, but a statute gave it jurisdiction over assault and battery—a crime which the constitution, as construed by the supreme court, required to be prosecuted by indictment. It was held that a conviction for that offense on an information was void.<sup>3</sup> And where the indictment was amended by striking out a clause by consent of the court, without returning it to the grand jury, a conviction was held void.<sup>4</sup>

§ 88. Jury denied, and vice versa.—The Constitution of the United States provides “that the trial of all crimes . . . shall be by jury.” Convictions upon a trial without a jury have

1. *Ex parte Wilson*, 114 U. S. 417 (5 S. C. R. 935); *United States v. De Walt*, 128 U. S. 393 (9 S. C. R. 111).

3. *Rector v. State*, 6 Ark. (1 Eng.) 187.

2. *Ex parte M'Clusky*, 40 Fed. R. 71.

4. *Ex parte Bain*, 121 U. S. 1 (7 S. C. R. 781).



been held void by the supreme courts of the United States and of Georgia.<sup>1</sup> The constitution of Georgia provided that "The court shall render judgment without the verdict of a jury in all civil cases founded on contract where an issuable defense is not filed on oath," and a judgment rendered on a verdict of a jury in such a case was held void.<sup>2</sup> I know of no principle that will support this case. The principle involved in the criminal cases cited is, that the state has an interest in the liberty of those under its dominion, and that it is contrary to public policy to allow them to jeopardize that liberty in a manner not provided by law, and that their consent thereto is void; but no such principle obtains in civil cases. The defendant, in a civil case, may waive any statutory or constitutional right, which he always does by remaining silent. Statutes and constitutions, in such cases, are made to protect the rights of the parties if they see fit to invoke them.

WITNESS, COMPULSORY PROCESS FOR, DENIED.—The denial of compulsory process to enable a person on trial for crime to obtain witnesses, though such right is guaranteed to him by the constitution, does not make his conviction void.<sup>3</sup>

1. Callan v. Wilson, 127 U. S. 540 (8 S. C. R. 1301); Seibels v. Hodges, 65 Ga. 245.

2. Tippin v. Whitehead, 66 Ga. 688.

3. *En parte* Harding, 120 U. S. 782 (7 S. C. R. 780).

## CHAPTER VI.

### JURISDICTION TAKEN BY REASON OF A MISTAKE OF LAW IN CONSTRUING A STATUTE OR THE COMMON LAW.

PRINCIPLE INVOLVED IN CHAPTER VI, . . . . .	§ 89
PART I.—CIVIL PROCEEDINGS, GENERAL, . . . . .	90-129
PART II.—CIVIL PROCEEDINGS, SPECIAL, . . . . .	130-184
PART III.—CONTEMPT PROCEEDINGS, . . . . .	185-199
PART IV.—CRIMINAL PROCEEDINGS, . . . . .	200-212

§ 89. Principle involved in Chapter VI.—Are all judicial proceedings void, collaterally, when jurisdiction is taken by reason of a mistake of law in construing a statute or the common law? When any construction is necessary or possible, for the reasons given in Sections 65, 66 and 67, *supra*, I think not. The decisions on that question will be examined in this chapter.

DIVORCE STATUTE CONSTRUED IN WISCONSIN.—Some years after the final decree in a divorce case in Wisconsin, the wife disobeyed an order made therein, for which the husband commenced and carried on a civil proceeding against her in his own name, and she was fined and imprisoned. Thereupon she applied for a writ of *habeas corpus* on the ground that the statute required the proceeding to punish her to be criminal on behalf of the state. The statute provided for both civil and criminal proceedings. The majority of the court, after much construction and comparison of different statutes, reached the conclusion that the proceeding ought to have been criminal, and that being civil it was void, and she was discharged.<sup>1</sup> Chief Justice Ryan dissented; and his opinion contains so clear a statement of the law, that I feel justified in making an extended quotation. In speaking of the opinion of the majority, on page 450, he said: "The opinion proceeds to hold that the section in question has relation only to pecuniary rights for which compensation may be made in money; and that it could not cover the loss of the father's custody of the child by the mother's taking it in violation of the judgment of

1. *In re Pierce*, 44 Wis. 411, 426, 450.

the circuit court. I am not satisfied that this construction is correct. . . . The circuit court . . . gave the section a different construction. *If that construction were wrong it would plainly and obviously be mere judicial error*; not usurpation or even abuse of jurisdiction; but as purely error as any of the various misconstructions of various statutes by the various circuit courts, for which this court reverses judgments and orders as erroneous, but holds valid until reversed. Every volume of the reports of this court, of all courts, bears witness to this view. And it would be waste of time to enlarge upon it. The opinion of the court distinguishes between criminal contempts proper, punished by fine, and contempts punished for recompense of the injured party; and holds that both may not be done in one proceeding. I doubt the correctness of this position; more especially because the opinion finds it necessary to the position, to emasculate the technical word *fine* in sections 23 and 24, ch. 149, and to make it read as civil indemnity to the injured party. This again is a question of statutory construction, on which this court and the circuit court differ; and if the circuit court were wrong, is pure error. The opinion does not hold that circuit courts cannot punish one and the same act as a criminal contempt by fine or imprisonment, and by awarding indemnity to the injured party. I have little doubt that they may. So the circuit court also appears to have held. And if both are improperly done in the same proceeding, that is an irregularity only, not a want or excess of jurisdiction." It was doubtless much easier for his brethren to ignore than to answer him.

## PART I.

### CIVIL PROCEEDINGS, GENERAL.

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| § 90. Appellate proceedings.         | § 101. Lien.                                |
| 91. "Balance due."                   | 102. Mandamus.                              |
| 92. Contemporaneous construction.    | 103. Married woman's enabling act.          |
| 93. Courts—Which has jurisdiction.   | 104. Municipal mortgage.                    |
| 94. "Debt," in statute.              | 105. Municipal precincts—Representation of. |
| 95. "Indebted"—Procedure to recover. | 106. New trials by justices.                |
| 96. "Instrument in writing."         | 107. Official misconduct.                   |
| 97. Judges—Number necessary.         | 108. Ordinances.                            |
| 98. Judge—Wrong one acting.          | 109. "Payment of money."                    |
| 99. "Laborer."                       | 110. "Process."                             |
| 100. Law or equity?                  | 111. Prospective statute.                   |

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| <p>§ 112. Retrospective statute.</p> <p>113. Service—Foreign corporation, on.</p> <p>114. Service—Length of time of.</p> <p>115. Service—Personal out of State.</p> <p>116. "State"—Meaning of, in statute.</p> <p>117. State court interfering with federal court, and <i>vice versa</i>.</p> <p>118. State statute not yet in force.</p> <p>119. State and Federal statutes in conflict.</p> <p>120. State or federal statute?—Congressional election contest, perjury in.</p> | <p>§ 121. State or federal statute?—Fugitive from justice.</p> <p>122. State practice in federal court.</p> <p>123. State stay law in federal court.</p> <p>124. Supreme court—Statute misconstrued by.</p> <p>125. Supreme and appellate courts of Indiana.</p> <p>126. Territorial or federal statutes?</p> <p>127. Trust—Power to deviate from.</p> <p>128. Vacation order—Power to make.</p> <p>129. Venue of action.</p> |
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§ 90. **Appellate proceedings.**—In Illinois and Missouri they have an intermediate court between the circuit and supreme, called, respectively, the appellate court and court of appeals. The Illinois appellate court dismissed an appeal because the statute authorizing it was void. The appellant applied to the supreme court for a writ of *mandamus* to compel the appellate court to proceed and hear the cause. It was held that the action of the appellate court was judicial; that it thereby "judicially determined a question incident to the proceedings and properly arising therein."<sup>1</sup> This case is an authority that the decision holding a statute void, even though erroneous, is not void. If the decision had been void, the appellate court would have been compelled by *mandamus* to take jurisdiction.<sup>2</sup> The supreme court of Missouri was not so considerate with the court of appeals of that state. The statute prohibited an appeal to the court of appeals, in matters involving constitutional questions, giving one directly to the supreme court. In a case where it was claimed that such a question was involved, the court of appeals said: "We have uniformly held that such a question, in order to be considered with reference to jurisdiction . . . must be at least fairly debatable." The supreme court said:<sup>3</sup> "We cannot yield our consent to that disposition of the question," seeming to hold that the jurisdiction of the court of appeals depended on a correct decision of the question without regard to doubts or difficulties. It seems to me that the supreme court of Illinois

1. *People ex rel. Sayer v. Garnett*, 130 Ill. 340 (23 N. E. R. 331).

2. *Beguhl v. Swan*, 39 Cal. 411; *State v. Laughlin*, 75 Mo. 358.

3. *State ex rel. Campbell v. St. Louis Court of Appeals*, 97 Mo. 276, 281 (10 S. W. R. 874).

and the court of appeals of Missouri were clearly right, and the supreme court of Missouri clearly wrong.

APPEAL FROM INTERLOCUTORY DECREE.—The statute authorized appeals from final decrees only; but an appeal entertained from an interlocutory one under the mistaken view that it was final, and the decree rendered thereon, are not void.<sup>1</sup>

APPRENTICESHIP.—A federal court in Alaska, proceeding under the statutes of Oregon which were extended to that territory, made an order binding out a minor as an apprentice. Afterwards the minor was released on *habeas corpus*, upon the ground that such jurisdiction inhered in the United States commissioner, and not in that court.<sup>2</sup> But as the statutes were obscure and doubtful, I think the case unsound.

§ “Balance due.”—A statute gave justices jurisdiction over “debts and demands where the balance due . . . for goods, wares and merchandise sold and delivered,” did not exceed a certain sum. A judgment for “a debt of forty-five dollars, due by open account, and four hundred weight of bar iron,” was held void, because not for a “balance due,” which the court held to mean “due upon express contract.”<sup>3</sup> It was for the justice to determine the meaning of the words “balance due.”

CONSENT TO JUDGMENT, WHAT IS.—A person filed a paper before a justice, duly entitled as an action against himself, reading: “Now, on, etc., comes the defendant in open court and acknowledges himself indebted to the plaintiff for the sum of”—stating the amount, and that it was on a note therewith filed. This was signed by him and sworn to before the justice, who duly entered a judgment thereon which was held void because the paper did not show any consent to a judgment.<sup>4</sup> What the court thought the defendant intended by such conduct it did not say. That he intended to confess judgment was not an unreasonable inference. What he did intend was a question for the justice to decide.

§ 92. Contemporaneous construction.—In a collateral attack on the probate of a will, the question was, Was it actually probated? The statute required the court, if satisfied that the will was duly

1. *Washington Bridge Co. v. Stewart*, 3 How. 413, 424; *accord*, *Hungerford v. Cushing*, 8 Wis. 324. See Section 126, *infra*.

2. *Ex parte Emma*, 48 Fed. R. 211 —Bugbee, J.

3. *State v. Alexander*, 4 Hawks 182.

4. *Loth v. Faconesowich*, 22 Mo. App. 68, 71—Thompson, J., *dissenting*.

executed, to attach a certificate to that effect to the will, which was not done, nor was any record probating the will made. Upon the contemporaneous construction put upon the statute by the probate courts, holding such certificate unnecessary, or ignoring it, the court held that its absence did not make the probate void.<sup>1</sup> The court quoted with approval from a Vermont<sup>2</sup> case deciding upon the validity of a sale of real estate by an administrator, not ordered by the probate courts, as follows: "The statute is so vague in its requisitions, were I sure there was a general understanding in the probate courts at that period that no such matters should exist or should appear of record, but that the administrator might deed without an order, I would not at this late day decide the titles void that were acquired under views of this kind entertained by those who then administered the laws, and for which titles a full and *bona fide* consideration was paid." The Indiana statutes authorized courts of probate "to hear and determine all matters in relation to the settlement of decedents' estates." Under this statute the courts of probate, being held by associate judges unskilled in the law, assumed to appoint guardians for infants, and that construction was acquiesced in by the legislature and the courts for five or six years and no question made. Thirty-five years afterwards such an appointment was collaterally assaulted in an action by the wards to recover land sold. It was held that, although the statute did not authorize the appointment, yet the contemporaneous construction of the statute by the courts, and the implied sanction by the legislature, shielded the appointment from collateral assault.<sup>3</sup> This decision gets down very closely to what seems to me to be the true doctrine of such cases. As to whether or not the power to settle the estate of a decedent included the power to appoint a guardian to take and care for that portion of his estate passing to his minor heirs, was a question that that court had to decide. That it could not be settled until a guardian was duly appointed and qualified to receive such portion, is self-evident; and that a court compelled to do a certain thing has all the implied powers necessary to accomplish that thing, is not a very far-fetched construction. In another Indiana case the court of probate, acting under the same statute giving it power "to hear and deter-

1. Matter of Will of Warfield, 22 Cal. 51, 70.

2. Hazard v. Martin, 2 Vt. 77.

3. Dequindre v. Williams, 31 Ind. 444, 448.

mine all matters in relation to the settlement of decedents' estates," made partition of the lands of a decedent among the devisees, but this was held void.<sup>1</sup> I think this case unsound.

§ 93. **Courts—Which has jurisdiction.**—A statute of Michigan gave a creditor the right to sue an administrator to recover the amount adjudged to be due him by the probate court, and after the probate court had adjudged the amount due on a claim, it was put into judgment before a justice of the peace. The supreme court, after much doubt, reflection and construction of various statutes, came to the conclusion that they did not give jurisdiction to the justice, and held his judgment void.<sup>2</sup> It did not occur to the court that the justice was competent to construe the statutes, and that any one dissatisfied with his decision ought to have brought *certiorari*. A statute of Kentucky authorized justices of the peace to commit runaway slaves; another statute gave to the county judge all the power of a justice in penal and criminal proceedings. Under this statute, a county judge committed a runaway slave. This was held void because the proceeding was neither penal nor criminal.<sup>3</sup> An act of Congress authorized aliens to be admitted to citizenship by the judgments of any court of record having a clerk and a seal and "common-law jurisdiction." The county court was a court of record with a clerk and seal but with only a limited common-law jurisdiction. Its judgments in such cases were held void, because its common-law jurisdiction was not general.<sup>4</sup> A person was arrested and brought before a justice to be bound over for trial. He offered bond for his appearance at one court, but the justice, conceiving that the law required him to be bound over to another court, refused to accept the bond and committed him. On *habeas corpus*, the court, after much construction of statutes, decided that the justice erred, and released him.<sup>5</sup>

One section of the constitution of Texas provided that "all offenses of a less grade than felony may be prosecuted . . . before any justice of the peace." Another section provided that justices of the peace should have such criminal jurisdiction "as shall be provided by law." A statute provided that justices of the peace should have jurisdiction in criminal causes where

1. Taylor v. Conner, 7 Ind. 115, 120.

2. Basom v. Taylor, 39 Mich. 682.

3. Arthur v. Green, 3 Met. (Ky.) 67 (75).

4. Knox County v. Davis, 63 Ill. 405,

420.

5. Matter of Lord, 63 How. Pr. 97.



the fine could not exceed one hundred dollars. A justice tried a person for an offense of a less grade than a felony, fined him five hundred dollars and imprisoned him for one year in the county jail. On *habeas corpus*, the court construed the constitution as giving the legislature power to invest justices with jurisdiction over all misdemeanors if it saw fit to do so, but that, as it had not done so, the sentence was void.<sup>1</sup> In other words, it held that the legislature derived its power from the constitution, and that the justice derived his power from the legislature, while the justice held that he derived his power directly from the constitution. As a question of legal construction the supreme court was undoubtedly right, yet the question was made before the justice, and he was compelled to decide it, and an erroneous conclusion was not void. The general statutes of Missouri limited the jurisdiction of justices to persons residing in the county where the justice held his office, but a special statute required foreign insurance companies to designate some person upon whom service could be made, and provided that service made upon such person should be valid "in any court of this state." Under this statute, a foreign insurance company appointed an agent in St. Louis to receive service, and a justice in Kansas City rendered a judgment by default against the company upon service made in St. Louis. This judgment was held void.<sup>2</sup>

A Washington statute read: "When any person shall be brought before a *court*, justice of the peace or other committing magistrate of any district, county, city or town in this territory having jurisdiction of the alleged offense, charged with the commission of a crime or misdemeanor, and such complaint upon examination, shall appear to be unfounded, and . . . if the court, justice of the peace or other magistrate *trying said charge* shall decide the complaint was frivolous or malicious, the judgment or *verdict* shall also designate who is the complainant, and may adjudge that said complainant pay the costs. In such cases a judgment shall thereupon be entered for the costs against said complainant, who shall stand committed until such costs be paid or discharged by due process of law." Under this statute, where a person was prosecuted for a crime in the superior court, and the

1. *Ex parte McGrew*, 40 Tex. 472, 475.

2. *United States Mutual Acc. Ins. Co. v. Reisinger*, 43 Mo. App. 571, 574.

jury returned a verdict: "We, the jury, do find the defendant not guilty; and we further find that the complaining witness in the cause is Leonard Permstick, and that the complaint was malicious and without probable cause," the court committed Permstick until the costs should be paid; but he was discharged on *habeas corpus* because the statute, in the opinion of the supreme court, only applied to committing magistrates and not to trials in the superior court.<sup>1</sup> In my opinion all the cases in this section are wrong. In each case, the statute was doubtful and debatable, and the trial court was competent to construe it, and compelled to do so before reaching a final conclusion. See Section 126, *infra*.

§ 94. "Debt," in statute.—A statute of Illinois provided that "any person, for a debt *bona fide* due, may confess judgment by himself or attorney duly authorized, either in term time or vacation, without process." A lease contained a *cognovit* authorizing judgment to be rendered not only for the installments of rent as they became due, but also for any sums paid by the lessor for water-rates, gas bills, cleaning, etc. A judgment confessed in open court on this *cognovit* was held void because the word "debt" used in the statute meant a liquidated sum, and did not cover the unliquidated amounts of the water rates.<sup>2</sup> This case seems to me to be unsound.

DISSOLUTION OF CORPORATION.—A corporation was dissolved in New York at the suit of a private person, and, although the statutes of that state were so confused that its various supreme courts differed concerning the power in such a suit,<sup>3</sup> yet the supreme court of Massachusetts made a careful comparison of its statutes and decided that neither they nor the common law authorized the dissolution of a corporation at the suit of a private person, and held the New York decree void.<sup>4</sup>

DIVORCE—ALIMONY IN LIEU OF DOWER.—A New York statute authorized the chancellor to decree a separation between husband and wife, and to grant alimony and a suitable support

1. Permstick v. Sheriff of Pierce County, — Wash. St. — (29 Pac. R. 350).

2. Little v. Dyer, — Ill. — (27 N. E. R. 905), reversing 35 Ill. App. 85—two judges dissenting.

3. Masters v. Eclectic Life Ins. Co., 6 Daly 455, and Kittredge v. Kellogg

Bridge Co., 8 Abb. N. Cas. 168, hold the affirmative, and Wilmersdoerfer v. Lake Mahopac Improvement Co., 25 N. Y. Supr. (18 Hun) 387, and Attorney-General v. Continental Life Ins. Co., 53 How. Pr. 16, hold the negative.

4. Folger v. Columbian Ins. Co., 99 Mass. 267 (96 Am. D. 747).

for the wife and children. A decree for four hundred and fifty dollars was made "in lieu and satisfaction of all . . . dower, right of dower," etc. This was held void as to the dower,<sup>1</sup> the supreme court disagreeing with the chancellor concerning the construction of the statute.

**FEES AND EXPENSES.**—The board of county commissioners in Indiana, under a mistaken construction of the statutes, allowed the auditor a commission on county orders redeemed by him. It was held that they had power to decide the question, and that their decision was not void because wrong.<sup>2</sup> A California statute gave the superior courts of San Francisco the power under certain circumstances, to furnish the court rooms, and provided that "the expenses incurred, certified by the judge or judges to be correct, shall be a charge against the city and county treasury, and paid out of the general fund." Under this statute, the court room was properly furnished by order of the court, and the expenses were ordered to be paid by the treasurer from the general fund, which he refused to do, for which he was imprisoned for contempt. On *habeas corpus*, it was held that the claim was a legal one to be collected by action, and that the court had no power to order the treasurer to pay it, and that the conviction for contempt was void.<sup>3</sup> But the superior court was just as competent to construe the statute as the supreme court.

**§ 95. "Indebted"—Procedure to recover.**—A statute of Florida concerning pilotage provided, that any person exercising such duties without a license "shall be guilty of a fraud, and shall be adjudged to be *indebted* to the board of commissioners of pilotage in the sum of three hundred dollars, and the court shall enter judgment therefor, with costs in favor of said board." It also provided for imprisonment for failure to pay the judgment. In such a case the county court rendered a judgment wherein the commissioners of pilotage were plaintiffs, and the defendant was imprisoned. On *habeas corpus*, the supreme court held that the case was criminal, and that the state ought to have been the plaintiff, and the defendant was discharged.<sup>4</sup> As the defendant was to be adjudged to be "indebted" to the board, it was a question for the trial court what kind of an action was proper.

1. *Crain v. Cavana*, 62 Barb. 109, 119.

2. *Snelson v. State*, 16 Ind. 29.

3. *Ex parte Widber*, 91 Cal. 367 (27 Pac. R. 733).

4. *Ex parte Nightingale*, 12 Fla. 272.

§ 96. "Instrument in writing."—A Kentucky statute provided that "Where any person . . . claims land as locator, or by bond or other instrument in writing," he might institute a suit in equity and obtain a decree for the land against unknown heirs upon service by publication. One Hamlin owned warrants calling for forty-five thousand acres of land and employed a surveyor to locate them, which he did in the name of Hamlin. But, while they were being located, Hamlin sold and delivered the warrants to Hollingsworth, who paid the surveyor for his services. The land standing on the records in the name of Hamlin, Hollingsworth brought a suit in the state court under the foregoing statute against the unknown heirs of Hamlin, made service by publication, and procured a decree *pro confesso* for the land. This decree was held void in the Supreme Court of the United States,<sup>1</sup> because Hollingsworth was neither a "locator" nor a purchaser from Hamlin by bond or instrument in writing. The court said that the phrase "claim as locator" signified "the compensation of a portion of the land located, agreed to be given by the owner of the warrant to the locator of it for his services." The court admitted that the word "locator" was a local one, having no legal or statutory definition, and it did not occur to it that the state court had to determine whether or not Hollingsworth was a "locator" within the meaning of the statute, or had a claim on the land by virtue of an instrument in writing, and that it was entirely competent to decide both of these questions. As Hollingsworth had paid for locating the land, and was assignee of the land warrants by delivery, all of which was shown by his bill of complaint, it seems to me that whether he was a "locator," or claimed by an instrument in writing, were debatable questions for the state court, and that the federal decision holding its decree void was wrong.

§ 97. Judges—Number necessary.—There were two Canadian statutes on temperance. Under the older, the court was composed of two justices, and under the later, of one. A single justice held the court and convicted a person. The appellate court held that the later statute did not repeal the older in respect to the organization of the court, and that the conviction was void, and the justice a trespasser.<sup>2</sup> As the justice was compelled to construe the same statutes, I think the case unsound.

1. Hollingsworth v. Barbour, 4 Peters 466, 470.

2. Graham v. M'Arthur, 25 Q. B. (U. C.) 478, 482.

§ 98. **Judge — Wrong one acting.** — The federal judge of the southern district of Georgia, on petition, granted a person leave to sue a receiver in the northern district on the ground that the judge was out of the state. The judge of the northern district, construing the statute to give such power to the judge of the southern district only in cases of actual vacancy of office in the northern district, held the order void.<sup>1</sup> A statute of New Brunswick provided that when a justice before whom a case was begun was a witness, the cause should be tried or determined before some other justice of the county. In such a case another justice was called and a jury trial was had, and verdict and judgment rendered for the plaintiff and duly entered on the docket of the first justice by the called justice. But the first justice then taxed the costs and signed judgment, and issued an execution upon which property was seized, and for this he was held to be a trespasser. One of the judges dissented on the ground that a proper construction of the statute required the first justice to do exactly what he did.<sup>2</sup> I do not think these cases are sound.

§ 99. **"Laborer."**—An English statute authorized magistrates to determine and adjudge the amount due to *laborers* from their employers. A person was employed to keep possession of goods seized under a writ, and procured a judgment therefor against his employer, under the statute, as a laborer. This was held void, because he was not a "laborer."<sup>3</sup> Whether this person was a "laborer," or not, was a question the magistrate was competent to decide.

**LAND UNDER WATER.**—The statute gave assessors power to assess all lands in their town. An error of law in assessing land under water did not make the assessment void.<sup>4</sup>

§ 100. **Law or equity?**—An erroneous adjudication that a particular case is of equitable cognizance,<sup>5</sup> even where the bill shows that there is an adequate remedy at law,<sup>6</sup> is not void. The Wisconsin statute authorized writs of *ne exeat* to issue "when it satisfactorily appears to the judge that sufficient grounds exist therefor." The statute did not define the causes in which it

1. *American Loan and Trust Co. v. East and West R. Co.*, 40 Fed. R. 182.

2. *Knox v. Noble*, 28 New Brunswick 34.

3. *Bramwell v. Penneck*, 7 B. & C. 336 (14 E. C. L. 242).

4. *Van Rensselaer v. Cottrell*, 7 Barb. 127, 129.

5. *Mellen v. Moline Iron Works*, 131 U. S. 352, 367 (9 S. C. R. 781).

6. *Goodman v. Winter*, 64 Ala. 410, 432.

could issue, but left the common law in force. At common law the writ was purely equitable and was only issued in equitable causes. The holder of a promissory note, a *legal* cause of action, upon an affidavit in due form, caused a judge to issue a writ of *ne exeat* upon which the maker was arrested. This writ was held void, and no protection to the party, because the law gave the court no jurisdiction to issue the writ on a legal cause of action.<sup>1</sup> This case is clearly wrong, as is shown by the first case cited. A citizen of Maryland filed a bill in the federal court in Virginia against a Virginia bank, and on the summary rule against a debtor to the bank, to show cause and after a defense made by the debtor, a decree was taken against him for the amount of his debt to the bank. This was held void, because he had a right to a jury trial in a court of law of the state.<sup>2</sup> Possibly this decree of the federal court was erroneous, which I doubt; but certainly it was not void. The court had jurisdiction over the main cause, and over all proper auxiliary proceedings necessary to aid the main cause, and if it mistook an improper proceeding for a proper one, that would not destroy its jurisdiction.

§ 101. **Lien.**—A corporation made an assessment on four shares of stock owned by a non-resident, which he failed to pay, and it sued him to foreclose its supposed lien on the stock, made service by publication, obtained a decree and sold the stock. This was held void, because the corporation had no lien by law and the stock was not within the jurisdiction of the court.<sup>3</sup> But if the corporation did have a lien on the stock and the right to sell it for unpaid assessments, the mere removal of the certificates from the state would not impair the lien, and whether or not there was a lien by law, was a question for the chancellor to decide. See Section 106, note 2, *infra*.

**LOTTERY.**—The construction of the federal lottery statute is a question for the trial court; and whether or not a certain scheme is a lottery cannot be determined on *habeas corpus* to release the accused before trial.<sup>4</sup>

§ 102. **Mandamus.**—A justice of the peace ought to have rendered a judgment for defendant for the value of goods taken in

1. Bonesteel v. Bonesteel, 28 Wis. 245, 250.

2. Nulton v. Isaacs, 30 Gratt. 726, 740.

3. Williams v. Lowe, 4 Neb. 382, 396.

4. Horner v. United States, 143 U. S. 570, 577 (— S. C. R.—)

replevin, but refused to do so and rendered a judgment for their return. The defendant then applied to the circuit court for a *mandamus* to compel the justice to render the proper judgment, and that court commanded him to render a judgment for the value and costs and to vacate his original judgment, all of which the justice obeyed. The defendant then sued on the replevin bond for the value of the goods as fixed by the judgment. This new judgment was held void and the original still in force.<sup>1</sup> But the circuit court had power to issue a mandate to the justice in all proper cases, and because it mistook a case would not seem a sufficient reason to hold its judgment void.

§ 103. **Married woman's enabling act.**—An Alabama statute authorized the chancellor, upon petition, “to relieve married women of the disabilities of coverture, as to their statutory and other separate estates, so far as to invest them with the right to buy, sell, hold, convey and mortgage real and personal property, and to sue and be sued as *femes sole*.” Upon a proper petition and in accordance with its prayer, the chancellor entered a decree declaring the petitioner “to be a *feme sole* only so far as to invest her with the right to mortgage her said house and lots in order to obtain an addition to her stock of goods and merchandise.” By virtue of this decree she gave a mortgage, and then resisted its foreclosure on the ground that the decree was not within the meaning of the statute and void, and her contention was sustained.<sup>2</sup> But whether or not the decree was within the meaning of the statute, was a question the chancellor was as competent as the supreme court to decide.

**MORTGAGED PREMISES SOLD ON EXECUTION.**—The Oregon statute, when properly construed, did not authorize mortgaged premises to be sold on an execution issued on a judgment at law on the claim secured by the mortgage, but such a sale was made on such a judgment, and the sale was confirmed. The court said: “The construction of the statute was a question for the court on the motion for confirmation; and the decision of the court confirming the sale, even if it was erroneous, ought not to be treated as a nullity.”<sup>3</sup> I think this case sound.

§ 104. **Municipal mortgage.**—A town gave a mortgage on land, which it had no power to do. The mortgage was foreclosed, and

1. O'Brien v. Tallman, 36 Mich. 13.

3. Mathews v. Eddy, 4 Or. 225, 234.

2. Ashford v. Watkins, 70 Ala. 156,



the land sold and a deed made. The decree of foreclosure and deed were held void, because the mortgage was void.<sup>1</sup> But whether or not the mortgage was void was a question depending on construction of statutes and comparisons with the common law, which the trial court was competent to decide. But, if the statute had positively prohibited the mortgage, so that there would have been nothing to construe, the cases cited in Section 236 *infra*, concerning actions on void judgments, show this case to be wrong.

§ 105. **Municipal precincts—Representation of.**—A Nebraska statute authorized precincts (being unincorporated political divisions of counties without power of suing or being sued) to issue bonds, and provided that the board of county commissioners should levy and cause to be “collected and paid to the holders of such bonds a special tax on all the taxable property” within the precinct, sufficient to pay the bonds. Fremont precinct, in Dodge county, issued bonds, failed to pay, and the holder sued the board of county commissioners in the federal court, and duly recovered a judgment, which contained a provision for its payment by means of a tax to be levied upon the taxable property of Fremont precinct. The statute also provided that in case of a refusal of the commissioners to levy such tax, they might be compelled to do so by *mandamus*. On the strength of this judgment, the plaintiff applied to the state court for a *mandamus* to compel the commissioners to levy a tax. The judgment was held void, on the ground that the only remedy was the statutory one to proceed *on the bonds* as a cause of action to compel the board to levy the tax; and it was held that the taxpayers of Fremont precinct never had had their day in court, and that their rights were undetermined.<sup>2</sup> But the board of commissioners necessarily represented the precinct, as it would be absurd to try to bring in all the taxpayers in person. If the state court had refused to entertain the case because the proper remedy was a motion in the federal court, its decision would have been more plausible.

§ 106. **New trials by justices.**—The Indiana statute authorized justices of the peace to grant new trials in civil cases, but was silent in regard to criminal cases. A justice, construing the civil code to apply to the criminal on that point, granted a new trial.

1. *Branham v. Mayor of San José*, 24 Cal. 585, 604.

2. *State ex rel. Chandler v. Board of Comrs. of Dodge County*, 10 Neb. 20 (4 N. W. R. 370).

But the supreme court, differing with him, held the new trial void and the original judgment in force.<sup>1</sup> But it does not seem to me that the action of the justice was wholly devoid of reason. The statute did not prohibit such action, and if it was necessary to grant new trials in civil cases in order to do justice, why not in criminal cases also?

NON-RESIDENT'S LAND—ACQUIRING LIEN UPON.—In an action against a non-resident, it was a question whether or not the plaintiff could describe the land in his complaint and thereby get a lien to be perfected by final judgment. The trial court so construed the statute and rendered a judgment in such a case. More than five years afterwards the original owner brought ejectment, and the supreme court, differing with the trial court, held the judgment and sale void.<sup>2</sup> I cannot agree with this case. See Section 101, *supra*.

§ 107. **Official misconduct.**—An order of the board of county commissioners in Indiana releasing the auditor from liability on account of money lost by burglary, although contrary to the statute as construed by the supreme court, is not void;<sup>3</sup> and where a judgment erroneously held the overseers of a town liable to pay a claim, a like ruling was made.<sup>4</sup> A Kentucky statute provided that "if any sheriff, clerk, or other person authorized to collect or receive the public money . . . shall fail to account for or pay into the treasury, as required by law, the auditor shall proceed, in the name of the commonwealth, by motion or suit, *without notice* to the parties, to collect the same by judgment on his bond," etc. Another statute provided that the sheriff should give bond to be approved by the county court at its January or February term. A sheriff did not give bond until the June term of the court. He afterwards defaulted, and the auditor proceeded without notice under the statute to take judgment on his bond. It was held that the state acquired no lien on land as against other creditors of the sheriff; that the bond was not a statutory one, because not executed at the proper term of court, and that, therefore, he could not be sued under the statute, by motion without notice, and that the judgment was void.<sup>5</sup> But it was a question of law for the county

1. Steel v. Williams, 13 Ind. 73.

4. People v. The Board, etc., 12 How.

2. Grigsby v. Barr, 14 Bush. 330, 333. Pr. 50, 53.

3. Board of Comrs. v. Bradley, 53 Ind. 422, 428.

5. Hall v. Com., 8 Bush 378.

court to decide whether or not it could take and approve his bond in June, and its decision was valid until reversed. Again: When the auditor presented his motion and copy of bond to the court it had to decide whether or not the statute applied to that particular case, and its decision was final until reversed. A judgment was recovered before a justice of the peace in Kansas on the official bond of another justice for his failure to pay over money collected. The statute provided that, "Justices shall not have cognizance of any action. . . . Third: In an action against justices of the peace . . . for misconduct in office." The court admits that another section "would seem to recognize judgments rendered by one justice against another for official misconduct," but it held that it ought not to be so construed, and that the judgment was void.<sup>1</sup>

§ 108. **Ordinances.**—The ordinances of municipal corporations are local statutes. They make a part of the "law of the land," within the limits of the corporation. They derive their validity from the statutes of the state. They depend upon the statutes as the statutes do upon the constitution, and, therefore, in determining their validity, collaterally, the same rules apply as in determining the validity of statutes depending upon constitutional power. In Kentucky, in 1817, it was sought to hold a judgment of the county court void because founded on a void ordinance. The court said: "No principle can be better settled than that the judgment of a court of competent jurisdiction, whether it be erroneous or not, is, while it remains in force, conclusive upon the parties to such judgment."<sup>2</sup> In an early case in Iowa a person was convicted and imprisoned by a police magistrate for violation of a city ordinance. He brought *habeas corpus* to be released because the council had no power to pass the ordinance. The court said: "But the argument is that the ordinance was passed without authority of law, and was null and void. Whether it was or not was a legitimate subject of inquiry by the magistrate, in the same manner as any other question which might be presented for adjudication. . . . It is not a case where a court has acted without having jurisdiction. On the contrary, the most that can be claimed is, that the magistrate erred in deciding that the ordinance was in force, and that the city had the power and authority to provide for the punishment of the offense."<sup>3</sup>

1. Neal v. Keller, 12 Kan. 247, 251.

3. Platt v. Harrison, 6 Iowa 79, 81

2. Wallace v. Usher, 4 Bibb 508, 510. (71 Am. D. 389, 390).

In a late case in Iowa a city ordinance was void for want of statutory power to pass it. A justice issued a warrant thereon, property was seized, and the justice was sued for trespass, but he was held not liable. The court said: "He was called upon to pass judicially upon the validity of the ordinance. In making this determination he acted strictly within his jurisdiction. An erroneous decision upon the subject is a mere mistake in judgment, for which he ought not to be held responsible."<sup>1</sup>

In a collateral attack on a conviction founded upon a void ordinance, the supreme court of Arkansas said: "The enforcement of the ordinances of the town was a duty imposed upon him by the statute, and the validity of the ordinance was a question he had the unquestionable power to pass upon."<sup>2</sup>

And where a special assessment was laid in Illinois by virtue of a void ordinance, and confirmed by the county court, the confirmation was held not void.<sup>3</sup> So a Texas case decides that the illegality of an ordinance is a defense to an action upon it, but that a conviction thereon is not void on *habeas corpus*.<sup>4</sup> And a later case in the same state holds that, where an ordinance for the construction of a sidewalk was void because it empowered the committee to designate the kind of material of which it should be constructed, a decree foreclosing an assessment for its construction was not void.<sup>5</sup>

A board of supervisors in New York passed an ordinance for the preservation of fish, for a violation of which a person was imprisoned. He brought an action for false imprisonment on the ground that the ordinance was not warranted by the statute. The trial court nonsuited him, which was reversed in the supreme court;<sup>6</sup> but the decision of the supreme court was reversed in the court of appeals, which said: "The justice of the peace had jurisdiction of the subject-matter of the action, being for the recovery of a penalty less than two hundred dollars. . . . The jurisdiction of the magistrate was not derived from, and did not depend upon the act which is challenged, but upon the general statutes of the state. He had jurisdiction to pass upon every

1. *Henke v. McCord*, 55 Iowa 378 (7 N. W. R. 623). This case disapproves *Kelly v. Bemis*, 4 Gray 83.

2. *Trammell v. Town of Russellville*, 34 Ark. 105, 110.

3. *Gage v. Parker*, 103 Ill. 528, 535.

4. *Ex parte Boland*, 11 Tex. App. 159, 170.

5. *Bordages v. Higgins* — Tex. — (19 S. W. R. 446).

6. *Hallock v. Dominy*, 14 N. Y. Supr. (7 Hun) 52.

question involved in the action, *including the validity of the law imposing the penalty.*"<sup>1</sup>

A city in California had power "to license and regulate all such callings, trades, and employments as the public good may require to be licensed and regulated, and as are not prohibited by law." An ordinance was passed, fixing the license fees for selling goods. It fixed one rate for goods sold then actually in or in transit to the city, and another rate, about twenty times as high, for goods sold not in nor in transit to the city. For a violation of the latter clause, a person was convicted and imprisoned. He applied for a discharge on *habeas corpus*. The court held that the law authorized the city to raise a revenue by license, but held that the ordinance was unreasonable, oppressive and void, and discharged the prisoner.<sup>2</sup> The court does not notice the fact that the case was before it collaterally. It is also held in Alabama<sup>3</sup> and Minnesota,<sup>4</sup> that a conviction upon an illegal ordinance is void, and a like ruling was made in a federal court concerning a conviction under an ordinance, void because of taxing an occupation under the guise of a license.<sup>5</sup> I think the last four cases wrong.

§ 109. "Payment of money."—A justice had jurisdiction in Delaware to render judgment in causes for the "payment of money." But a money judgment on a guardian's bond was held void because it was not an obligation for the direct payment of money, but one to secure the faithful performance of duties.<sup>6</sup> The contrary construction of the justice was not very strained.

PENDING SUITS—REPEAL OF LAW.—It is a well-settled common-law rule that the repeal of a law without a saving clause as to pending suits, takes away rightful authority to proceed further. But as the repeal may not, in fact, be known to the court or to any of the parties, and as the court may not know what the common law is, or be able to find it, it would seem that further proceedings in such suits would not be void; but the cases are all the other way. Administrator's sales<sup>7</sup> and attachment proceedings<sup>8</sup> were held void in such cases. A judgment against a garnishee in New Jersey was revived, according to the common-law practice,

1. *Hallock v. Dominy*, 69 N. Y. 238, 240.

2. *Ex parte Frank*, 52 Cal. 606.

3. *Ex parte Burnett*, 30 Ala. 461.

4. *Dictum* in *In re White*, 43 Minn. 250 (45 N. W. R. 232).

5. *The Laundry License Case*, 22 Fed. R. 701—Deady, J.

6. *Green v. Clawson*, 5 Houst. 159, 161.

7. *Campau v. Gillett*, 1 Mich. 416, 419 (53 Am. D. 73); *Ludlow's Heirs v. Wade*, 5 O. 494; *Perry v. Clarkson*, 16 O. 571, 573.

8. *Stephenson v. Doe*, 8 Blackf. 508, 513 (46 Am. D. 489).

after two returns of "*nihil*." But while such proceedings were pending, a new statute in relation to service in such cases was enacted. One of its sections provided that, "henceforth no judgment shall be entered" without personal service on residents. Another section provided for publication in case the defendant could not be found. This judgment was held void.<sup>1</sup>

§ 110. "**Process.**"—The Illinois statute provided that when the judge failed to attend on the first and second days of a term, the court should stand adjourned to the next term, and that "all suits, writs, process, . . . and other proceedings" should stand continued until the next term. A guardian gave notice that, at the October term of court, he would apply for an order to sell land. The October term lapsed by failure of the judge to attend. At the November term, the guardian filed his petition, proved his notice, procured an order to sell, and sold. This was held void, because the court had no jurisdiction of the subject-matter until the petition was filed, which was not done in October, and that, consequently, there was nothing to be continued to the November term.<sup>2</sup> But the notice given by the guardian was "process," and came within the very letter of the statute—at least it was a question for the probate court.

§ 111. **Prospective statute.**—An English statute authorized a court, at the *first* or *second* general session after the passage of the act, or "at some adjournment thereof," to discharge insolvent debtors. A session of the court, held before the act passed, had been adjourned to a day specified, and before that day arrived the act was passed. When the court met on the adjourned day, it discharged an insolvent. This was held void.<sup>3</sup> This case is wrong I think. Whether the court had power to act at its adjourned meeting depended on the construction to be given to the words "adjournment thereof." If the word "thereof" meant "of the court," it had power. If it meant "of the first or second session," it did not have power. That was a question for the insolvent court.

REPLEVIN.—An Illinois statute gave justices jurisdiction in replevin where "the value of the property does not exceed two hundred dollars." When the value was shown to exceed two

1. *Castner v. Styer*, 23 N. J. L. (3 Zab.) 236, 250.

3. *Brown v. Compton*, 8 Term Report 424.

2. *Knickerbocker v. Knickerbocker*, 58 Ill. 399, 401.

hundred dollars on the trial, the justice dismissed the case and awarded a return of the property. This judgment of return was held void.<sup>1</sup> What to do with the case when the discovery was made that the goods were worth more than two hundred dollars, was a question that confronted the justice. It seems to me that he did not even err.

§ 112. **Retrospective statute—Administrator appointed.**—Under the Mexican law in force in California, the lands of a decedent descended absolutely to his heirs, who became personally responsible for his debts. The state enacted a statute creating probate courts and providing for the settlement of the estates of decedents. The act made no express provision for an administration upon the estates of persons who died before the adoption of the state constitution. A probate court appointed an administrator for a decedent who died before the adoption of the constitution, and he sold land of the decedent to pay debts. This sale and the whole administration proceeding were held void, because the statute was not retrospective and did not apply to the decedent.<sup>2</sup>

**ALLOWANCE TO WIDOW.**—A Texas statute authorized the courts, at the first term after the granting of letters of administration, to make an allowance for the support of the widow. Such an allowance, made after the act was passed, was held void where the letters had been granted before the passage of the act.<sup>3</sup> A Pennsylvania statute authorized the orphans' court to set off property to the widow in case the estate were insolvent; after the death of a person, a new statute authorized a certain amount to be set off to her without regard to solvency. Land was set off to the widow under the later statute, and this was held void because it did not apply to cases where the person was dead at the time of its passage.<sup>4</sup>

**HOMESTEAD FOR WIDOW.**—The South Carolina constitution of 1868 authorized a homestead to be set off to the widow. A person had died in 1861, and in 1872, a decree setting off a homestead to the widow was duly made. This was held void on the ground that the constitution did not or could not apply to cases

1. *Vogel v. People*, 37 Ill. App. 388.      gational Society, 66 Cal. 105 (4 Pac. R. 1096).

2. *Downer v. Smith*, 24 Cal. 114, 123, *accord*, *McNeil v. First Congre-*

3. *Marks v. Hill*, 46 Tex. 345, 350.

4. *Shumate v. McGarity*, 83 Pa. St. 38.



where the person was dead before it was adopted.<sup>1</sup> But in the absence of an express prohibition, it is always a question for the courts whether or not a statute shall have a retrospective operation, and for this reason I think all the cases cited in this section wrong.

§ 113. **Service—Foreign corporation, on.**—A Virginia statute prohibited foreign life insurance companies from doing business in the state until an agent was appointed upon whom service could be made; and it also provided that in case such agent should die, resign or be removed, the company should make a new appointment, so that, at all times, and while any liability remained, there should be such an agent of the company in the state. Under this statute, in 1856, a company began to do business in Virginia, and duly appointed an agent, but revoked his appointment when the war broke out, and never made a new appointment, and such agent died in 1876, and an administrator was appointed for him. In 1877, a law was passed providing that, in case of the death of such an agent and the failure of the company to appoint a new one, service could be made on the administrator of the original agent. The holder of a policy had ceased to pay premiums in 1860, and died in 1869, and in 1878 his administrator sued the company in a state court and caused service to be made on the administrator of the original agent, according to the law of 1877, and recovered a judgment by default, and brought suit thereon in the federal court in Connecticut, which held the Virginia judgment void on the ground that the statute of 1877 was prospective and had no reference to past transactions.<sup>2</sup> There were two judicial questions in this case: (1) Could the state appoint a person to receive service on the failure of the defendant to comply with the law making it its duty to do so, and (2) Was the law of 1877 retrospective? The Virginia court was just as competent to decide these questions as the federal court in Connecticut, and its decision was conclusive collaterally.

§ 114. **Service, length of time of.**—A California statute required publication of summons for not less than three months, and that the defendant should be allowed forty days from the completion of the service within which to appear and answer. The proof of service in a California record showed that the publication commenced November 15, and ended February 15, and that

1. *Hosford v. Wynn*, 26 S. C. 130 (1 S. E. R. 497).

2. *Ellis v. Connecticut Mutual Life Ins. Co.*, 8 Fed. R. 81—Shipman, J.

judgment by default was taken March 26. The validity of this judgment coming in question before the supreme court of Massachusetts, it said: "Whether the three months intended were lunar or calendar months, and if the latter, whether the 15th day of February was to be excluded from the three months, and, with the day of default, included in the computation of forty days from completion of the service, were questions of construction and application of the statutes of that state, upon which, as well as upon questions of fact, that court must be held to have passed in rendering judgment. Its decision thereon is conclusive."<sup>1</sup>

§ 115. **Service—Personal out of State.**—A divorce was granted in Pennsylvania upon personal service on the defendant in New York. The Pennsylvania statute was a little obscure about the right to serve process personally out of the state in lieu of publishing, but the Pennsylvania court held it good. The court in New York differed with it on that point, and held the decree void because service was not made by publication<sup>2</sup>—which was wrong, in my opinion.

§ 116. **"State"—Meaning of, in statute.**—An Arkansas statute gave the courts power to quiet title to land depending on a sale and deed "made by the auditor of *this state*." A title based on a sale and deed made by the auditor of the *territory* before it became a state was quieted, and this decree was held erroneous, but not void.<sup>3</sup> This decision is right. It was a question for the trial court whether the word "state" was used in the statute in a technical sense to distinguish it from the territory, or in a broader sense meaning the government of Arkansas.

§ 117. **State court interfering with federal court, and vice versa.**—The state and federal courts exercising jurisdiction over the same territory and persons, their officers will occasionally clash, and it will be a long time before the dividing line between them will become so definite and settled as to be free from doubt. When a debatable question arises, the court to which it is presented must hear and decide it; and for the other court to disregard the decision is simply usurpation. The two sets of courts complement each other, and together they possess complete jurisdiction over all judicial matters. And for any error committed

1. Stockwell v. McCracken, 109 Mass. 84, 87.

2. Burton v. Burton, 52 N. Y. Supr. (45 Hun) 68.

3. Evans v. Perciful, 5 Ark. 424, 429.

by either in respect to such jurisdictional questions, the Supreme Court of the United States is the final arbiter. The case is precisely the same as it is where there is a clash between two state courts having concurrent jurisdiction over the same territory, in which the court of last resort in the state is the final arbiter. It is sometimes said that if the state courts are allowed to interfere with the federal officers, they may commit them all and thus paralyze the federal government. But, on the same kind of reasoning, the federal officers, backed by the federal courts, may imprison all the state officers, and thus paralyze the state. There is nothing in such reasoning. The officers of either court may do many things which will subject them to a suit in the other, and when a case is presented against an officer of the other court, the court must decide upon its own jurisdiction. In a case in the federal circuit court, it was held that when the federal marshal, under a writ of replevin, seized the goods of another person, such person must come into that court to try his title, and that the deputy marshal could not be arrested and committed by the state court, and that the federal court would release him on *habeas corpus*. This was on the ground of a want of jurisdiction over the subject-matter.<sup>1</sup> But a sheriff, on a writ of attachment from a state court, seized a horse as the property of defendant. A stranger, Gilman, replevied the horse from the sheriff in the federal court, and these facts were set up in the fourth plea. After a trial on the merits in which the defendants were defeated, they moved to dismiss the cause for want of jurisdiction over the subject-matter. This motion was denied, because it came too late.<sup>2</sup> But if there was a want of jurisdiction over the subject-matter, it was never too late to move to dismiss. These cases stand opposed to each other.

§ 118. *State statute not yet in force.*—The constitution of Kansas provided that “No law of a general nature shall be in force until the same shall be published.” A statute creating a crime was enacted and duly published, except that the clause, “Be it enacted by the legislature of the state of Kansas,” was omitted from the publication. A person was indicted for the crime thus created, and arrested and imprisoned by order of the court to await trial. But the supreme court released him on *habeas*

1. *Beckett v. Sheriff*, 21 Fed. R. 32 —Bond, J.

2. *Gilman v. Perkins*, 7 Fed. R. 887 —Blodgett, J.

*corpus*, because the publication made did not put the law in force.<sup>1</sup>

**WRONG STATUTE APPLIED.**—One section of the New York code authorized an injunction to issue by the judge of another court on presentation of the complaint in the cause, and another section authorized it on presentation of affidavits without the complaint. An injunction having been issued and violated, it was contended that it was void because issued without a presentation of the complaint. The court said: "The court or judge upon an application for an injunction would have to determine whether the particular action in which the application is made falls within section 603 or section 604, and to determine the necessity of a formal complaint accordingly. . . . An erroneous decision as to the necessity of a formal complaint would not deprive the court or judge of jurisdiction."<sup>2</sup>

**STATUTE OF OTHER STATE MISCONSTRUED**—Where a judgment of a state court of Missouri was founded upon an erroneous construction of the statutes of Illinois concerning the power of a corporation, this was held to be no reason for disregarding it in a federal court.<sup>3</sup>

§ 119. **State and federal statutes in conflict.**—A person was imprisoned by a state court of Louisiana for exercising the office of pilot contrary to the law of the state as construed by its supreme court. On *habeas corpus* before the federal court, he was discharged because he had the right to act under the federal law.<sup>4</sup> But this was all wrong. The state and federal law combined made the law of the land in Louisiana. If there was any conflict between them, it was the sworn duty of the state court to settle that conflict. It was just as competent to do its duty as the federal court. If it committed an error in holding the state law paramount, it could have been corrected by an appeal to the court of last resort in the state, and from there to the Supreme Court of the United States.

§ 120. **State or federal statute.** — **Congressional election contest, perjury in.**—In a contest for a seat in congress, a person took an oath before a notary public, a state officer, for which he was

1. *In re Swartz*, 47 Kan. 157 (27 Pac. R. 839).

2. *People ex rel. Roosevelt v. Edson*, 51 N. Y. Super. (19 Jones & Spencer), 238, 249.

3. *Chicago and Alton R. R. Co. v. Wiggins' Ferry Co.*, 108 U. S. 18 (1 S. C. R. 614).

4. *United States v. Thibaut*, 19 Fed. R. 631—*Pardee and Billings, JJ.*

arrested for perjury in the state court, and released on *habeas corpus* in the federal court.<sup>1</sup> The theory of the state court was, that he had committed perjury before a state officer and was amenable to the state. The theory of the federal court was, that the state officer, *pro hac vice*, was a federal officer, and that the crime was committed solely against the United States. The theory of each was correct on its construction of the law. The state court, acting on the same theory with the federal court, ought to have released him from the custody of the federal court.

§ 121. State or federal statute?—Fugitive from justice.—The governor of Oregon made a requisition on the governor of California for one Bayley, an alleged fugitive from justice, and appointed one Robb as the agent of Oregon to receive him. Bayley was arrested on the order of the governor of California and delivered into the custody of Robb. A writ of *habeas corpus* was issued from a California court commanding Robb to produce Bayley, which he refused to do, because he held him by virtue of federal authority, and he was committed for contempt; and such commitment was held lawful by the supreme court of California. But on petition for a writ of *habeas corpus* to the federal circuit court, it differed with the supreme court of the state and discharged the petitioner, on the ground that he was an officer of the United States and could not be molested by the state courts.<sup>2</sup> But this decision was reversed by the Supreme Court of the United States upon the ground that the petitioner, Robb, was a state officer and amenable to its courts.<sup>3</sup> That a federal circuit judge should hold the deliberate judgment of the supreme court of the state void collaterally, because he differed with it on a close question of law, seems improper. He was bound to hear the petitioner, as he had the power to grant the relief demanded in a proper case. But he erred concerning the proper question for his consideration. The question before him was, Was there any doubtful or debatable question of law before the supreme court of the state? If so, its decision, right or wrong, was the law of that case. Instead of that, he proceeded to overhaul its decision on the merits, and decided it to be wrong when it was right.

1. *In re Loney*, 38 Fed. R. 101. *Affirmed*, *In re Loney*, 134 U. S. 372 (10 S. C. R. 584).

2. *In re Robb*, 19 Fed. R. 26—Sawyer, J.

3. *Robb v. Connolly*, 111 U. S. 624, 639 (4 S. C. R. 544).

§ 122. **State practice in federal court.**—A federal circuit court ordered a party to appear and be examined as a witness in advance of the trial, according to the provisions of the state code of practice. He refused, and was imprisoned for contempt. This was held void by the Supreme Court of the United States, on *habeas corpus*, because the state code of practice on this point had not been adopted by the act of congress.<sup>1</sup> The question was a close one, depending on judicial construction, and the case, in my opinion, is unsound.

§ 123. **State stay law in federal court.**—The Federal courts had the power, by rule, to adopt the state law allowing the judgment defendant to stay execution on giving surety for the payment of the judgment within a specified time. The stay operated as a judgment confessed by the surety. A stay was taken by the clerk on a judgment in a federal circuit court in which no rule had been made adopting the state stay law. On this, an execution was issued and land of the stayor was sold and reported for confirmation. The stayor appeared and objected, but the sale was confirmed and a deed made to the purchaser, who then brought an action to recover the land, and the court below held that the stay law of the state had been adopted as a part of the law of the United States courts by section 914 of the act of congress, and that the sale was valid. On error, the supreme court held that section 914 did not adopt the stay law of the state as the law of the United States courts, but that section 916 gave the court power to do so by rule; and that, as that had not been done, the act of the clerk accepting the stay was void, and that the subsequent confirmation of the sale was also void. The court said: "A confirmation of a sale may cure mere irregularities not affecting its fairness, but not an infirmity growing out of the nullity of the judgment under which it was had."<sup>2</sup> But the act of the clerk was the act of the court,<sup>3</sup> and, as the question was not free from doubt, I think the decision unsound.

§ 124. **Supreme court—Statute misconstrued by.**—A Vermont statute reorganized the courts and transferred all causes in the supreme court in which matters of law were to be litigated, to another court. The supreme court did not transfer one case, and rendered final judgment on which the defendant was imprisoned,

1. *Ex parte Fisk*, 113 U. S. 713 (5 S. C. R. 724).

2. *Lamaster v. Keeler*, 123 U. S. 376, 391 (8 S. C. R. 197). [infra.

3. See Section 803, *supra*, and 180<sup>3</sup>,

and he brought trespass on the ground that the judgment was void. The court said: "If the judgment here complained of was either erroneous or irregular, the court, on a proper application, would set it aside; but, until set aside, it is to be considered a regular judgment for every purpose; and it belongs exclusively to this court to examine into and decide upon the regularity of its own proceedings. The act of 1824 was subject to judicial construction, as well as any other act of the legislature. Of the causes and actions then pending before this court, it was for them to determine what part, according to the statute, was to be retained in this court, and what part should be removed to the county court. And the party who acts in obedience to their determination is not to be made responsible for the correctness of it, nor is the correctness of it to be a subject of inquiry before any other tribunal." <sup>1</sup>

§ 125. **Supreme and appellate courts of Indiana.**—An Indiana statute of 1891, established a sub-supreme court, called the appellate court, with final appellate jurisdiction in numerous classes of cases. When the appellate court was organized, it became the duty of the supreme court to transfer all the causes on its docket which belonged to the appellate court, to that court. This the supreme court did by a general order in the form of an *ex parte opinion*.<sup>2</sup> It is probable that, in course of time, the court may change its opinion in regard to some cases. If it does, will the prior decisions of the wrong court be held void for want of jurisdiction over the subject-matter? According to my views, they will not, but according to the majority of the cases, they will.

§ 126. **Territorial or federal statutes?**—There were two sets of laws in force in Washington territory—federal and territorial. A person was convicted and imprisoned under a territorial statute. On *habeas corpus*, it was contended that he ought to have been tried under the federal statute. The court said: "The determination of the question under which law the prisoner should be tried was a matter proper for the determination of the court below, . . . and if in the determination of that question error was committed, the same can be corrected only on writ of error or appeal." <sup>3</sup> This decision is clearly sound.

1. *Dictum* of Williams, J., in *Wallbridge v. Hall*, 3 Vt. 114, 120. See Sections 90 and 93, *supra*.

2. *Ex parte Sweeney*, 126 Ind. 583 (27 N. E. R. 127).

3. *Ex parte Williams*, 1 Wash. T. 240.



§ 127. **Trust—Power to deviate from.**—The managers of the Newark Savings Institution presented a petition to the chancellor of New Jersey showing that its investments had depreciated badly; that deposits had been largely withdrawn, and that they expected increasing withdrawals, which would impair if not destroy the usefulness of the institution; that they had means with which such deposits could be paid for a long time; yet they believed they could not allow such a course to be pursued without violating their duties as trustees for all the depositors; that they believed that by a careful management of the trust under the direction of the court, the existence and usefulness of the institution could be maintained, and its depositors secured from ultimate loss; that they regarded themselves as trustees for the depositors, and were unwilling to proceed in the execution of their trust without the sanction and direction of the court, believing that without its aid they could not maintain the institution in public confidence, nor secure equality among the owners of its assets;—in other words, they believed that the frightened depositors would bankrupt the institution by their withdrawals unless the court came to their rescue. On hearing this petition, the court granted their prayer, one portion of which was that all future deposits should be regarded as special, and invested only in bonds of the United States, or of the state of New Jersey or the city of Newark.<sup>1</sup> This was in 1877. The institution continued under the control of the court until 1884, when it failed, and a receiver was appointed. Its failure was brought about by disobedience of the order of the court, in making large loans on securities other than those designated. A depositor filed his petition to have the managers guilty of such violation punished for contempt. Their defense was, that the court had no power to entertain their petition or make such an order; that it was void and might be violated with impunity. This matter came on to be heard before Van Fleet, V. C., who held that the court had jurisdiction; that the order was valid, and found the president guilty of contempt.<sup>2</sup> On appeal, the court of errors and appeals held that the proceeding was void for want of jurisdiction over the subject-matter, and that the president was not guilty of contempt.<sup>3</sup> That court (page 709) assumed that the

1. Application of Newark Savings Institution, 28 N. J. Eq. 552, by Runnion, C.

2. *Una v. Dodd*, 39 N. J. Eq. 173.

3. *Dodd v. Una*, 40 N. J. Eq. 672, 709 (5 Atl. R. 155).

relation between the managers and depositors was one of trust, but said that the petition did not represent to the court that the terms of the trust had been violated, or the trust abused, but asked that they should be permitted to depart from the terms of the trust as prescribed by the statute—meaning that the statute gave them power to invest in numerous securities while the court restricted them to three, thus curtailing the discretion given them by the statute. On page 712 the court said: “Viewed in this aspect, the order which limited the range of securities for investment, I feel constrained to say, was an exercise of a power not accorded to any court. It restrained the power which had been granted to the institution by the legislative authority. It relieved its managers in part from the duty which had been imposed on them by like authority, and which was thereby, without authority, assumed in part by the court. The order, in its practical effect, amended the legislative enactment.” On this point, in the court below, the vice-chancellor said: “Nothing is better settled, nor more familiar as a principle of equity jurisprudence, than that trustees are entitled, in a proper case, to the direction and protection of a court of equity in the discharge of their duties. Whenever the duty of a trustee is involved in doubt, or the terms of the trust will justify the *cestuis que trust* in settling up conflicting claims to the trust property, there can be no doubt that it is the right of the trustee to do nothing until he receives judicial instruction as to his duty. . . . The power of this court to take cognizance of all trusts when judicial action is required, is beyond dispute.” It seems to me that the court of errors and appeals did not quite comprehend the question before it. If it be conceded that the chancellor committed an error of law and infringed the statutory powers of the managers, or that the petition filed did not make such a showing as in law authorized him to take charge of that particular institution, his decision was not void for that reason. Confessedly, the court had jurisdiction over trusts, and power to aid, direct and control trustees in some cases. When the managers presented their petition seeking aid, it was a question of law he had to decide, whether or not the allegations of the petition were such as to bring that particular case within the general power of the court. If he erred on that point, it was an error of law on a very close question—a question of construction of general equitable power about which lawyers equally emi-

ment will take contrary views, and an error of that kind never makes a judgment void. So also, after he obtained jurisdiction, it was a question of law for him to decide whether or not, under the peculiar circumstances of the case, the statutory power of the managers in regard to investments should not be curtailed. It was a question whether the statute applied to the new circumstances. That is a question that all judges have to meet and decide often, and they do sometimes hold that the statute was not intended for the particular cases before them. But still further: The institution was in the actual custody of the court, and the statutory powers of the managers were as completely terminated as though a receiver had been appointed. The managers became officers of the court, and subject to its orders in all things.

§ 128. **Vacation order—Power to make.**—The circuit judge lawfully issued an injunction in vacation, and for its violation during the same vacation caused the guilty person to be attached and imprisoned. The supreme court, after considerable discussion, concluded that he had no rightful authority to issue the attachment in vacation and held it void.<sup>1</sup> But, as the authority depended upon construction, I think the case unsound.

§ 129. **Venue of action.**—A person in England was sued out of his district in a county court. As the cause of action arose within the district where the court sat, it held that it had jurisdiction over him and rendered a judgment upon which he was arrested. It was held that the court erred on the law, that the judgment was void and the judge a trespasser.<sup>2</sup> As the county court had to construe the statute, I think this case unsound.

A note was dated at "Des Moines," presumably a township in Polk county. It read: "We, or either of us, of ———, county of Dallas, state of Iowa, promise to pay," etc. . . . "We also consent that judgment may be taken upon this note before any justice of the peace *in said county*." A judgment was entered in Des Moines township, Polk county. This was held void, because the consent was only that it might be entered in Dallas county.<sup>3</sup> But when the note was filed as a complaint, its true meaning and construction was a question for the justice to decide.

1. Taylor v. Moffatt, 2 Blackford 305.

3. Brown v. Davis, 59 Iowa 641 (13

2. Houlden v. Smith, 14 Ad. & El. N. W. R. 861).

N. S. 841 (68 E. C. L. 839).

## PART II.

## CIVIL PROCEEDINGS, SPECIAL.

Title A.—Attachment and garnishment proceedings, § 130-133	Title F.—Injunction proceedings, . . . . . § 149-150
Title B.—Bankruptcy, insolvency and poor debtors' proceedings, . . . . . 134-141	Title G.—Partition proceedings, . . . . . 151-155
Title C.—Condemnation proceedings, . . . . . 142-143	Title H.—Probate proceedings, . . . . . 156-178
Title D.—Confiscation and forfeiture proceedings, . 144-145	Title I.—Receivership, replevin bail or stay of execution proceedings, . . 179-180
Title E.— <i>Habeas corpus</i> proceedings, . . . . . 146-148	Title J.—Strays—Proceedings to impound and sell, . . 181
	Title K.—Tax-proceedings, . 182-184

## TITLE A.

## ATTACHMENT AND GARNISHMENT PROCEEDINGS.

§ 130. Administrators — Assault and Battery.	§ 132. Contract or tort—Distress warrant.
131. Bond—Necessity of.	133. Dredge-boat.

§ 130. **Administrators.**—The statutes of New York, as construed by the supreme court, did not authorize a writ of attachment against an administrator of a debtor, and for that reason such a writ issued by order of the judge of the court of common pleas, and all proceedings thereunder, were held void.<sup>1</sup>

**ASSAULT AND BATTERY.**—So, where a justice of the peace, relying upon several decisions of the supreme court, issued a writ of attachment in a case of assault and battery, the supreme court, concluding that its earlier decisions were wrong, held the proceedings before the justice void.<sup>2</sup> I think these cases are wrong.

§ 131. **Bond—Necessity of.**—The supreme court of New York had decided in five cases that a bond was not necessary before issuing a writ of attachment by a justice of the peace, but finally the court of appeals held otherwise; but prior to this decision, and while the supreme court decisions stood as law, a justice issued such a writ without a bond; after the decision by the court of appeals, the supreme court held this attachment proceeding void.<sup>3</sup> What was the justice to do? If he had known more than the supreme court, and refused to issue with-

1. Matter of Hurd, 9 Wend. 465.

3. Davis v. Marshall, 14 Barb. 96,

2. Saddlesvene v. Arms, 32 How. 98.

out a bond, that court would have compelled him to do so. Truly, he was between the devil and the deep sea; sworn to follow the supreme court, compellable to do so, and a trespasser when he did.

§ 132. **Contract or tort?**—A Nebraska statute authorized foreign attachments before justices on matters of “contract, judgment or decree.” The affidavit stated that the claim was “for damages in not delivering goods purchased,” and the bill of particulars stated the claim to be for “damages by delay in receiving goods” bought of defendant, “and for delay caused by wrong shipment.” The justice was sued in trespass for taking jurisdiction, and the circuit court held that the action sounded in contract, and that the action of the justice was not even erroneous; but the supreme court held that the action sounded in tort, and that the justice was a trespasser.<sup>1</sup> It was a question for the justice to decide whether the claim sounded in contract or in tort, and the fact that the circuit court instructed the jury that it sounded in contract, shows that it was a doubtful one.

**DISTRESS WARRANT.**—The Georgia statute, as construed by the supreme court, gave justices no authority to garnish on a distress warrant; nevertheless, such an action was held to be merely erroneous, and not void.<sup>2</sup>

§ 133. **Dredge boat.**—An Illinois statute authorized attachments against “boats and vessels of all descriptions, built, repaired or equipped, or running upon any of the navigable waters within the jurisdiction of this state.” Under this statute a judgment in attachment was rendered against a “dredge boat.” This was held void, because a dredge boat was not covered by the statute.<sup>3</sup> I think all the cases in the last four sections are unsound, except the one from 76 Georgia, 762.

## TITLE B.

### BANKRUPTCY, INSOLVENCY AND POOR-DEBTORS' PROCEEDINGS.

§ 134. Amount of debts.

135. “Change of circumstances.”

136. Copartners, corporators.

137. Estate of deceased partner.

§ 138. “Inability to endure.”

139. “Proper authority.”

140. Second application for discharge.

141. Tort?

§ 134.—**Amount of debts.**—Under an English statute, any person, being a trader, and “owing debts amounting in the whole to

1. Rouss v. Wright, 14 Neb. 457 (16 N. W. R. 765).

2. Taylor v. Benjamin, 76 Ga. 762.

3. Knisely v. Parker, 34 Ill. 481, 483.

less than three hundred pounds," might, on petition to the county court, get an order of "protection" from certain legal proceedings. A debtor had obtained one order of protection in 1843. In 1851 he applied for another order, and a creditor opposed on the ground that his unpaid old debts, together with his new debts made since 1843, exceeded three hundred pounds. But the court decided that, under the various statutes on the subject, the old debts were not to be taken into account, and granted the debtor a "protection." On application for a writ of prohibition against the county court, the queen's bench decided that the construction of the statutes was a question for the county court, and that an erroneous decision did not destroy or oust its jurisdiction.<sup>1</sup>

§ 135. "Change of circumstances."—A statute of Rhode Island concerning the discharge of poor debtors, prohibited the debtor from taking out a second citation to his creditor—a discharge on the first one being refused—"unless upon proof of some change of circumstances after the taking out of the first citation." The debtor was first imprisoned on *mesne* process, and his discharge refused. He was then imprisoned on final process, and, after notice, discharged. It was held that "some change" meant some reasonable change—"something which might properly and reasonably affect or influence the judgment of the magistrates," and that the fact that the debtor was at first confined on *mesne* process and afterwards on final process, was not such a change as the statute contemplated.<sup>2</sup> But this was simply substituting the opinion of the supreme court for that of the magistrate on a matter wherein the law made his decision final unless appealed from. In a prior case,<sup>3</sup> that court had held that where the record showed that *some* proof of change of circumstances had been offered, error of the magistrate in holding it sufficient did not make the discharge void.

§ 136. Copartners.—The California statute in relation to insolvency proceedings, as construed by the supreme court, applied only to individual debtors and not to copartners, as such. The members of a firm united in a petition in insolvency, and this was held to make the discharge void.<sup>4</sup>

"CORPORATORS."—The statute authorized "a majority of the

1. *In re Bowen*, 15 Jurist 1196.

3. *Angell v. Robbins*, 4 R. I. 493,

2. *Eastwood v. Schroeder*, 5 R. I. 501.

388, 390.

4. *Meyer v. Kohlman*, 8 Cal. 44.

corporators" to file a petition in bankruptcy, but one was filed by the secretary by authority of the board of trustees, and the corporation was adjudged a bankrupt. This adjudication was held void on the ground that the word "corporators" in the statute meant "shareholders."<sup>1</sup> Both these decisions seem to me clearly wrong.

§ 137. **Estate of deceased partner.**—The statute of Texas authorized persons to provide by will that no proceedings should be had in the probate court in settling their estates, except the probating of the will and the return of an inventory; and, in such cases, it provided that persons having claims might put them in judgment against the executor and collect them from the estate of the testator in his hands. One Jones was a partner with one Ulrich, and the firm was dissolved and Jones assumed and agreed to pay all the firm debts. After that Jones died, leaving a will as above provided, and his executors took possession of his estate, and certain creditors obtained judgments against them and had the right to levy on the lands of Jones in their hands. At this stage of the proceedings, a creditor of the firm filed his petition against Ulrich, the surviving partner, and the executors of Jones, to put the firm into bankruptcy. Service was had on the executors of Jones, but none on Ulrich, as he was in Mexico, and the firm was duly adjudicated bankrupt, and an assignee appointed, who took possession of the assets. On petition of the creditors who had recovered judgment against the executors, the assignee was ordered to sell the lands of Jones, which was done and a deed made. The individual property of Ulrich was also sold, and he returned and received his discharge. Some years afterwards the heirs of Jones brought an action of trespass to try title against the purchaser of the land at assignee's sale. The court held that there was nothing in the bankrupt law authorizing proceedings against the estates of deceased persons or deceased partners, and that the whole bankruptcy proceedings were void, and that the heirs could recover.<sup>2</sup> The executors of Jones, under the law and the will, were simply trustees, holding all the property of Jones, and were not accountable to the probate court; and, under the contract with Ulrich, it was their duty to pay all the firm debts. Having thus all the assets of the deceased partner, it seems to me to have been a fair

1. *Matter of Lady Bryan Mining Co.*, 2 Abb. (U. S.) 527, 529.

2. *Adams v. Terrell*, 4 Fed. R. 796—Woods, J. See section 162<sup>3</sup>, *infra*.



question of law for the bankrupt court to decide, whether or not they could be brought into court in their representative capacity when the firm was adjudged bankrupt, and that such decision was conclusive collaterally. The decision allowed the heirs to recover land from a *bona fide* purchaser, whose money had gone to pay their ancestor's debts, simply because the wrong officer sold it.

§ 138. "**Inability to endure.**"—A Kansas statute authorized the court or judge to discharge, on such terms as might be just, a person imprisoned "in case of his inability to perform the act, or to endure the imprisonment." A person being imprisoned for debt, was released on bonds binding him not to go outside the county, and was thus imprisoned within the county. He then applied to the court for leave to go to Illinois, on account of the illness of his wife, and, after due notice to the plaintiff, he was given thirty days' leave of absence. It was held that it was for the court to decide whether the word "inability" in the statute meant physical or mental, and that an error did not make its decision void.<sup>1</sup>

§ 139. "**Proper authority.**"—A debtor was released from arrest on giving a bond that he would apply "to the proper authority" and take the poor debtor's oath within one year. He made an application, took the oath, and was discharged. The creditor then sued on his bond. The trial court held that he had applied in the proper county, and that his discharge was valid; but the supreme court, after much construction of statutes, held that he had not, and that the discharge was void.<sup>2</sup> This decision I regard as unsound.

§ 140. **Second application for discharge.**—The court of common pleas of New Jersey had general jurisdiction to discharge insolvents from custody. Whether or not the statute authorized a debtor to make a second application after failing on the first, was a question for the court to decide on the second application, and an erroneous decision that the first one did not bar the second, did not make the discharge void.<sup>3</sup>

§ 141. **Tort.**—A person was imprisoned for not paying over money, tortiously obtained. While still in prison, he made application to be released from imprisonment as an insolvent. On

1. Randolph v. Simon, 29 Kan. 406, 410.

3. State v. Sheriff of Middlesex, 15 N. J. L. (3 Green) 68.

2. Hawley v. White, 18 N. H. 67.

the hearing, the creditor who had caused him to be imprisoned appeared and litigated his right to be discharged, but the court discharged him. After he had made his application for a discharge, he was released on bail. After he was discharged his bail made application to be exonerated. The court—not the one granting the discharge—held that the statute did not extend to a case of tort, and refused to release the bail.<sup>1</sup> This case presents the spectacle of one co-ordinate court sitting and revising the action of another for supposed judicial errors. It did not occur to the judge of the second court, that his brother presiding in the first court was as competent to decide upon the proper construction of the statute as he was.

#### TITLE C.

##### CONDEMNATION PROCEEDINGS.

§ 142. Railroad lands condemned. | § 143. Street removed by railway.

§ 142. **Railroad lands condemned.**—A highway was laid out longitudinally upon the land of a railroad company in Vermont by order of a county court. This was held erroneous, but not void.<sup>2</sup> But in Indiana, the contrary was ruled concerning an order of court to construct a public ditch longitudinally upon the land of a railroad company.<sup>3</sup> But this case seems clearly wrong, as it was only by construction that the court could hold it erroneous, and the circuit court was as competent to construe the statutes as the supreme.

§ 143. **Street removed by railway.**—The statute of Illinois authorized a railroad company “to enter upon and take possession of and use all such lands and real estate as may be necessary and indispensable for the construction and maintenance of said railroad, and the appendages and accommodations requisite and appertaining thereto,” and to have the same condemned by a proceeding in court. A company desired to locate its road upon a street, and in order to furnish the public an equivalent, desired to move the street fifty feet further north upon and along a certain block. In order to do so, it filed a petition to condemn a strip fifty feet wide off the south side of the block, alleging that the same was “needed by said company *for their right of way*, and for the alteration of River street in

1. *Grocers' National Bank v. Clark*,  
31 How. Pr. 115, 123.

2. *State v. Vernon*, 25 Vt. 244.

3. *Baltimore and Ohio R. R. Co. v. North*, 103 Ind. 486, 494 (3 N. E. R. 144).

said town of Sterling," and asking for appraisers to assess the damages to the landowners "for the construction of the said railroad and its appendages, and for the other purposes named in said petition." Appraisers were appointed and assessed damages of fifty dollars to one Wells for the "purposes specified" in the petition, and the court adjudged "that the assessment of fifty dollars to said Wells, for and by reason of the appropriation by said company for the use of said railroad, and for the alteration of River street, for that part of lots 6 and 7, in block 44, west of Broadway, in Sterling, the property of said Wells, which lies within fifty feet of the south line of said block, be, and is hereby approved and confirmed." This was held void in ejectment, because the statute gave the company no power to condemn land for street purposes.<sup>1</sup> The petition alleged that the company needed the land "for their right of way, *and* for the alteration of River street." If it was not necessary for the company to condemn so wide a strip, Wells ought to have made that defense. The company was condemning the *whole* strip for its right of way, but because it purposed to let the public use a part of it for a street, did not touch the jurisdiction of the court. At least, it was a question for the court to decide whether the company could condemn for such a joint use under the statute.

#### TITLE D.

##### CONFISCATION AND FORFEITURE PROCEEDINGS.

§ 144. Corporate property.

| § 145. "Forfeit his vessel."

§ 144. **Corporate property.**—In 1862, the congress of the United States passed an act to confiscate the property of persons in rebellion, and under this act the property of a corporation was confiscated. This was held void, because the act did not include corporations.<sup>2</sup> But if the corporate stock was owned by rebels, that might have been confiscated, and that would have carried with it the corporate property. The confiscation court had complete jurisdiction, and if the corporation could not commit the crime of treason, it was a good time then to convince the court. In Wisconsin a person was imprisoned for libeling a corporation. On *habeas corpus*, the supreme court said that, conceding that a

1. Chicago & North Western Ry. Co. v. Galt, 133 Ill. 657 (23 N. E. R. 425).  
2. Risley v. Phenix Bank, 83 N. Y. 318.

corporation could not be the subject of libel, yet that was a question for the court below.<sup>1</sup>

§ 145. "Forfeit his vessel."—A Virginia statute made it a penal offense to fish with a steamer, and provided that any person so offending should be fined and "forfeit his vessel." In such a case one Overton, the master of a vessel was arrested and the vessel seized, and he was convicted and fined, and the court made an order of forfeiture and sale. This order was held void as against the owner of the vessel, one Polk, because the words "his vessel" meant the vessel *owned* by him, and not the vessel *employed* by him.<sup>2</sup> The court laid considerable stress on the point that the law provided no means by which the owner could appear and contest the case. But his property in the hands of his agent was seized, and he was bound to take notice of that, and, like a warrantor of title, he had the right to make defense because he was interested. It needed no statute to authorize that. And it is old and well settled law that vessels used by the master in violation of law are liable to forfeiture, without regard to the owner,<sup>3</sup> who has a right to defend because he is interested.<sup>4</sup> The meaning of the words "forfeit his vessel" was a question for the trial court.

## TITLE E.

### HABEAS CORPUS PROCEEDINGS.

§ 146. "Criminal matter."

147. Debt or fraud?

§ 148. Void discharge held valid.

§ 146. "Criminal matter."—Justices of the peace had jurisdiction in South Carolina to release on *habeas corpus* where the confinement was for "criminal, or supposed criminal matter." An irregular process was issued by a court of equity, upon which a person was arrested and confined for not paying a decree. He was released on *habeas corpus* by a quorum of justices. This discharge was held void, and no defense to the sheriff, on the ground that an arrest in a civil case was not criminal or supposed criminal matter.<sup>5</sup> In this case the justices construed the irregular arrest to be criminal. It does not seem to me that

1. Hauser v. State, 33 Wis. 678, 680.

2. The J. W. French, 13 Fed. R. 916,  
923—Hughes, J.

3. Smith v. Maryland, 18 How. 71.

4. The Ann, 8 Fed. R. 923, 927.

5. Harvey v. Huggins, 2 Bailey 252,  
267.

the question was void of color. It was a question that magistrates unskilled in the law might easily mistake.

§ 147. **Debt or fraud?**—The statute of New York authorized imprisonment in civil cases for fraud, but not for debt. The chancellor, in a suit for specific performance, determined that the allegations and proofs showed a case of fraud, and imprisoned the defendant. The supreme court, concluding that the allegations of the bill did not make out a case of fraud, released him on *habeas corpus*.<sup>1</sup> Closely akin to the last case, and contrary in principle, was another in the same state. The statute authorized imprisonment on civil process for torts, but not upon contract. A person was lawfully imprisoned “for converting a certain quantity of plank, or lumber, of the plaintiff’s,” but a commissioner wrongfully discharged him on *habeas corpus*. This discharge was held not void, and a protection to the sheriff in an action for an escape.<sup>2</sup> In another case in the same state, a person was imprisoned for a contempt in violating an injunction, and was then discharged in bankruptcy from his debts. A commissioner, conceiving that he was in prison on a matter covered by his discharge, released him on *habeas corpus*; but the court of errors, differing with the commissioner, held his release void.<sup>3</sup> I think the case from Barbour right, and the others wrong. They are contrary to the case cited in the next section.

§ 148. **Void discharge held valid.**—The judge of a county court in Tennessee had made a void order for the release of a prisoner, which the sheriff declined to obey. The prisoner sued out a writ of *habeas corpus* from the criminal court, and that court, deeming the discharge ordered by the county judge valid, ordered the sheriff to release the prisoner, and refused an appeal, both of which were erroneous. The sheriff refused to obey, and was fined for contempt. This fine was held not void.<sup>4</sup>

## TITLE F.

### INJUNCTION PROCEEDINGS.

§ 149. Injunction against managing officers of corporation.	§ 150. Injunctions against municipal corporations.
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§ 149. **Injunction against managing officers of corporation.**—A Michigan statute authorized the court, at the suit of any director,

1. *En parte Beatty*, 12 Wend. 229.

2. *Wiles v. Brown*, 3 Barb. 37, 39.

3. *Spaulding v. People*, 7 Hill 301.

4. *Vanvabry v. Staton*, 88 Tenn. 334.

(*In re Vanvaver*, 12 S. W. R. 786).

trustee or creditor, to compel the managing officers of a corporation to account for their official conduct in the management and disposition of the funds and property committed to their charge, and to pay over all moneys lost or wasted by them, and to account for the value of all property misappropriated, and also authorized it to suspend or remove them for abuses of trust. Three of the seven directors of a corporation brought such a suit for malfeasance against the other four, and on an *ex parte* application procured an injunction against their further acting, and the appointment of a receiver. It was held that the issuing of the injunction and the appointment of the receiver were void.<sup>1</sup> But it seems to me that it was a question for the *nisi prius* court to decide as to the necessity of an injunction and a receiver, in order to fully and speedily carry out the powers conferred by the statute.

§ 150. **Injunctions against municipal corporations.**—The Illinois statute provided that the town clerk, upon the petition of ten legal voters and taxpayers, should post notices for an election to determine whether or not the town would subscribe to the stock of a railroad company. The statute also provided that after a rejection at an election, the authorities of the town might, at their discretion, call a new election. After one election and rejection, the authorities called a new election, which was enjoined, and the injunction was disobeyed by them and they were fined for contempt. It was held that the injunction and fine were void for want of jurisdiction over the subject-matter.<sup>2</sup> The court admits (page 205) that the officers might have been enjoined if “they were departing from the power which the law had vested in them or were assuming a power which the law did not give them.” If that is correct, the decision is wrong, as it was a question of both law and fact for the chancellor to determine, whether or not they were departing from the power given them by law. In a later case, the same court held that a decree enjoining the board of supervisors from building a jail was void, because the court had no power to control their discretion.<sup>3</sup>

1. *Port Huron & Gratiot Ry. Co. v. Judge St. Clair Circuit*, 31 Mich. 456, and *People v. Jones*, 33 id. 303. with *Curtiss v. Brown*, 29 Ill. 201, 229, which holds that a judgment is not void if the court had power to render it under any possible state of facts.

2. *Walton v. Develing*, 61 Ill. 201, 205; *accord*, *Darst v. People*, 62 Ill. 306. These cases seem to be in conflict 3. *Andrews v. Board of Supervisors of Knox County*, 70 Ill. 65.

Of course, as a general proposition, the judicial department of the government cannot interfere with the executive or legislative departments. A decree interfering with the duties of the governor or legislature would be wholly void, no matter how much fraud and conspiracy were proved. But I do not understand that the same rule applies to all the sub-legislative and executive agencies established throughout the state. I understand that certain departures from authority, and certain frauds and conspiracies, give the courts power to interfere; and the decree is not void because the court mistakes the occasion. In accord with these views, is a late case in New York, which holds that whether or not an act of a municipal corporation is one of a legislative character which the court has no right to enjoin, is a question for the court to determine; and that such determination cannot be overhauled in a proceeding for contempt for its violation.<sup>1</sup>

## TITLE G.

## PARTITION PROCEEDINGS.

§ 151. Persons not entitled to have partition.

152. Property not subject to partition sale—Dower unassigned.

§ 153. Property not subject to partition sale—Undivided interest.

154. Time of granting partition.

155. Title to property partitioned, party having no.

§ 151. Persons not entitled to have partition.—A New Jersey court had sold the interest of remaindermen in partition proceedings, but the supreme court, after a careful comparison of the New Jersey and English statutes, came to the conclusion that such authority was not given,<sup>2</sup> and held the sale void as authorized by a decree in excess of jurisdiction.<sup>3</sup> A Vermont statute provided, that *any person* holding real estate in common might have partition in the county court. A husband and wife, so holding real estate, filed their joint petition for partition, and it was made and confirmed. This was a proceeding at law. The court held it void, saying: "We think the county court had no power to order partition on this petition of Packer and wife. . . . If they could not make partition between themselves by consent, they could not well confer power on others to

1. *People v. Dwyer*, 90 N. Y. 402, 409, *affirming* 34 N. Y. Supr. (27 Hun) 548.

2. *Stevens v. Enders*, 13 N. J. L. (1 Green) 271.

3. *Young's Adm'r v. Rathbone*, 16 N. J. Eq. (1 C. E. Greene) 224, 227 (84 Am. D. 151); *accord*, *Maxwell v. Goetschius*, 40 N. J. L. (11 Vroom) 383.



make it for them." <sup>1</sup> For reasons heretofore given, I think these cases wrong.

§ 152. **Property not subject to partition sale—Dower unassigned.**—The Illinois partition statute authorized a division or sale of lands held in joint tenancy, tenancy in common or coparcenary. An infant ward owned land subject to his mother's unassigned dower. His guardian brought a suit in partition on behalf of the ward against his mother, showing that she had an unassigned dower interest, and that the premises could not be divided, and procured an order to sell, and a sale was made and confirmed. This was held void, because unassigned dower was no estate, and did not make her a tenant in common, and that, therefore, there was nothing for the court to act upon.<sup>2</sup> But the *nisi prius* court had to decide those questions, and came to a contrary conclusion.

§ 153. **Property not subject to partition sale—Undivided interest.**—The right to make partition and sale in Maryland was governed by statute, and the statute gave no power to the court to make partition or sale of an undivided parcel of land. The court entertained a bill to make partition of an undivided one-fourth of a parcel of land, and because partition could not be made, ordered it to be sold. In a collateral suit, it was insisted that the sale was not authorized by the statute and was void. The court agreed that the statute did not authorize the sale, but said: "But while such is our construction of the statute we cannot agree that the court, in passing the decree, had no jurisdiction of the subject-matter, and that the purchaser acquired no title to the interest sold under it. The bill was filed for the partition or sale of an undivided fourth part of the property in which the plaintiffs and defendants were tenants in common. It was filed under article 16, section 99, code. The court had a general jurisdiction to decree a sale of property held by cotenants, and it had the jurisdiction to determine whether *under the code it had the power to sell an undivided interest in the property*. Jurisdiction is the power to hear and determine. If the judgment of the court is erroneous, the remedy is by appeal, and until reversed on appeal the judgment is binding on the parties to the suit." <sup>3</sup>

1. Howe v. Blanden, 21 Vt. 315, 321.

3. Dugan v. Mayor, etc., of Balti-

2. Reynolds v. Cooper, 100 Ill. 356, more, 70 Md. 1 (16 Atl. R. 501).

§ 154. **Time of granting partition.**—The Massachusetts partition statutes, as construed by the supreme court, did not authorize the reversion to be set off during the life of the widow to be enjoyed after her death,<sup>1</sup> nor the reversion to be decreed to the eldest son, after her death, upon his paying compensation to the other heirs,<sup>2</sup> and such proceedings were held void. And a sale of a remainder in partition proceedings in Tennessee, to be enjoyed after the cessation of the widow's dower, after a close and careful construction of the statutes, was held void.<sup>3</sup> I cannot agree with any of these cases.

§ 155. **Title to property partitioned, party having no.**—A decree in partition was made in the orphans' court between the uncles and aunts of decedent and the children of deceased uncles. There were no pleadings required or had in that court. As a matter of law, the children of the deceased uncles had no title to the property partitioned. Their title decreed to them was held not void, and also that the land could not be recovered in ejectment.<sup>4</sup> The decree would not have been void if the statutes denying their rights had been free from all doubt. See Chapter VII, Part II; and Chapter VIII.

## TITLE H.

### PROBATE PROCEEDINGS.

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| <p>§ 156. Administrator or executor—Appointment of.</p> <p>157. Administrator, executor or guardian—Resignation of.</p> <p>158. Executor of executor recognized as executor.</p> <p>159. Loan of money by administrator.</p> <p>160. Probate sales—Authority in statute.</p> <p>161. Probate sales—Bond, necessity of.</p> <p>162. Probate sales—"Care for and preserve"—Court, which one?</p> <p>163. Probate sales—"Debts," meaning of.</p> | <p>§ 164. Probate sales—"Estate lies"—"Estate shall be"—meaning of.</p> <p>165. Probate sales—Heir—Unborn child.</p> <p>166. Probate sales—Inherent power of court.</p> <p>167. Probate sales—Joint administrators.</p> <p>168. Probate sales—Married woman's land.</p> <p>169. Probate sales—Permissive statute.</p> <p>170. Probate sales—Sell, exchange, mortgage.</p> <p>171. Probate sales—"Sell the whole"—Part.</p> |
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1. Sumner v. Parker, 7 Mass. 79, 86 —Parker, J., *dissenting*, on the ground that the decree was simply erroneous, and not void.

2. Hunt v. Hapgood 4 Mass. 117, 122.

3. Kindell v. Titus, 9 Heiskell 727, 742.

4. Herr v. Herr, 5 Pa. St. 428 (47 Am. D. 416).

§ 172. Probate sales—Time.

173. Probate sales—Title of decedent.

174. Probate sales—"Ward."

175. Probate sales—Widow's consent to sale.

§ 176. Probate sales—Widow's quantity of interest in land.

177. Probate sales—Widow's rights, "value" of, given in land instead of money.

178. Probate sales—Will, sale authorized by.

§ 156. **Administrator or executor — Appointment of.**—Letters of administration were issued for no other purpose than to prove up the equitable right of the decedent to a land certificate, which was done, and the certificate sold. Twenty-nine years afterwards, the heirs tried to recover this land. While no statute could be found to fully justify the proceedings, the court said: "Probate courts have an equitable jurisdiction over minors and the estates of deceased persons, and they are not restricted in their equitable powers, unless by positive statute—which we think was not the case here—from doing any act for the protection of such estates and the estates of such minors." So the proceedings were held not void.<sup>1</sup>

§ 157. **Administrator, executor or guardian—Resignation of.**—A Wisconsin statute provided that the probate courts might appoint an administrator *de bonis non* "when any executor or administrator shall become insane, or otherwise incapable or unsuitable to discharge the trust reposed in him." The administrator had resigned, and the court had appointed an administrator *de bonis non*, who duly obtained an order and sold land to pay debts. The heirs brought ejectment and were allowed to recover, on the ground that neither the statute above quoted nor the common law authorized the court to accept the resignation of an administrator, or to appoint an administrator *de bonis non* upon such resignation.<sup>2</sup> When the administrator tendered his resignation, it was a question the court had to decide whether he was "incapable or unsuitable to discharge the trust reposed in him" further. If the court concluded that he was incapable or unsuitable, the statute gave it express authority to appoint an administrator *de bonis non*, which appointment necessarily operated as a removal of the administrator, whether his resignation was accepted or not. The same question upon the same letters came up again. The counsel insisted, that, as the petition to sell showed a cause of action within the jurisdiction of the court,

1. Hudson v. Jurnigan, 39 Tex. 579, 587.

2. Sitzman v. Pacquette, 13 Wis. 291, 303—Cole, J., *dissenting*.

it necessarily passed upon truth the petition, and that a wrong conclusion did not affect the jurisdiction; but the court said that no issue in regard to the validity of the appointment of the administrator *de bonis non* was tendered by his petition to sell, which merely recited that as a fact, and that the court simply assumed that to be true, but did not so decide.<sup>1</sup> Waiving the question discussed in Chapter XIII, *infra*, whether any possible appointment or removal of an administrator is ever void, and conceding that this administrator *de bonis non* was a mere usurper, that could not possibly make his acts void, collaterally. He claimed to be administrator *de bonis non*, and filed a petition praying that an order to sell the land of decedent might be granted *to him as such officer*. The heirs were duly notified to appear and show cause why the prayer of this petition should not be granted. They were challenged to show any defense they might have. One good defense would have been that the petitioner was not the officer he pretended to be; that he was not the real party in interest, and that *he* had no right to the relief prayed for. If he had sued the heirs to foreclose a mortgage alleged to have been executed by their ancestor, and, after due service, had obtained a decree and sold the land to a *bona fide* purchaser, no one would suppose that the heirs could maintain ejectment, either by showing that their ancestor never executed the mortgage or that the plaintiff had no interest therein. Yet that is precisely, in principle, what the heirs were allowed to do in these cases. They were permitted to show that the petitioner had no interest, and for that reason the relief granted him was held void. An early case in Illinois is contrary. The court had power "to remove guardians for good and sufficient reasons," but they had no right to resign. A guardian tendered his resignation which the court accepted, and revoked his letters and appointed a successor. It was held that the decision of the court, that his tender of resignation was good ground for his removal, could not be overhauled collaterally.<sup>2</sup> An executor in California tendered his resignation and rendered a full account, and his resignation was accepted, his accounts approved, and the court "ordered that said letters of executorship be set aside, and on turning over all the effects and property

1. Fredrick v. Pacquette, 19 Wis. 541, 547, 551. The court confused the doctrines of *res judicata* and collateral

attack, as pointed out in Section 17, *supra*.

2. Young v. Lorain, 11 Ill. 624 (52 Am. D. 463).

for the same purpose.<sup>1</sup> I think both these decisions wrong. A sale may be the best or only way to care for or preserve property; and whether it is or is not, is a question for the probate court. The Arkansas case seems to me contrary in principle to a prior case decided by that court, which held that a sale of land in that state to pay debts in Missouri and save the land of decedent there from being sold, was not void, although no statute of Arkansas so authorized.<sup>2</sup>

COURT, WHICH?—When a will in Texas appointed an “independent executor,” that is, an executor with orders to settle the estate free from the interference of the probate court, the statute gave the creditors the right to put their claims in judgment against the executor, in the district court, and to issue execution and sell the lands of the testator still in the possession of the executor, much the same as in an action against the testator in his lifetime. The district court also had power to aid the defective execution of a power by the appointment of a trustee, if necessary, to carry out the trust. When land had been devised to a minor and the executor had acquiesced in the minor’s possession, and caused it to be mentioned and designated in the probate court as a part of the estate of the minor, it was no longer in the possession of the executor so as to be reached by any proceeding in the district court, and the sole remedy of creditors was in the probate court. This being the law, an independent executor, who was settling the estate without a resort to the probate court, delivered the possession of land to the minor devisee, and caused that fact to be placed upon the records of the probate court. After that, certain creditors brought a suit in the district court against the executor and the devisees, including this minor, and such proceedings were had, that a decree was rendered fixing the amount of the claims, and, under the guise of aiding the power vested in the executor, a trustee was appointed to take charge of and sell the land so devised and set apart to the minor, all of which was done. This action of the district court was held to be void upon the ground that, as the land had been set apart to the minor in the probate court, the district court possessed no further jurisdiction over it; and it was also held that that proceeding could derive no aid from the appointment of a trustee to carry out the trust, because that was improper

1. Long v. Burnett, 13 Iowa 28 (81 Am. D. 420).

2. Sturdy v. Jacoway, 19 Ark. 499, 517.

under the facts involved.<sup>1</sup> But, whether or not the statute covered the case before it, or the action of the executor was sufficient to place this land within the exclusive jurisdiction of the probate court, or the power given in the will was so defective that it needed aid to the extent of appointing an independent trustee, were all questions which the district court was competent to decide, and which it was compelled to decide, and it seems to me that the case is wrong.

§ 163. Probate sales—"Debts," meaning of.—Where the statute authorized a sale of land to pay debts of decedents, it was held that a sale to pay costs of administration,<sup>2</sup> or a legacy,<sup>3</sup> was void. But it seems to me that it was a question for the probate court, whether or not the word debts meant claims against the estate of any kind. When these claims were presented, the probate court had to decide whether they were debts or not. If the heirs were not satisfied with its construction, an appeal was in order. A late and important Pennsylvania case was this: A co-partner died leaving his widow his executrix. The surviving partner and widow, as executrix, continued the business in the old name, which was very prosperous, and six years afterwards they erected a valuable building for the firm on the land of the decedent, to pay for which the widow borrowed twenty-eight thousand, five hundred and forty-two dollars from the firm. Two years afterwards, the widow, still being executrix, died, and an administrator with the will annexed was appointed. He filed a petition in the orphans' court showing the foregoing facts, and prayed for leave to mortgage the land of decedent to repay the surviving partner the money borrowed by the executrix to pay for the building, which was granted, and he borrowed twelve thousand six hundred dollars of a stranger and gave him a mortgage on the decedent's land. The statute required the petition to exhibit inventories of all the property, real and personal, and a schedule of the debts, but this was not done; nor did it show that decedent had any unpaid debts unless the claim mentioned was one. Ten years afterwards, the heirs brought a suit in equity in the orphans' court to cancel this mortgage as being void, and it was canceled.<sup>4</sup> True, the petition was defective in substance,

1. Allen v. Von Rosenberg, — Tex. — (16 S. W. R. 1096.) See section 137, *supra*.

2. Farrar v. Dean, 24 Mo. 16.

3. Torrance v. Torrance, 53 Pa. St. 505, 510.

4. Hilton's Appeal, 116 Pa. St. 351 (9 Atl. R. 434).

and bad on demurrer, but that did not touch the jurisdiction of the court, as is shown in Chapters VIII and XIII, *infra*; and whether or not the improvements placed by the executrix upon the land of the decedent were debts or just claims against the estate, were questions for the orphans' court to decide. The relief granted was not outside of the issues nor beyond the possible power of the court in a proper case. The heirs had their day in court when the order to mortgage was made.

§ 164. **Probate sales**—"Estate lies"—"Estate shall be"—**Meaning of.**—The Ohio orphans' court of the county where the "estate lies" was authorized to sell a decedent's land to pay debts. The court of Hamilton county ordered the sale of land in Butler county. In ejectment by the heirs, many years afterwards, this sale was held void.<sup>1</sup> The supreme court held that the word "estate" meant "land," while the orphans' court held that the "estate" meant the administration, and that it lay where the letters were issued.

"ESTATE SHALL BE."—The Kentucky statute authorized letters of administration for non-resident decedents to issue from the probate court of the county "wherein his estate, or the greater part thereof shall be." Where assets of a non-resident decedent were brought into the state *after* his death, letters issued thereon were held void, on the ground that the statute only contemplated the issuing when he left assets in the state at the time of his death;<sup>2</sup> and in another case,<sup>3</sup> the decedent left real but no personal estate in the state, and it was held that letters were void because the statute by "estate" meant personal estate. I think all these decisions are wrong.

§ 165. **Probate sales**—**Heir**—**Unborn child.**—The Alabama statute authorized an administrator to obtain a sale of the lands of a decedent on a petition showing that the same could not be "equitably divided amongst the heirs or devisees." Under this statute no right to sell would exist unless there was more than one heir or devisee. A person died intestate, leaving one child three years old and his wife pregnant with another. The administrator filed a petition showing those facts and alleging that the lands of the decedent could not be equitably divided between the living and the

1. *Lessee of Ludlow v. McBride*, 3 O. 240, 257.

2. *Embry v. Millar*, 1 A. K. Marsh. 300, 302.

3. *Thumb v. Gresham*, 2 Met. (Ky.) 306.



unborn child. An order of sale was made and the land was sold. The second child was afterwards born alive. After that the two children brought ejectment for the land. The administrator and heirs of the purchaser filed a bill to enjoin this action, and the court below enjoined it; but, on appeal, this was reversed and the injunction set aside—the court above holding the administrator's sale to be void on the ground that an unborn child is considered in being solely for the purpose of inheriting or taking property, but not for the purpose of being sued or of conferring rights on others; and that, consequently, when the order of sale was made, the decedent had but one heir at law, the child then born, and that the court had no power to order a sale.<sup>1</sup> I feel quite sure that this case cannot be supported on principle. The unborn child *was* an heir of the decedent, and it did then own an interest in his land subject to be divested if not born alive. But when it was born alive its title related back to the death of the decedent. At least, those were questions of law for the probate court to decide.

§ 166. Probate sales—Inherent power of court.—Courts generally possess more or less inherent and discretionary power, not defined by statute, and the probate courts are no exception. As long as they keep within their possible power in the relief granted, their acts are not void because not justified in positive law by the occasion. Thus it was held by the supreme court of Illinois, that a court of chancery had inherent power beyond the statute to order the sale of the land of an insane ward for her support and benefit.<sup>2</sup> The same court also held that a guardian's sale of land in that state to raise money to improve the ward's land in another state was not void, although no statute made that a ground for an order to sell.<sup>3</sup> The same ruling was made in Arkansas concerning the sale of a decedent's land in that state to raise money to pay debts in Missouri in order to save his land there,<sup>4</sup> when no statute of Arkansas so authorized. See section 160, *supra*.

§ 167. Probate sales—Joint administrator.—The Massachusetts statute provided that an "administrator may sell real estate . . . upon obtaining a license therefor" from the pro-

1. Gillespie v. Nabors, 59 Ala. 441 (31 Am. R. 20).

2. Dodge v. Cole, 97 Ill. 338, 355, 362.

3. Allman v. Taylor, 101 Ill. 185, 190.

4. Sturdy v. Jacoway, 19 Ark. 499, 517.

bate court. But where there were two administrators, and one alone filed a petition and procured a license and sold, the sale was held void,<sup>1</sup> because the word "administrator" used in the statute meant all those acting. But just how that mistake in practice, not touching the merits, affected the power of the probate court, collaterally, the court does not point out, and I cannot.

§ 168. **Probate sales—Married woman's land.**—Certain debts contracted by a married woman constituted a lien in equity upon her land in Missouri. A sale of her land by her administrator to pay such a lien was held void.<sup>2</sup> But surely the probate court was competent to decide whether or not that claim was such a debt as authorized a sale of land.

§ 169. **Probate sales—Permissive statute.**—A Texas statute authorized administrators to apply to the probate court for an order to convey land in accordance with the contract of the decedent. A person holding such a contract applied to the court for an order to *compel* the administrator to make a conveyance, and it was so ordered and a conveyance made. This was held void, apparently because the statute only authorized the court to permit and not to compel the administrator to make such a conveyance.<sup>3</sup> But as the court held the statute to mean that the administrator *must* apply for permission in proper cases, the only irregularity apparent is one of practice concerning the initiation of the proceedings. I cannot think the case sound.

§ 170. **Probate sales—Sell, exchange, mortgage.**—A statute of Indiana authorized the court for certain causes to order the land of a ward "to be sold." A guardian's petition showed that it would be to the interest of his wards "to exchange their four-ninths' interest in the property in Monroeville for the land of one Jeremiah Nesbit," etc., in accordance with a contract made with him. The court ordered a sale "for cash." Upon this order, the guardian tendered a deed to Nesbit for the wards' interest in their lands, and demanded a conveyance from him which he refused, and the guardian brought a suit to compel him to convey. Nesbit contended that the statute did not authorize an exchange of the wards' lands, and that the petition for that purpose did not

1. *Hannum v. Day*, 105 Mass. 33— S. W. R. 273), relying upon *Davis v. Wells, J., dissenting.* Smith, 75 Mo. 219.

2. *Boston v. Murray*, 94 Mo. 175 (7 3. *Walker v. Myers*, 36 Tex. 203, 252.

confer jurisdiction, but the court held otherwise, and that the guardian had done enough to maintain the suit.<sup>1</sup>

This case is an authority that where the statute merely authorizes a "sale," an order for an "exchange" is not void. On the other hand, where the statute of Arkansas authorized a guardian, upon order of the probate court, to sell land of his ward in order to invest the proceeds in other land, and a guardian filed his petition for an order to exchange the ward's land for other land described, which was granted and an exchange made, this was held void because the word "sell" did not include "exchange."<sup>2</sup> The probate court did not deem it necessary to make two bites of one cherry. It seems to me that this decision sacrificed a substantial and equitable right to a legal technicality,—one that the probate court was competent to decide. But, in accord with this, is an early case in the Supreme Court of the United States. A private statute authorized a person who held lands in trust for himself and children to sell or mortgage it by an order of the chancellor, and to apply the proceeds as the chancellor might require. The chancellor ordered him to convey a tract to a creditor in payment of a debt, which he did. This conveyance was held void because the word "sale" meant a transfer for cash.<sup>3</sup>

**MORTGAGES.**—So where the Kansas statute authorized the court to grant orders to administrators to sell the land of decedents, an order to mortgage and the mortgage made are void.<sup>4</sup> But a mortgage being a sale on condition, or something less than an absolute sale, it was a question for the probate court whether the greater did not include the lesser. See section 721, *infra*, notes 14 and 15.

§ 171. **Probate sales—"Sell the whole"—Part.**—A Michigan statute authorized the probate court to sell the "whole or such part of the real estate" of a decedent to pay debts as the court might judge necessary. The court, on a petition by the executor showing that three of the six heirs had paid their share of the debts, and that the others had not, ordered the undivided half to be sold, which was done. This was held void in ejectment—the court saying that the statute gave no power to sell less than the whole

1. Nesbit v. Miller, 125 Ind. 106, 109 (25 N. E. R. 148).

2. Meyer v. Rousseau, 47 Ark. 460 (2 S. W. R. 112).

3. Williamson v. Berry, 8 How. 495, 544.

4. Black v. Dressell's Heirs, 20 Kan. 153.

interest of the decedent in any parcel.<sup>1</sup> So, when one of the heirs had mortgaged his interest, and the administrator got an order to sell subject to the mortgage, and so sold, it was held void because the entire interest of the decedent was not sold.<sup>2</sup> But surely, whether the word "part" in the statute meant a divided or undivided one, was a question for the probate court. It would have been a fairly debatable question on appeal whether the power to sell the whole did not include the power to sell an undivided part.

§ 172. **Probate sales—Time.**—The New York statute required a petition by an administrator to sell land to be filed within three years from the granting of letters of administration. The court revoked the original letters and issued letters *de bonis non*, and then granted an order to sell on a petition filed within three years from the time they were issued. This sale was held void because the petition was not filed within three years from the time of the original grant.<sup>3</sup> But before this statute was enacted, it was erroneous to grant an order to sell fourteen years after the issuing of letters, but not void.<sup>4</sup> Why a disregard of the statute should have a more serious effect than a disregard of the common law, I am unable to see, as both are equally imperative. But it was a question for the probate court as to what the statute meant.

**TIME OF SALE.**—The law of Ohio authorized a homestead to be set off to the widow and minor children, and did not authorize its sale until all the children became of age, when it ceased to be a homestead and was subject to sale. The court set off a house and lot to the widow and minor children as a homestead. On petition of the executor, it was then sold subject to the homestead, and the sale was confirmed. After all the children had become of age and the homestead rights had ceased, the purchaser brought ejectment against the widow and children; but it was held that the sale was void and he was defeated, because it was not subject to sale until the homestead had ceased.<sup>5</sup> The statute was not clear as to the time when the right to sell accrued, and necessarily had to be construed by the probate court. See sections 152, 153 and 154, *supra*.

1. Eberstein v. Oswalt, 47 Mich. 254 *affirming* 2 Hun 78 and 4 T. & C. (10 N. W. R. 360). 266.

2. Hewitt v. Durant, 78 Mich. 186 (44 N. W. R. 318).

4. Jackson v. Robinson, 4 Wend. 436.

3. Slocum v. English, 62 N. Y. 494.

5. Wehrle v. Wehrle, 39 O. St. 365.

**TIME FOR SETTLEMENTS.**—The New York statutes (which were very numerous), as construed by the court of appeals, gave the surrogate power to settle annually with testamentary trustees, but no power to settle with guardians until the trust was terminated. A person made a will giving certain personal property to a legatee, and appointed an executor and made him “guardian and trustee” for the legatee. The surrogate, laboring under a mistake of law, made annual settlements with the executor as guardian and trustee. The court of appeals held that he was not a testamentary trustee, because the property was not given to him in trust for the legatee, but given to the legatee for him to manage as guardian, and for that reason held the annual settlements void.<sup>1</sup> I think the decision of the probate court on so close a question of law, conclusive collaterally.

**§ 173. Probate sales—Title of decedent.**—Can the probate court settle the question of title in a proceeding to sell land? The court having complete and exclusive jurisdiction over the settlement of the estates of decedents, it is certainly a debatable question whether that does not include the power to determine what property belonged to the deceased. Thus, the Indiana statute gave the court of common pleas exclusive jurisdiction “of all matters relating to the settlement and distribution of decedents’ estates,” and concurrent jurisdiction with the circuit court “in all civil cases except . . . where the title to real estate shall be in issue,” and it was held that its exclusive jurisdiction over the estates of decedents carried with it the power to try and determine the title to real estate which the administrator petitioned to sell.<sup>2</sup> So also its exclusive jurisdiction in suits against heirs,<sup>3</sup> and its concurrent jurisdiction in suits to foreclose mortgages,<sup>4</sup> and mechanics’ liens,<sup>5</sup> and in suits for partition,<sup>6</sup> were held to give it power to settle all questions of title in those proceedings, so as to make the relief granted final and complete. But where a person initiated pre-emption proceedings in Kansas, and died, and his administrator perfected them, and a patent was issued to his “heirs,” which gave them the legal title, and where the administrator then sold the land to pay debts, this sale

1. *In re Hawley*, 104 N. Y. 330 (10 N. E. R. 352, 359).

2. *Gavin v. Graydon*, 41 Ind. 559, 296. 562.

3. *Fleming v. Potter*, 14 Ind. 486.

4. *Holliday v. Spencer*, 7 Ind. 632.

5. *Bourgette v. Hubinger*, 30 Ind.

6. *Wolcott v. Wigton*, 7 Ind. 44.

was said to be void because the invalidity appeared on the record.<sup>1</sup>

The probate court in Texas had power to sell community land to pay community debts, but no rightful power to try the question of title to land. A husband and wife died, seized jointly of land. A creditor, claiming to have a community debt, brought an action in the probate court to have this land sold, alleging it to belong to the husband and wife in community. The heirs of the wife were made parties, and pleaded that the land was the separate estate of their mother. The court found the debt sued upon to be a community debt, and the land to be community property, and ordered it to be sold, which was done. The heirs of the wife then brought ejectment, and were allowed to show that their plea in the probate court was true, and to recover the land, on the ground that the probate court had no power to try the question of title to land.<sup>2</sup>

An administrator filed a petition to sell land of the decedent in Tennessee, and the widow answered by setting up title in herself, and after a trial she was defeated. She then brought a suit to restrain the sale, and to quiet her title. The law was so obscure that the chancellor held that the county court had power to adjudicate upon her title; but the supreme court, differing with him, held that the adjudication did not affect her rights.<sup>3</sup>

On principle, where the heirs, or widow, or other persons, are given an opportunity to show cause why an administrator's petition to sell land should not be granted, their failure to set up their titles makes the order to sell a bar to all their rights. The record in such cases is a conclusive adjudication that they have no claims whatever.

§ 174. **Probate sales—"Ward."**—A New Jersey statute provided: "That if the personal estate, and rents and profits of the real estate be not sufficient for the maintenance and education of the ward, the orphans' court" might order the guardian to sell the ward's real estate. Under this statute, one "Henry G. Doremus, guardian of Henry, Josiah, George, Richard and Jane Doremus, for maintenance and education, exhibited to the orphans' court of Essex county, June 15, 1818, an account amounting to one thousand seven hundred and sixty-four dol-

1. *Dictum* in *Rogers v. Clemmans*,  
26 Kan. 522, 526.

2. *Bradley v. Love*, 60 Tex. 472, 476.

3. *Walsh v. Crook*, — Tenn. —  
(19 S. W. R. 19).

lars." On the same day, the record showed a bond given to the ordinary conditioned "that if the above bound Henry G. Doremus, as father and natural guardian of Jane, Henry, Josiah, Eliza, George and Richard, his children" should perform the duties of his trust, the bond should be void. The orphans' court ordered the lands of the wards to be sold, which was done, and, in 1861, their heirs brought ejectment. The foregoing entries were all that could be found. The court of errors and appeals held that the orphans' court only had jurisdiction over the estates of *orphans*, and not of minors who were not orphans, and that the order of sale was void for want of jurisdiction over the subject-matter. It took thirteen pages of reasoning and comparison to make it clear that the statute, in speaking of wards, meant wards who were orphans.<sup>1</sup> Mr. Justice Van Dyke dissented on the ground that the statute meant just what it said. The meaning of the statute had to be decided by the orphans' court, and an error ought not to make its decision void. The decision seems to me to confound the distinction between jurisdiction over the person and jurisdiction over the subject-matter.

§ 175. **Probate sales—Widow's consent to sale.**—The Indiana statute authorized the court to order the sale of a decedent's lands to pay debts upon a petition by the administrator showing certain matters, to which the widow and heirs were to be made defendants and served with notice, unless they, being of lawful age, "shall signify in writing their assent to such sale," in which case the notice was to be dispensed with. The statute also provided that the widow's rights should not be sold. In such a case the administrator filed a petition asking to sell the entire estate, widow's rights and all, and the widow appeared and filed her assent in writing that the whole premises, including her interest, might be sold, upon an alleged agreement that the one-third of the proceeds should be paid to her. A sale was ordered and made. In ejectment by the heirs of the widow, it was held that this sale was void, and that the heirs could recover unless the widow had estopped herself by receiving the proceeds.<sup>2</sup> The case holds that the sale was void for want of jurisdiction over the subject-matter, because the statute forbade the sale of her interest. But the court was one not only of general but of universal jurisdiction, and had power to sell her land in a proper case, and it was

1. *Graham v. Houghtalin*, 30 N. J. L. (1 Vr.) 552, 557.

2. *Roberts v. Lindley*, 121 Ind. 56 (22 N. E. R. 967).



a question of law for it to decide whether or not her interest could be sold with her consent. This case is contrary in principle to an earlier one in the same court, which held that a decree in partition made in a manner unknown to the law, was not void when done by consent.<sup>1</sup>

**§ 176. Probate sales—Widow's quantity of interest in land.**—An Indiana statute provided that one-third of a decedent's lands should descend to his widow in fee simple free from the demands of creditors, but that if she were a second or subsequent wife with no children by the decedent, and the decedent had children alive by a previous wife, "the land which, at his death, descends to such wife, shall, at her death, descend to his children." This statute, as construed by the supreme court, gave her the fee, but made the children her forced heirs at her death. In such a case, the administrator filed his petition to sell all the land of the decedent to pay debts, and made the widow and children parties. The court ordered all the land sold in fee simple, "subject to the life estate of the widow in the one-third part thereof." After the death of the widow, the children sued to recover the one-third which descended to the widow, and it was held that they could do so.<sup>2</sup> The court said that the probate court had no more power to sell the widow's land than that of any other living person; that she owned the one-third in fee, and that the children had no interest which could be sold. But the probate court, which had power to determine conflicting titles in that proceeding,<sup>3</sup> construed the statute as giving her only a life estate with the fee in the children. That was the practical effect of the statute, and not a very strained construction. The children were in court and had a full opportunity to protect their rights. The widow and children, together, owned the fee in some manner. The court adjudged that the widow had only a life estate and the children the remainder, and ordered the sale of the entire fee subject to her life estate. To permit the children to say, in another action, that they did not then own the remainder, was to overturn the judgment of the court, collaterally, for a mistake of law on a point which the court necessarily had to decide. I am unable to see the force of the remark that "the court had no more power to sell the widow's land than that of any other

1. Applegate v. Edwards, 45 Ind. 329, 334.

2. Armstrong v. Cavitt, 78 Ind. 476, 482.

3. Gavin v. Graydon, 41 Ind. 559.

living person." If any other person had had a title to the land described in the petition as belonging to the decedent, and such person had been brought into court and had permitted a decree for a sale to go, his title would have gone. An early case in Vermont is similar. A person devised away all his real estate. The widow refused to take under the will. It was a very close question of construction of several statutes whether she was entitled to one-half the real estate in fee simple, or one-third for life. She applied to the probate court, and it duly set off to her one-half in fee simple. In ejectment between the widow and devisee, the supreme court held that the law only gave her one-third for life, and that the decree of the probate court was void.<sup>1</sup> If the probate court had power to pass on the title, this decision, in my opinion, is wrong.

§ 177. **Probate sales—Widow's rights—"Value" of, given in land instead of money.**—The statute of Texas, in relation to the widow's rights in certain cases, provided that the "value" of certain exempt property might be set off to her. In such a case, the value of the exempt property was set off to her in real estate instead of in money. This was held to be erroneous, but not void.<sup>2</sup> The court said: "It is true that, ordinarily, when one under a statute is entitled to the value of a thing named, this value should be paid in money, for it is by this that value is to be determined; but the statute under which the court acted did not so declare, and it was a matter of construction upon which, if the court came to a wrong conclusion, the law gave a means to correct the error."

§ 178. **Probate sales—Will, sale authorized by.**—A petition prayed for the sale of certain lands ordered to be sold by the will, describing them as "George's Adventure," containing three hundred and fifty-six acres. One hundred acres of this land was not then subject to sale under the terms of the will, as afterwards construed by the supreme court, until the death of the life tenant. The order of the court was "that the real estate in the said will directed to be sold shall be sold." Under this order, the one-hundred-acre tract was sold, and the sale duly confirmed. This sale was held void because not then authorized

1. *Hendrick v. Cleaveland*, 2 Vt. 329, 337.

2. *Pelham v. Murray*, 64 Tex. 477, 482.

by the will, and because the decree did not order its sale.<sup>1</sup> But the chancellor was competent to construe the will, and if the life tenant did not like his construction, he ought to have appealed. In Ohio, a purchaser from an heir brought a suit in partition, in which the land was sold. This was reversed because the will gave the possession to the executor in order to sell, but in trespass against the purchaser at the partition sale, it was held not void.<sup>2</sup> The court in the partition proceedings had misconstrued the will.

### TITLE I.

#### RECEIVERSHIP, REPLEVIN-BAIL OR STAY OF EXECUTION PROCEEDINGS.

§ 179. Receiver in "an action."

§ 180. Replevin bail or stay of execution—"Entering on docket"—Time of entry.

§ 179. **Receiver in "an action."**—A statute of Indiana provided that a receiver might be appointed "*in actions*" between partners. A complaint by one partner against the other alleged, in substance, that they were bankers; that "a run" had been going on by their depositors for several days, whereby their cash had been reduced; that they were insolvent and unable to continue business; that a receiver was necessary to prevent a multiplicity of suits and to save the estate for the creditors, praying for a dissolution and an accounting between the partners, etc. The other partner signed an answer admitting all the allegations of the complaint, and gave it to the complaining partner, who presented both the complaint and answer to the judge in vacation. The judge, construing this to be "an action," appointed a receiver. The validity of this appointment was attacked collaterally on the ground that, as this was an amicable arrangement between the partners, it did not constitute "an action" within the meaning of the statute. The word "action" in that state included both actions at law and suits in equity. The majority of the court held that the proceeding constituted an action, and that the appointment of the receiver was not void.<sup>3</sup> One judge dissented on the ground that the proceeding did not constitute

1. *Shriver's Lessee v. Lynn*, 2 How. 175, 183 (4 N. E. R. 682)—Mitchell, J., dissenting. Accord, *First National*

2. *Dabney v. Manning*, 3 O. 321, 326. *Bank v. United States Encaustic Tile Co.*, 105 Ind. 227 (4 N. E. R.

3. *Pressley v. Lamb*, 105 Ind. 171, 846).

“an action” between the partners. He contended that a “controversy of some kind between parties involving legal or equitable rights . . . presented in such manner that the court may act judicially in the premises,” was necessary to constitute an action. But when these papers were presented to the judge he had to decide whether or not they constituted “an action” in the sense of the statute, and an error on that point would not make his decision void. I think the case well decided.

§ 180. **Replevin-bail or stay of execution**—“**Entering on docket**”—**Time of entry**.—An Indiana statute provided that a “judgment defendant may have stay of execution by entering replevin-bail on the docket of the justice.” The whole page being filled by the judgment entry, except the margin, an undertaking for the stay of execution was duly written on a piece of paper, signed by the person desiring to become replevin-bail and attested in due form, and pinned across the face of the leaf on which the judgment was entered. This replevin-bail had the force of a judgment confessed. It was held void because not “entered on the docket” as provided by the statute.<sup>1</sup> But when the page was full—it might have been the last one—the justice might have pasted on a piece of paper, it seems to me, and made the entry on that, the same as a piece can be pasted on a note to make room for indorsements; but instead of pasting it on, he pinned it on. He was acting judicially, and it does not seem to me that so slight an error in procedure should make his judgment void.

**TIME OF ENTRY**.—An Iowa statute provided, that, to obtain a stay of execution, a sufficient bond must be executed within ten days from the entry of the judgment, and approved by the clerk and recorded; and this operated as a judgment confessed. The clerk took a bond in such a case more than ten days after the entry of judgment. This was held not void because the clerk acted judicially and decided the statute to be directory as to time; and it was also held that his decision could not be overhauled collaterally in an action of replevin.<sup>2</sup> This case seems to me to be sound. A mistake in regard to time never affects the jurisdiction.

1. *Lockwood v. Dills*, 74 Ind. 56.

2. *Maynes v. Brockway*, 55 Iowa 457 (8 N. W. R. 317).

## TITLE J.

## STRAYS—PROCEEDINGS TO IMPOUND AND SELL.

## § 181. "Discover on his land."

§ 181. "Discover on his land."—A Pennsylvania statute declared that, "If any person shall discover upon his, her or their improved and inclosed lands, any stray cattle, horse or sheep, it shall and may be lawful for such person or persons to take up the same."<sup>1</sup> It then provided for a judicial sale by a justice, after publication of notice. In replevin for a cow thus sold, the court, in speaking of the proceedings before the justice, said: "It is alleged that he mistook in deciding that a stray taken up on the public road, after having, on prior days, broken into the inclosure, comes within the meaning of the law. If so, it was a mistake in the exercise of a jurisdiction committed to him by the acts of the assembly, not the assumption of a jurisdiction not given by law"—and the proceedings were held not void.<sup>2</sup>

## TITLE K.

## TAX PROCEEDINGS.

§ 182. Railroad-aid tax in Alabama.	§ 184. Treasurer assessed as tenant.
183. Street assessment—Owner of lot.	

§ 182. Railroad-aid tax in Alabama.—A statute of Alabama authorized the electors of a county to order a subscription on behalf of the county to the capital stock of railroad companies, by a majority vote, and in such cases, it was made the duty of the court of county commissioners to assess and levy a tax to pay for the same, and also to require the tax-assessors and tax-collectors to assess and collect the tax; and the court was also invested with all the powers, privileges and rights, and bound by the same duty of proceeding against tax-collectors and tax-assessors, and their sureties, as were vested in, granted to and imposed upon the auditor of public accounts against those officers. It was also made the duty of the tax-assessors and collectors to collect this special tax the same as state and county taxes. The statute also provided that the court should be and was "vested with power to do any and all acts to carry out all the provisions of this act, which are not inconsistent with the

1. Act of April 13, 1807.

2. Thompson v. O'Hanlen, 6 Watts  
492.

act itself, and the laws of the state and United States." Under this act, a county duly issued a series of coupon bonds to a railroad company, and the holders of some of them duly recovered a judgment against the county, in the federal circuit court, upon the coupons, and applied for a writ of *mandamus* to compel the court of county commissioners to *levy and collect* a tax to pay the judgment, which was granted. In ostensible obedience to this mandate, the court of county commissioners levied a sufficient tax and ordered "that the tax-collector proceed to collect said tax, as required by law." Just prior to the making of this order, the legislature of Alabama passed a statute, providing that the tax collectors might execute separate bonds—one for the collection of state and county taxes, and one for the collection of such special tax; and it also provided that if any tax collector should give the one bond, and not the other, he should only collect the taxes covered by his bond, and that in such cases the probate judge should notify the governor, who was empowered to appoint a special collector to collect the other tax. In this case the tax collector failed to give a bond to collect this special tax, and the probate judge duly notified the governor, who neglected to appoint a special collector; and thus matters stood for five years, when a rule was issued to the members of the court of county commissioners to appear and show cause why they should not be punished for contempt in neglecting to *levy and cause to be collected* a tax to pay the judgment in accordance with the mandate. They all appeared and showed what they had done, and this being held insufficient, they were all imprisoned for contempt, and applied to the Supreme Court of the United States for a release on *habeas corpus*. That court held that they had no power over the tax collector which they were compelled by law to exercise, and that they had done their full duty, and that the order of the circuit court, commanding them to cause the tax *to be collected* was in excess of any power conferred on them by law, and was void, and they were discharged.<sup>1</sup> It will be seen that the court of county commissioners was vested with all the powers of the auditor of public accounts against tax collectors. The court admits that the auditor of public accounts was vested with the power to sue the tax collector on his bond for a neglect of duty, or to proceed against him by *mandamus* to compel him to do his

1. *Ex parte Rowland*, 104 U. S. 604.

duty, and, by the terms of the statute, this power was vested in the court of county commissioners. It will also be seen that the statute gave the court power "to do any and all acts to carry out the provisions of this act." The statute authorizing collectors to give bond for the collection of the state and county tax only, and then to refuse to collect this special tax, was held unconstitutional and void by the supreme court of Alabama.<sup>1</sup> The circuit court, in order to decide the question brought before it, was compelled to construe these statutes and to determine what power they gave the court of county commissioners; and whether or not they gave the court power to proceed further than it did, the neglect of which was a contempt, was a fairly debatable question which that court was competent to decide, and I think the decision is wrong.

§ 183. **Street assessment—Owner of lot.**—An assessment for a street improvement was made a lien on land assessed, and the statute, by implication, required the assessment to be made against the owner, who was also made personally liable. A lot was assessed in the name of a former owner, although the deed of the present owner was on record. The assessment was held void and to place no lien upon the lot.<sup>2</sup> But as the proceeding against the lot was *in rem*, and as the name of the real owner was required to be given by implication and construction only, I think the case unsound.

§ 184. **Treasurer assessed as tenant.**—An English statute exempted "all the buildings within the walls or limits" of a certain hospital from a land tax, and laid it personally on the "owner or tenant" of the houses. A person lived in one of the houses *as treasurer of the hospital*, but was not otherwise owner or tenant. The commissioners assessed him personally, on the theory that he was a tenant. This was held void, and the commissioners trespassers.<sup>3</sup> But whether his occupation of the house made him a tenant, was a question the commissioners had to decide, and I think the case wrong.

1. Edwards v. Williamson, 70 Ala. 489; Crooke v. Andrews, 40 N. Y. 145. 547.

2. Newell v. Wheeler, 48 N. Y. 486, 3. Harrison v. Bulcock, 1 H. Bl. 68, 72.



PART III.

CONTEMPT PROCEEDINGS.

Title A.—Contempts in inferior courts, . . . . § 185-191	Title B.—Contempts in superior courts, . . . . § 192-199
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TITLE A.

CONTEMPTS IN INFERIOR COURTS.

§ 185. Principle involved in Title A.	§ 189. Clerk, contumacious—Constable, contumacious.
186. Affidavit refused—Appeal refused.	190. Fine, power to inflict—Implied power—Newspaper article—Pardon by mayor.
187. Appearance by attorney.	191. Time of action.
188. Bond in replevin.	

§ 185. Principle involved in Title A.—When a court is established it necessarily possesses power to carry on its proceedings to a final and complete termination. This includes the power to compel the attendance before it of all necessary officers and persons, and the power then to compel them to do their duty under the law. It also includes the power to keep order and preserve the peace in the presence and hearing of the court. If its own officers refuse to do their duty, or are incapable of so doing, it necessarily possesses the power to appoint temporary ones in their places. These powers necessarily inhere in every judicial tribunal without regard to grade or dignity, and it is a mistake to suppose that statutes conferring a portion of the above powers on inferior tribunals exclude the others. I doubt the validity of any statute attempting to do so.

§ 186. Affidavit refused.—An Iowa statute provided that, “When any person is desirous of obtaining the affidavit of another, who is unwilling to make the same fully, he may apply to any officer competent to take depositions as herein declared, by petition, stating the object for which he desires the affidavit.” “If such officer is satisfied that such object is legal and proper, he shall issue his subpoena to bring the witness before him,” and take his affidavit, or his deposition, “which deposition may be afterwards used as an ordinary affidavit.” A person filed a petition before a justice under this statute, alleging that he was about to commence an action for an injunction against parties named, and that, in order to obtain the necessary information, he needed and desired the affidavit of a witness named. The witness was duly

summoned to come before the justice, but refused to do so, and the justice committed him for contempt. On *habeas corpus*, the commitment was held void because there was no suit pending in which the affidavit of the witness could be used.<sup>1</sup> Another Iowa statute gave a party the right to call any person before a justice of the peace, and have his affidavit taken to be used on a motion for a new trial. The statute, *by construction*, did not allow an *ex parte* affidavit to be used on such a motion, but where the justice committed a person for refusing to give such an affidavit, it was held that it was a question of law for the justice to decide, and that his decision, although erroneous, was not void and could not be attacked on *habeas corpus*.<sup>2</sup> I think the first case cited is wrong and the other right.

**APPEAL REFUSED.**—The erroneous refusal of an appeal by a justice of the peace from a conviction for contempt, being a judicial act, does not make the commitment void in New Hampshire, and authorize the release of the prisoner on *habeas corpus*.<sup>3</sup>

§ 187. **Appearance by attorney.**—Under an English statute, a person was notified to appear before a magistrate and show cause why he should not be committed for failing to pay a penalty. He appeared by an attorney, but the statute, as construed by the magistrate, required an appearance in person, and for failure to do so, he issued a warrant upon which the defendant was arrested. He sued the magistrate for damages, and was permitted to recover because the court differed with the magistrate concerning the construction of the statute,<sup>4</sup> which seems wrong to me. So, in California, where a person was ordered to appear and show cause why he should not be punished for disobedience of an order to pay alimony, and he offered to appear and answer by attorney, which the court refused to permit, and attached and imprisoned him, this was held void on *habeas corpus*.<sup>5</sup> No reference was made to any statute.

§ 188. **Bond in replevin.**—In replevin before a magistrate in the Sandwich Islands, the defendant refused to give bond for the production of the property at the trial. The statute in such cases

1. Dudley v. McCord, 65 Iowa 671 (22 N. W. R. 920).

2. Robb v. McDonald, 29 Iowa 330 (4 Am. R. 211)—Williams, J., *dissenting*.

3. State v. Towle, 42 N. H. 540, 546.

4. Bessell v. Wilson, 1 El. & Bl. 489 (72 E. C. L. 488) (17 Jur. 664; 22 L. J. M. C. 94).

5. *Ex parte* Gordan, 92 Cal. 478 (28 Pac. R. 489).

provided a method for the sheriff to take and hold the property. But the magistrate, holding such method merely cumulative, fined and imprisoned the defendant for contempt. This was held void and to make the magistrate a trespasser.<sup>1</sup> This, I think, was wrong.

§ 189. **Clerk, contumacious.**—An Illinois statute provided that the court of county commissioners might remove its clerk for gross neglect of duty or other good cause, and fill the vacancy caused by such removal, and gave it power to punish as a contempt any disobedience of its orders. The clerk refused to enter a judgment of allowance. For this the court removed him from office, appointed a successor and ordered him to deliver over the books and papers of his office, which he refused to do, and took an appeal to the circuit court from the order of removal. The court then issued an attachment for contempt against him for refusal to deliver over the books and papers, on which he was imprisoned. On *habeas corpus*, he was released—the majority of the court, two judges dissenting, holding that as the statute made his refusal to deliver over the books and papers a crime which the commissioners' court had no power to try, it could not be a contempt. They also held that his appeal from the order of removal operated as a *supersedeas* and kept him in office, and that that fact made the ministerial act of his successor in issuing the warrant void.<sup>2</sup> According to the opinion of the majority, a contumacious clerk could block the court indefinitely by refusing to enter its orders and by appealing from its order of removal. The statutes added nothing to the inherent power of the court. If the clerk refused to enter its orders, it necessarily had the power to appoint some one to do so and to compel the delivery of the books and papers to him so he could act, and such clerk *pro tempore* must necessarily sign all process.

**CONSTABLE, CONTUMACIOUS.**—An Indiana statute authorized justices to punish, as contempts, the refusal of a witness to appear, and disorderly conduct during the progress of judicial proceedings. A constable refused to return a past-due execution on the order of the justice, and the justice imprisoned him for contempt. He sued the justice for damages, and the action of the justice was held void by the majority of the court. The dissenting

1. *Alau v. Everett*, 7 Hawaiian R. 82.      2. *Ex parte Thatcher*, 7 Ill. (2 Gilm.) 167, 169.

judge (Downey) showed that the statute did not mention all his powers; that others, such as the power to compel the attendance of jurors, and to punish those who prevent the attendance of witnesses, were powers necessarily possessed by him; and it was his opinion that the abuse of process by a constable came within his implied powers.<sup>1</sup> It seems to me that the dissenting judge was right. The constable, an officer of the court, refused to do his duty in a cause and disregarded an order made therein. When he was brought up for contempt, the court had jurisdiction over his person and over the general subject of contempts, and the question was whether or not the violation of the order infringed any express or implied power possessed by the court. That was a question for debate, as is shown by the fact that the supreme judges differed about it.

§ 190. **Fine, power to inflict.**—The surrogate in New York had power to punish for contempt, and to imprison for failure to comply with his orders. For a contempt, the surrogate assessed a *fine*, and adjudged imprisonment until it was paid. The supreme court, after much construction of statutes and distinguishing of cases, concluded that he had no power to inflict a *fine*, as such; that his power was limited to making an order that the party pay a sum of money, and to imprisoning him for its non-payment, and his order was held void, and the prisoner discharged on *habeas corpus*.<sup>2</sup>

**IMPLIED POWER.**—A New York statute provided that, when a person was brought before a justice of the peace for being intoxicated, he should be examined under oath as to where he got his liquor, but the statute provided no penalty for his refusal to be sworn. In such a case the justice committed a person for such a refusal. On *habeas corpus* this commitment was held void because no statute could be found exactly fitting the case.<sup>3</sup> The prior temperance act expressly gave such power, and the general laws of the state gave the justice such power to punish for contempt in proper cases. It was a question for the justice to decide, whether the statute which made it his duty to examine the defendant did not, impliedly, give him power to punish disobedience.

**NEWSPAPER ARTICLE.**—The statute of Montana made any

1. Doepner v. State *ex rel.* Altland, 36 Ind. 111, 117.

2. In Matter of Watson, 5 Lans. 466.

3. People v. Webster, 14 How. Pr. 242.

“unlawful interference with the process or proceedings of a court” a constructive contempt. Under this, it was held that a commitment for contempt by a police magistrate for an article published after a cause was terminated, was void.<sup>1</sup> That was adjudged to be a contempt which was not so in law.

PARDON BY MAYOR.—A police court in Arkansas duly convicted and imprisoned a woman for violating a city ordinance. Another ordinance gave the mayor the power to discharge any person from prison when further confinement “would endanger” his life. For this reason the mayor discharged her from prison. But the police court issued a new warrant to an officer, directing her to be recommitted, which the officer refused to execute. For this, the court committed him for contempt, and this was held to be void by the federal court, on the ground that the release by the mayor was a pardon.<sup>2</sup>

§ 191. Time of action.—A juror refused to appear before a justice of the peace in New York. After the trial was over, the justice issued a warrant and caused his arrest and fined him for contempt, and he sued the justice. The statute did not make provision for arresting the juror and bringing him before the justice, and did not provide when he should be fined. It was held that the justice necessarily had the power to arrest him, and also had the power to adjudge whether it was necessary or expedient to try the contempt proceeding during the trial of the main case, or afterwards.<sup>3</sup> But in Massachusetts it was held that, although a person who refused to appear as a witness before a magistrate was liable to be punished for contempt, yet it could only be done during the trial, and that the justice could not arrest and try him in a new proceeding after the original cause was terminated, and that it was void.<sup>4</sup> The opinion says that, although he had jurisdiction over the subject-matter, he was empowered to exercise it only in a particular mode, and under certain limitations. But it does not seem to me that mere questions of time or modes of practice ever touch the jurisdiction.

1. *In re Shannon*, — Mont. — (27 Pac. R. 352).

2. *In re Monroe*, 46 Fed. R. 52.

3. *Robbins v. Gorham*, 25 N. Y. 588, 592.

4. *Clarke v. May*, 2 Gray 410 (61 Am. D. 470); *Clarke's Case*, 12 Cush. 320.

## TITLE B.

## CONTEMPTS IN SUPERIOR COURTS.

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| § 192. Attorney disbarred.<br>193. Bond in criminal case—Conflict<br>of jurisdiction.<br>194. "Costs and expenses"—Court<br>allowance—Debt. | § 195. Execution awarded.<br>196. Fees of referee.<br>197. Imprisonment.<br>198. Jury committed.<br>199. Jury service refused. |
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§ 192. **Attorney disbarred.**—The circuit court of the District of Columbia struck the name of an attorney from its rolls for an alleged insult, and the attorney sued the judge for damages. It was held that, conceding that the cause alleged was no ground for the action taken, still it was merely an excess of jurisdiction in that case and not a clear absence of all jurisdiction, which, it was admitted, would have made the judge liable. The court said: "Indeed, some of the most difficult and embarrassing questions which a judicial officer is called upon to consider and determine relate to his jurisdiction, or that of the court held by him, or the manner in which the jurisdiction shall be exercised."<sup>1</sup> An attorney cast reflections on the judge of the district court in a brief filed in the supreme court of Texas, for which it issued an attachment. While that was pending, the district court issued a notice to him to appear and show cause why his name should not be stricken from the roll. He appeared, had a trial, and was disbarred. He then attempted to practice, and was proceeded against by information and fined fifty dollars. He appealed, and contended that the judgment of disbarment was void for want of jurisdiction. The court held that the district court had jurisdiction over contempts and over the attorney, and that if it erred in holding the brief to be good cause for disbarring, it was an error not touching the jurisdiction, and one which could be corrected only by an appeal.<sup>2</sup> On the other hand, it was decided in Kansas, that contemptuous language used against the judge of the trial court in a brief in the supreme court, was no contempt of the trial court, and that a conviction and imprisonment therefor were void, and the prisoner was released on *habeas corpus*.<sup>3</sup> I think this case wrong and the Texas case right. A statute of Michigan authorized a summary conviction for a contempt committed in the "immediate view and presence" of the court, but for con-

1. *Bradley v. Fisher*, 13 Wall. 335, 351, 352.

2. *Smith v. State*, 5 Tex. 578.

3. *In re Dalton*, 46 Kan. 253 (26 Pac. R. 673); *In re Thompson*, — Kan. — (26 Pac. R. 674).

tempts not so committed, required an affidavit to be filed stating the facts. An attorney, out of the "immediate view and presence of the court," gave the clerk a check to pay a fine, and indorsed thereon language which the court, on subsequent inspection, adjudged to be a contempt, and notified him to appear and show cause, which he failed to do, and then committed him without any affidavit. This was held to be void.<sup>1</sup> But in this case there was neither want of jurisdiction over subject-matter nor person. Two modes of procedure were prescribed, and the court adopted the wrong one. I do not think the case sound.

§ 193. **Bond in criminal case.**—One who forfeits his bond to appear for trial in a criminal case, is not guilty of a contempt, and a conviction therefor was held void on *habeas corpus*.<sup>2</sup> The court had jurisdiction over both person and subject-matter, but mistook that for a cause of action which was not good in point of law.

**CONFLICT OF JURISDICTION.**—Two persons were appointed receivers for the same parties, one by one court, and the other by another court, there being a conflict of jurisdiction. One of the receivers reported to his court that the other receiver was interfering, whereupon it issued an attachment against him for contempt, upon which he was arrested in a third county. The court of this third county discharged the arrested receiver on *habeas corpus*, thus adjudging the order of attachment void. This was held to be erroneous, and was reversed because one court could not so treat the order of another; that it was for the attaching court to decide upon his release.<sup>3</sup>

§ 194. **"Costs and expenses."**—The New York statute authorized the court to include the "costs and expenses" in the fine for contempt. In such a case, the court included one hundred and fifty dollars in the fine "as a counsel fee," and imprisoned the party for failure to pay. On *habeas corpus*, this was held not void, but merely an erroneous decision on a matter of law.<sup>4</sup>

**COURT ALLOWANCE.**—A California statute authorized the court, under certain circumstances, to furnish the court room, and provided that the expense should be "a charge against the city and county treasury, and paid out of the general fund thereof."

1. *In re Wood*, 82 Mich. 75 (45 N. W. R. 1113).

3. *Doyle v. Com.*, 107 Pa. St. 20.

2. *Ex parte Dill*, 32 Kan. 668 (49 Am. R. 505).

4. *People ex rel. Woolf v. Jacobs*, 66 N. Y. 8, *affirming* 5 Hun 428.



The court having properly furnished a room and certified the same, ordered the treasurer to pay it out of the general fund, which he refused; for which he was imprisoned for contempt. This was held void because the statute gave no such power.<sup>1</sup>

DEBT.—The Vermont statute had abolished imprisonment for debt. An executor was ordered to pay a certain sum to the widow and neglected to do so and was imprisoned for contempt. On *habeas corpus* it was held to be an imprisonment for a debt, and void.<sup>2</sup> But whether or not that was a debt within the meaning of the statute, was a question which the probate court was just as competent to decide as the supreme court.

§ 195. **Execution awarded.**—A New York statute provided that the non-payment of money ordered to be paid should be a contempt “in cases where by law, execution cannot be awarded for the collection of such sum.” The court adjudged an assignment void and ordered the assignee to pay a certain sum to the receiver, which he neglected to do; and the court, construing the judgment as interlocutory upon which no execution could issue, awarded an attachment for contempt. The court of appeals, construing the judgment as final on which an execution could issue, held the attachment void.<sup>3</sup> I think this case wrong.

§ 196. **Fees of referee.**—A statute of New York made any disobedience of an order of court which “defeats, impairs, impedes or prejudices” a right or remedy of the adverse party, a contempt. The plaintiff asked for a reference, and it was granted and ordered that, in case the report was adverse to him, he should pay the fees of the referee. The report was adverse, and the plaintiff refused to pay the referee's fees, and the defendant, on motion, procured his commitment for contempt, which was reversed in the court of appeals for the reason that the refusal did not defeat, impair, impede or prejudice any right or remedy of the defendant, and hence constituted no contempt.<sup>4</sup> The plaintiff then sued the defendant's attorney for false imprisonment, but it was held that the order of commitment was not void and that the plaintiff could not recover.<sup>5</sup> The court said: “All of the facts constituting the alleged contempt were undisputed,

1. *Ex parte* Widber, 91 Cal. 367 (27 Pac. R. 733).

2. *In re* Leach, 51 Vt. 630.

3. *Meyers v. Becker*, 95 N. Y. 486, 491.

4. *Fischer v. Raab*, 81 N. Y. 235.

5. *Fischer v. Langbein*, 103 N. Y. 84 (8 N. E. R. 251).

and were presented to the special term for its consideration on the hearing. . . . The disobedience of its order by the plaintiff gave the court jurisdiction of the subject-matter and called upon it to determine whether a contempt had been committed or not. The right to adjudicate upon this question did not depend upon the fact whether the plaintiff was guilty of a contempt, but whether a case had been made calling for an adjudication upon that question."

If the simple "disobedience of its order" gave the court jurisdiction over the subject-matter, then a commitment for contempt would never be void. The real reason why it was not void was, that the court was compelled to hear the defendant's motion and compelled to construe the statute and decide whether the acts of the plaintiff did impair or impede any right of the defendant's; that was a debatable, or at least colorable, question, and its decision, although wrong, was not void.

§ 197. **Imprisonment.**—In a suit in Ohio to reach the property of a judgment debtor in the hands of a third person, the court has power by statute to appoint a receiver and to order such third person to pay over to the receiver, but no express authority to imprison him for a refusal; and an imprisonment for so refusing to pay over was held void.<sup>1</sup> But the right to punish by imprisonment being a common-law power, its erroneous exercise would not be void. The court necessarily possessed that power in some cases of contempt, and its exercise in a case not warranted by the facts, would not be void.

§ 198. **Jury committed.**—In a somewhat celebrated case the jury acquitted a person on trial for a crime, contrary to the instructions of the court, and were fined and imprisoned therefor, and were released on *habeas corpus*;<sup>2</sup> but in a later case, where the recorder of London fined and imprisoned the jury for bringing in a verdict of acquittal in a criminal case, contrary to the instructions of the court, and one of the jurors sued the recorder for false imprisonment, it was admitted that the action of the court was erroneous, as determined in Bushell's case; but it was held that the judge acted judicially; that the court had power to punish a misdemeanor in a jury, but erred in holding that to be a misdemeanor which was not so in law; and that the action

1. White v. Gates, 42 O. St. 109.

2. Bushell's Case, Vaughn 135 (T. Jones, 13).

would not lie.<sup>1</sup> The first case cited was decided by the king's bench, and the other by the common pleas. As the king's bench was the higher court, of course the last case did not profess to overrule the first. Yet it seems to me to demonstrate that Bushell's case, although one of the landmarks in the law, is wrong. The court had and still has the undoubted right in a civil case to order the jury to return a specified verdict where the party having the burden of the issues introduces no evidence, and the right to commit the jury for disobedience; and such an order, even in an improper case, would not be void. As decided in the Hammond case, it would simply be a decision that that was a contempt which was not so in law. The Texas statute provided that "the foreman of the grand jury may issue a summons or attachment for any person in the county where they are sitting, which summons or attachment may require the witness to appear before them at a time fixed or forthwith, without stating the matter with respect to which the witness will be called to testify." Under this statute the foreman of the grand jury issued a writ of attachment for the judge of the court, and the bailiff delivered the writ to him in open court, in a respectful manner, but did not attempt to arrest him, at which the judge took offense, and called upon the grand jurors to purge themselves of contempt. Their answer was that they had simply exercised their legal rights, and denied any intent to commit a contempt. The court fined them fifty dollars each, and imprisoned them for refusing to pay. On their application for a writ of *habeas corpus* to the court of appeals, that court said: "We know of no statute or rule of law which exempts a district judge from liability to be legally summoned or attached as a witness before a grand jury. Certainly no such exemption is provided in the article above quoted. There can be no question, however, but that the arrest of a district judge by virtue of a writ of attachment while he is upon the district bench presiding over his court, whereby, if such be the result, the proceedings of his court are interfered with, obstructed, or stopped, would be a most gross, unwarranted, and illegal exercise of the powers conferred upon the grand jury or any other tribunal authorized to issue process for witnesses. It would be a gross contempt of the authority and dignity of the judge, as well as the court over which he presides, and one which he would have the power summarily to resent and punish as a

1. Hammond v. Howell, 2 Mod. 218, 1 id. 184.

contempt. Independent of the inherent right which courts have to protect and maintain their dignity and authority, our statute expressly confers upon them the power to punish for contempts." The court then cites and comments upon a large number of cases and authorities, and quotes section 110, of Brown on Jurisdiction, which reads: "There are three essential elements necessary to render a conviction valid. These are that the court may have jurisdiction over the subject-matter, the person of the defendant, and the authority to render *the particular judgment*. If either of these essential elements are lacking, the judgment is fatally defective." The court finally concluded that the district court had no power to render the *particular judgment* given, because the action of the grand jurors was not a contempt under the law, and they were released.<sup>1</sup> If the action of this grand jury was not a contempt of court, it came so near it, that many good lawyers would mistake it for one. If the officer had had no more sense than the grand jury, and had obeyed their writ and arrested the judge and carried him before them, the court of appeals admits that the contempt would have been complete; but whether or not the mere failure of the officer to carry out their command prevented them from being in contempt, was a question of law for the court to decide.

§ 199. **Jury service refused.**—A person was committed in Missouri for refusing to serve as a juror. On *habeas corpus*, the supreme court held that the commitment was wrong, because the record showed on its face that the statute, as construed by that court, exempted him from jury service; but the majority held the commitment not void, and a discharge was refused.<sup>2</sup> Of course it is a contempt for a juror to disregard a lawful order of the court; and a mistake of law, concerning what is a lawful order, ought not, on principle, to make the sentence void.

1. *Ex parte Degener*, — Tex. App. — (17 S. W. R. 1111).

2. *Ex parte Goodin*, 67 Mo. 637, 647.

## PART IV.

## CRIMINAL PROCEEDINGS.

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| § 200. Principle involved in Part IV.<br>201. "Breach of the peace."<br>202. Forgery of "document."<br>203. Forgery of engrossed bill.<br>204. Grand jury—Power to impanel.<br>205. Larceny of "bundles of corn-stalks." | § 206. Larceny—"Digging Potatoes."<br>207. Larceny, grand or petit?<br>208. Libel of corporation.<br>209. Limitations, statute of.<br>210. Malicious mischief.<br>211. Vagrants.<br>212. Writing, complaint not in. |
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§ 200. Principle involved in Part IV.—The common law and statutes impose certain duties, obligations and restrictions upon various persons, the violation of which creates causes of action in favor of the person injured. When such cause of action is in favor of an individual, it is called civil, and when in favor of the state and also involves the liberty of the wrongdoer, it is called criminal. In any cause, civil or criminal, the question always is this: Do the allegations, express and implied, constitute a cause of action within the law? If they do, the tribunal ought to hear the plaintiff's evidence, and if they do not it ought not to hear it. But the tribunal, by an erroneous construction of the statutes or common law, may conclude that a cause of action is stated, and wrongfully proceed to hear the evidence and render judgment for the plaintiff in a proceeding either civil or criminal, and then the question arises, is such judgment merely erroneous and valid until set aside, or is it void? On principle, the same rule must be applied to both civil and criminal proceedings—namely: If the question is debatable or colorable, the judgment is not void, but is valid and binding until set aside by some means provided by law for so doing. The best considered decisions, in dealing collaterally with criminal cases, accord with this view, which is not mine except as I gather it from the books.

A person was convicted and imprisoned and sought to be released on *habeas corpus* because the indictment charged no offense. The Supreme Court of the United States said: "To determine whether the offense charged in the indictment be legally punishable or not, is among the most unquestionable of its powers and duties. The decision of this question is the exercise of jurisdiction, whether the judgment be for or against the prisoner." <sup>1</sup>

<sup>1</sup> *Ex parte Watkins*, 3 Peters 193, 203.

In a later case the same court said: "It is also strenuously insisted by counsel for the appellants in their argument, that no offense under the act of congress is recited in the indictment. . . . We are the less inclined to enter into these controversies, as to a narrow construction of the statutes of Indiana and the acts of congress, because we think they were questions properly before the district court on the trial of the prisoners. They were questions *of which that court had jurisdiction and which it was its duty to decide*. It would be as well to say that every question concerning the sufficiency and validity of an indictment and the evidence necessary to support it was a matter of jurisdiction, and authorized an interference, if error took place, by a writ of *habeas corpus* for its correction. That this cannot be done has been repeatedly held in this court." <sup>1</sup> The court said that if the charge made was no crime known to the law, a conviction would be void; by which I understand the court to mean, that if there were no question about it, it would be void. The court certainly did not mean that if, as a matter of strict law, such as would reverse the case on error, the matters charged constituted no crime the conviction would be void, because it refused to go into that question, holding that the decision of the court below, even though erroneous, was conclusive collaterally.

A person was brought before a justice of the peace in New York charged with the offense of furnishing diluted milk to a butter manufactory. Upon arraignment, he pleaded not guilty, and offered to waive a preliminary examination and give bail to appear before the next grand jury of the county. The district attorney claimed that the justice had power to try him, and the justice being of the same opinion, he was tried and convicted and imprisoned. He carried the case to the court of sessions, where it was affirmed; but on appeal to the general term of the supreme court the judgment was reversed and he was discharged. He then sued the justice for false imprisonment, and the trial court non-suited him; but on appeal to the general term of the supreme court, this was reversed, which last decision was itself reversed by the court of appeals. The statutes governing the case were so blind and doubtful that it took a decision of the court of appeals to make it certain that the justice erred in refusing to take his bond and in proceeding to try him; but this

1. *In re Coy*, 127 U. S. 731, 755 (8 S. C. R. 1263).

decision had not been made at that time. The court of appeals, in considering the question of the liability of the justice, said: "In trying the plaintiff, and, upon his conviction, committing him to prison, has the justice rendered himself liable in damages to the plaintiff? He did erroneously decide that he had the right to try the plaintiff notwithstanding his demand; but has such erroneous decision rendered him, as to all future acts, a trespasser? The answer depends upon a matter of jurisdiction. It is not a question of jurisdiction to proceed with the trial notwithstanding the demand, but it is a question of jurisdiction to decide whether he has or has not that right. Manifestly, he does not, as a matter of law, acquire jurisdiction to proceed by deciding that he has it; but, being confronted with the question of jurisdiction, has he the power to decide it so far that his erroneous decision that he has it exempts him from liability on the ground that he has only made a judicial error or an error of judgment upon a question of law which he was bound to decide? In such a case as this, it must be remembered that the justice had, in the first instance, at all events, jurisdiction of the subject-matter—viz., the inquiry into the alleged offenses against the provisions of this act, and the trial of alleged offenders. He also had jurisdiction of the plaintiff. Full jurisdiction had thus been confided to the justice over the subject-matter and person at the time when the plaintiff was arraigned before him. In the absence of a proper demand and the giving of sufficient bail, it was the duty of the justice, and his jurisdiction continued, to try the accused. This would seem to be the case where, jurisdiction having thus attached, the decision of the justice to try the plaintiff was only an erroneous exercise of such jurisdiction. It is unlike the case where jurisdiction has never been conferred, and the justice decided to exercise a power that he does not, and never did, possess. Here, in the course of proceedings which he was forced to institute, and in the case of one over whose person he has properly acquired jurisdiction, the justice is confronted with the necessity of deciding a question depending upon the construction to be given to a statute, and that question must be decided by him one way or the other before he can take another step in those proceedings, which, up to that moment, have been legally and properly pending before him, and over which he has had full and complete jurisdiction. It seems plain that his decision upon the question is one in the course of a proper exercise of the juris-



diction first committed to him, and that his error in deciding that he had jurisdiction to proceed was an error of judgment upon a question of law, and that he is therefore not responsible for such error in a civil action. It is unlike the case where a justice of the peace proceeded to try a civil action for assault and battery. The justice never had in such case obtained jurisdiction over the subject-matter, and he could not obtain it by deciding that he had it. The case falls under the principle of law that, where a judge never has had jurisdiction over the subject-matter, he acts as a trespasser from the beginning in assuming it, and his decision that he has it is no protection to him." After commenting on several cases, the court continues: "We are inclined to think that this was not a case for holding the magistrate liable to an action on the part of the plaintiff in the nature of trespass to recover damages for his illegal imprisonment. In this case there seems to have been no question but that the justice, in all that he did, acted in entire good faith. The district attorney appeared for the people before the magistrate, and contended that the magistrate had exclusive jurisdiction to try the case under the particular statute. The justice so decided. The court of sessions of Jefferson county, upon appeal, concurred in that construction of the statute; and although the general term of the supreme court came to a different conclusion, in the correctness of which we concur, it is yet manifest that there was at least color for different constructions of the terms of the act. It would be a pretty hard rule which, under such circumstances, should hold a magistrate liable to be cast in damages for an honest mistake in judgment upon a question of law in a proceeding over which he had jurisdiction up to the moment when he was called upon to decide the question."<sup>1</sup> It will be noticed from the foregoing quotation that the court said: "He did erroneously decide that he had the right to try the plaintiff notwithstanding his demand; but has such erroneous decision rendered him, as to all future acts, a trespasser? The answer depends upon a matter of jurisdiction. It is not a question of jurisdiction *to proceed with the trial notwithstanding the demand*, but it is a question of jurisdiction *to decide whether he has or has not that right*." What the court evidently meant was, that the justice had no *rightful* power to proceed, but that the law being somewhat obscure, his

1. *Austin v. Vrooman*, 128 N. Y. 229 (28 N. E. R. 477), *reversing* 10 N. Y. Supp. 959 (32 N. Y. St. Rep'r 1133; 63 N. Y. Supr. (56 Hun) 645).

oath compelled him to investigate and construe the statutes concerning his power and duty, and that such investigation and determination of his own jurisdiction were judicial acts, and not void because he reached an erroneous conclusion. This is not only sound but self-evident law. But the court, probably having the fear of numerous prior decisions before it, proceeded to say: "Manifestly, he does not, as a matter of law, acquire jurisdiction to proceed by deciding that he has it." But the court decided in this very case that, while he had no *rightful* jurisdiction to proceed, yet that his *wrongful* decision that he did have it, was conclusive collaterally. The court further called attention to the fact that he did have jurisdiction up to the point where the demand to be allowed to give bail was made, when he was confronted with the question of jurisdiction to proceed further, and said that that question was unlike the case where jurisdiction had never been conferred, and where the justice had decided to exercise a power that he did not possess. In other words, the court says that while the *wrongful assumption* of jurisdiction is void, the *wrongful continuation* of it after it is lost is not void. I think it would have troubled the court to have assigned a reason for this distinction. The same question would confront the justice in either case, namely: What power do these statutes give to, and what duties do they lay upon me? These are questions he must investigate and determine for himself whether he meets the statutes at the threshold of the case or further along in the proceeding. If there is anything to consider, he must consider it, and decide it. He cannot take the advice of the court of last resort.

§ 201. "**Breach of the peace.**"—An Indiana statute gave justices of the peace jurisdiction in "assault and battery, affrays, and other breaches of the peace." A conviction for a riot by a justice was held void on the ground that "other breaches of the peace" did not mean much.<sup>1</sup> But whether or not it meant enough to include a riot, was a question the justice had to decide, and I think the case wrong.

§ 202. **Forgery of "document."**—A statute of the United States provided that "if any person shall forge the signature of a . . . register . . . for the purpose of authenticating any . . . document, . . . such person shall be guilty of a felony." A person forged the name of the register to a paper

1. Wakefield v. State, 5 Ind. 195.

reading: "Received of J. D. Martin . . . the application, with necessary papers, for adjudication in bankruptcy of said Martin; also, fifty dollars, amount of required deposit." For this he was convicted. On *habeas corpus*, he contended that the receipt was not a "document" within the meaning of the statute. But the court said that that was a question for the trial court to decide, and that its decision was conclusive collaterally.<sup>1</sup>

§ 203. **Forgery of engrossed bill.**—A California statute made it a crime to alter an engrossed copy of a bill, and a person was convicted therefor. But the law was passed at the same session at which the bill mentioned was engrossed, and was one defining the duties of officers, but not referring expressly to the officers of the then session, by reason of which the supreme court concluded that the statute did not cover the document in question. And although it was a close question of construction, the supreme court applied the same rules as if the case were before it on appeal, and differing with the trial court, held its action void, and discharged the prisoner on *habeas corpus*,<sup>2</sup> in which I think the court erred.

§ 204. **Grand jury—Power to impanel.**—The federal court in the Indian Territory duly impaneled a grand jury, and a person was indicted and convicted and imprisoned in Arkansas. On *habeas corpus* before the federal court sitting in that state, the court, after considerable comparison and construing of statutes, came to the conclusion that the territorial court had no power to impanel a grand jury, and that, therefore, the indictment and conviction were void, and he was released.<sup>3</sup> For a judge to sit and revise the decision of his brother judge of equal grade and dignity, on a close question of law, upon which he, with equal care and conscientious performance of duty, came to a deliberate conclusion, is an unseemly spectacle, and not sound law, in my opinion.

§ 205. **Larceny of "bundles of cornstalks."**—A New Jersey statute made it an offense to unlawfully carry away a stack of corn. A person was arrested and committed by a magistrate under the statute for unlawfully carrying away bundles of cornstalks, for which he sued the magistrate. The court admitted that the matter charged did not constitute an offense, but held that it was sufficient to set the judicial mind in motion and to call for a decision whether or not the statute was broad enough to cover such

1. *Ex parte Parks*, 93 U. S. 18, 20.

3. *Ex parte Farley*, 40 Fed. R. 66.

2. In *Matter of Corryell*, 22 Cal. 179.

matter, and that the erroneous decision of the magistrate was not void, and protected him.<sup>1</sup>

§ 206. **Larceny—"Digging potatoes."**—An affidavit filed before a justice of the peace in New York made a general charge against defendant of stealing potatoes, but the examination, which seems to have been considered as a part of the charge, showed that he merely dug and carried them away. The arrest and trial for larceny under such circumstances was held to make the justice a trespasser.<sup>2</sup> The only defect was that the potatoes, at the instant of taking, were real estate instead of personal property. But, under some circumstances, potatoes in the ground are personal property, and a mistake of law in holding them to be personal property as between the owner and a felonious taker, would not touch the question of jurisdiction, so far as I can see.

§ 207. **Larceny, grand or petit?**—A New York statute gave a court jurisdiction over petit larceny but not over grand larceny. It took twenty-five dollars in value to make grand larceny, except where the property was taken from the person, in which case the statute read that the offender "may" be punished as for grand larceny, although the property be of less value than twenty-five dollars. A person was convicted and sentenced to imprisonment for *petit* larceny for stealing twelve dollars and fifty cents from the person. On *habeas corpus*, the court admitted that the word "may" in statutes was sometimes permissive and sometimes mandatory, having the force of "shall." After considerable construction, it held that the word "may" in the statute in that case meant "shall," and that, therefore, the stealing of the twelve dollars and fifty cents was grand larceny and not petit, and the prisoner was discharged on *habeas corpus*.<sup>3</sup> The trial court had to construe the statute, and construed it the other way.

§ 208. **Libel of corporation.**—A person was arrested in a municipal court of Wisconsin for the alleged crime of libeling a corporation. The court refused to quash the information, and imprisoned the defendant to await trial. He then removed the case to the supreme court on a writ of *certiorari*—which was a writ of error on *jurisdictional* questions; but that court said that, conceding it to be no crime to libel a corporation, still the court below had held that it was, and that its decision was not void.<sup>4</sup>

1. *Grove v. Van Duyn*, 44 N. J. L. 654 (42 Am. R. 648, note).

2. *Comfort v. Fulton*, 39 Barb. 56.

3. *People v. Riley*, 21 How. Pr. 451.

4. *Hauser v. State*, 33 Wis. 678, 680.

§ 209. **Limitations, statute of.**—The Vermont statute of limitations in larceny was six years, and it provided that a complaint made more than six years after the commission of the crime, should “be void and of no effect.” A charge of larceny was made before a justice six years and fifty days after its commission, but because the commission was not discovered until within six years, the justice held that the statute did not apply, and caused the accused to be arrested and imprisoned, and for this he was held liable for false imprisonment.<sup>1</sup> But the decision of the justice was not entirely devoid of reason, and I think the case unsound.

§ 210. **Malicious mischief.**—A person was arrested under an English statute on a general charge of maliciously cutting down a tree, but the examination, which seems to have been made a part of the record, showed that he was in the possession of the premises on which the tree was cut, so that the statute did not apply. The trial was held to have been erroneous, but not void, and a protection to the magistrate.<sup>2</sup>

PERJURY.—A person was convicted and imprisoned in Oklahoma for the crime of perjury in making an affidavit to corroborate a person in a land-claim contest before the register of the United States land office. On *habeas corpus*, it was contended that no such affidavit was authorized by law, and that perjury could not be predicated upon it. But it was held that those were questions of law for the trial court, and that an error did not make the conviction void.<sup>3</sup>

§ 211. **Vagrants.**—A statute of New York declared that “common prostitutes, who have no lawful employment whereby to maintain themselves,” should be deemed vagrants. Under this statute, a person was convicted of being a “common prostitute and idle person,” but this was held to be void.<sup>4</sup> The case seems to me to be unsound.

§ 212. **Writing, complaint not in.**—A conviction for violating a city ordinance without filing a written complaint, was held void.<sup>5</sup> But as this result was only reached after judicial construction, I think it unsound. See sections 271, 327 and 328, *infra*.

1. Vaughn v. Congdon, 56 Vt. 111 (48 Am. R. 758)—two judges out of seven dissenting.

2. Mills v. Collett, 6 Bing. 85, 92 (19 E. C. L. 47, 50).

3. *Ex parte Harlan*, — Okl. — (27 Pac. R. 920).

4. Forbes' Case, 11 Abb. Pr. 52 (4 Park. Cr. 611).

5. Prell v. McDonald, 7 Kan. 426, 450.

## CHAPTER VII.

### JURISDICTION TAKEN BY REASON OF OVERLOOKING UNDISPUTED LAW.

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| <p>§ 213. Scope of Chapter VII.<br/>214. Principle involved in Chapter VII.<br/>215. Attachment and garnishment—Garnishment of cities—Garnishment of exempt person.<br/>216. Contempts—Ditches and drains.<br/>217. Highways—Homestead.<br/>218. Injunctions against crimes.<br/>219. Judge, special, unauthorized.</p> | <p>§ 220. Larceny in ship—Malicious prosecution—Mandamus—Partition—Place of event occurring.<br/>221. Privateer—Prize—Railroad statute.<br/>222. Sheriff, motion against in wrong court.<br/>223. Taxation of exempt property.<br/>224. Time of holding election.</p> |
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§ 213. **Scope of Chapter VII.**—The last two chapters treat of the validity of judicial proceedings collaterally where jurisdiction was taken by reason of a mistaken construction of doubtful law, while this chapter treats of the same matters where jurisdiction was taken by reason of overlooking law too plain for any controversy, but where the court had power to grant the relief prayed for in a proper case.

§ 214. **Principle involved in Chapter VII.**—When the tribunal has power to grant the relief sought in a specified class of cases, the granting of that relief in a prohibited case which is similar to the specified cases, or belongs to the same general class, is not void. The prohibition may be in another statute, or be obscure and difficult to find ; and on principle, the failure to find an obscure exception should no more make a proceeding void than a misconstruction of an obscure law. But the principle is broader than this. It is not confined to mere excepted cases. For instance, if the court has power to render a judgment for money on causes sounding in contract only, its judgment for money is not void because the cause sounded in tort. That is a matter of defense to be brought to the attention of the court. The same principle applies where the law prohibits certain persons from suing or being sued in that court. As the court has power to grant the relief sought in all proper cases, the granting of the

same to or against an improper person, is merely a wrongful exercise of power and not usurpation. In a case in the court of appeals of Missouri, where it was contended that a decree of divorce was void because the petition failed to allege that the plaintiff was a resident of the county where the suit was brought, Mr. Justice Thompson said: "The question in such cases is, not whether in point of fact the court had jurisdiction, but whether it was competent to ascertain whether it had or not, and whether it must have ascertained that it had before proceeding to judgment."<sup>1</sup>

§ 215. **Attachment and garnishment.**—The statutes concerning attachment and garnishment give those remedies under certain specified circumstances. In other words, the same as in all other causes, certain facts are necessary in order to constitute a cause of action. But the court having power to grant the relief sought in a proper case, a mistake in doing so in an improper but similar case, on principle, ought not to make the proceedings void. In accord with this view, it was held in California,<sup>2</sup> and Missouri,<sup>3</sup> that a judgment in attachment proceedings founded on a tort was not void, although prohibited by statute. But the contrary was held in a later case in California;<sup>4</sup> and in Pennsylvania a judgment garnishing a legacy in the hands of an administrator was held void because no statute so authorized;<sup>5</sup> and in Maine a mail coach in actual use was seized on a writ of attachment, and ordered to be sold by a final judgment therein, but the whole proceeding was held void because it was a criminal offense to make the levy.<sup>6</sup> Of course that was a good ground to quash the attachment, but how it affected the jurisdiction of the court I am unable to see.

**GARNISHMENT OF CITIES.**—A judgment of a police court in Massachusetts against the officers of a city on trustee process, in direct violation of a statute, was decided not to be void.<sup>7</sup> It was contrary to the policy of the law to harass the officers, and complicate the affairs of the cities by subjecting them to garnishment or trustee process, yet that was an exception easily overlooked, and a defense for the city to make. The Wisconsin

1. *Werz v. Werz*, 11 Mo. App. 26, 31.

2. *McComb v. Reed*, 28 Cal. 281, 285.

3. *Hardin v. Lee*, 51 Mo. 241, 243.

4. *Mudge v. Steinhart*, 78 Cal. 34 (20 Pac. R. 147).

5. *Hartle v. Long*, 5 Pa. St. 491.

6. *Harmon v. Moore*, 59 Me. 428.

7. *Webster v. City of Lowell*, 2 Allen 123.



statute concerning garnishment did not except cities, but a judgment garnishing a city was held void upon an exception interpolated by the supreme court.<sup>1</sup> The Massachusetts case seems to me to be the better of the two. This Wisconsin case is also wrong according to the principle considered in the last chapter—namely: The statute being silent, the trial court was compelled to decide what the public policy was in regard to the garnishment of cities, and its decision, although erroneous, was not void.

**GARNISHMENT OF EXEMPT PERSON.**—Precisely like the last case in principle, is a late one in Arkansas. The statute authorized the garnishment of debtors generally, but had been limited by the supreme court so as not to include judgment debtors, and a garnishment of such a debtor was held void.<sup>2</sup> This decision is wrong, on the ground suggested in section 214. A decision of the supreme court is not law, but only evidence of it, and is constantly liable to be overturned; and a judgment disregarding it is never void, and may not be even erroneous.

**§ 216. Contempts.**—Commissioners of sewers, under the English statutes, were a judicial body with power to make assessments, which were to be collected by execution, and with power to commit for contempt of their authority. They made an assessment upon a village, and ordered it to be collected from one of the inhabitants, which was done. For this he sued them in the court of king's bench and recovered. For bringing this action, they brought him before them and committed him for contempt. This was held to be void, and the commissioners were themselves attached and fined.<sup>3</sup>

**DITCHES AND DRAINS.**—Where the Indiana drainage statutes gave the circuit court general power to order the construction of ditches and drains throughout the county, and another statute gave cities exclusive power to order their construction within their limits, a judgment of the circuit court establishing a drain within a city—completely overlooking the city statute—is erroneous, and will be reversed on appeal,<sup>4</sup> but is not void.<sup>5</sup> So the action of the city council, under the same statute, being judicial,

1. *Burnham v. City of Fond du Lac*, 15 Wis. 193.

2. *Wingfield v. McLure*, 48 Ark. 510 (3 S. W. R. 439).

3. 19 Viner's Abr. 423, E. 1.

4. *Anderson v. Endicott*, 101 Ind. 539.

5. *State v. Jackson*, 118 Ind. 553 (21 N. E. R. 321).

in establishing a drain in a place excepted by the statute—namely, on land not owned by the city—is not void.<sup>1</sup>

§ 217. **Highways.**—An Iowa statute authorized county courts to establish highways, and provided that they should not exceed sixty-six feet in width, but an order establishing one one hundred feet wide was held not void.<sup>2</sup> A late case in Indiana is the same in principle. The statute prohibited the laying out of highways of a less width than twenty-five feet; but where one was laid out only twenty feet in width, for a part of its length, for which reason a person contended, collaterally, that it was void, the court declined to adopt that view.<sup>3</sup>

**HOMESTEAD.**—A Missouri statute authorized the sale of the homestead, as against the widow, to pay debts contracted before its acquisition, but not for those made afterwards. Under this statute an administrator's sale to pay debts generally was held void.<sup>4</sup> So it was decided in Texas, that if a husband had homestead rights in the land of a second wife after her death, they would cease at his death and descend absolutely to her children; and that an order of the probate court, setting it apart as a homestead to the third wife and family after his death, would be void as against the children of the second wife.<sup>5</sup>

§ 218. **Injunctions against crimes.**—Courts of equity have a very extensive jurisdiction to enjoin wrongful acts where the remedy at law is inadequate, and if a mistake should be made, and an act enjoined where the remedy at law was adequate, the injunction would not be void; but it has never possessed any jurisdiction to enjoin the commission of crimes, as such. In other words, when a wrongful act rises to the grade of a crime, the jurisdiction of equity ceases. It is then excepted from the jurisdiction of the court. But if the court should make a mistake and enjoin an act which was a crime, it would not seem, on principle, to be void. Thus, the court of appeals of New York said: "We are entirely satisfied that the decree of a court of equity restraining a public nuisance is not void, even though the attorney-general be not plaintiff, and though no special injury to the actual plaintiff is averred."<sup>6</sup> This was said in a proceeding for contempt against

1. Jackson v. Smith, 120 Ind. 520, 523 (22 N. E. R. 431).

2. Knowles v. City of Muscatine, 20 Iowa 248.

3. Chicago & Atlantic Ry. Co. v. Sutton, — Ind. — (30 N. E. R. 291).

4. Kelsay v. Frazier, 78 Mo. 111, 114.

5. McDougal v. Bradford, 80 Tex. 558 (16 S. W. R. 619).

6. People v. Sturtevant, 9 N. Y. 263, 270.

the mayor of a city for violating an order restraining a public nuisance. But an injunction against the publication of a libel, and the commitment of the publisher for its violation, were held void in Louisiana,<sup>1</sup> and a *dictum* of the Supreme Court of the United States is to the same effect.<sup>2</sup>

§ 219. **Judge, special, unauthorized.**—An Indiana statute authorized a criminal case to be set down for trial in vacation before a special judge, when the regular judge was disqualified to act by reason of interest, or relationship, or of having been counsel. In a case where a change was taken from the regular judge on account of his *bias*, he set the case down for trial before a special judge in vacation, at which the defendant was convicted. On *habeas corpus*, this conviction was held void, because the statute did not authorize the appointment of the special judge where the regular judge was biased.<sup>3</sup> I think this case unsound. The defendant ought to have applied for a writ of prohibition.

§ 220. **Larceny in ship.**—A commissioner in Alaska had power to convict in larceny where the value of the property did not exceed thirty-five dollars, and to punish by imprisonment in the county jail not exceeding one year. Another statute provided that when a person should be convicted of larceny in any ship, steamboat, or other vessel, he should be imprisoned in the penitentiary. This statute fixed no limit to the amount stolen. A commissioner sentenced a person to one year in jail for stealing thirty dollars' worth of goods from a ship, and this was held void by the federal circuit court on the ground that the only punishment provided by statute was imprisonment in the penitentiary, while the only power possessed by the commissioner was to imprison in jail.<sup>4</sup>

**MALICIOUS PROSECUTION.**—A justice of the peace in Wisconsin was authorized by law to issue warrants in civil causes, with some exceptions, one of which was for damages caused by malicious prosecution. A warrant issued in such a case was held void, and no protection to the justice.<sup>5</sup> I think both these cases are unsound. The cases were exceptions from a similar class over which jurisdiction extended.

**MANDAMUS.**—A writ of mandamus issued to a city officer in

1. State *ex rel.* Livesey v. Judge of Civil District Court, 34 La. Ann. 741.

2. *Dictum* in *In re Sawyer*, 124 U. S. 200 (8 S. C. R. 482).

3. *Ex parte Skeen*, 41 Ind. 418.

4. *Ex parte Kie*, 46 Fed. R. 485.

5. Baldwin v. Hamilton, 3 Wis. 747, 750.

violation of a statute which prohibited its use against such an officer, was held void.<sup>1</sup> It seems to me that that was a defense for the officer to make.

**PARTITION.**—So where the probate court had power to make partition as an incident of administration in order to distribute, its decree of partition in a cause not so connected was held void.<sup>2</sup> The parties ought to have raised the point in the original proceeding.

**PLACE OF EVENT OCCURRING.**—A statute required all warrants alleging an offense to have been committed in Augusta to be made returnable before the municipal court. A magistrate made such a warrant returnable before himself, and his proceedings were held void.<sup>3</sup> The magistrate had jurisdiction over that class of cases, but none over that particular case.

§ 221. **Privateer—Prize.**—A federal statute authorized a privateer to seize the enemy's goods on the high seas. It seized such goods on an island belonging to the United States, and filed a libel showing that fact in the prize court, and they were duly condemned. The owners sued the captors for trespass in a state court, and it held the sentence of the prize court void.<sup>4</sup> The prize court had general power to condemn the enemy's goods, but none in favor of a privateer unless they were seized on the high seas, which exception was overlooked.

**RAILROAD STATUTE.**—Error of law in condemnation proceedings in applying the general provisions of the railroad statutes of Missouri to a special railroad, does not make the proceeding void.<sup>5</sup>

§ 222. **Sheriff, motion against in wrong court.**—A Virginia statute authorized proceedings by notice and motion against a sheriff in default on an execution, in the court from which it issued. A judgment taken in the circuit court on such a notice and motion, on an execution issued from the county court, is erroneous, but not void. The reason given was that the circuit court had jurisdiction of pleas against the sheriff, generally, and that a misapplication of the jurisdiction to a particular case did not make the proceeding void.<sup>6</sup> A judgment was rendered by a justice of the peace, in Georgia, against a husband and wife, and an execution was issued and levied upon land. The husband, claiming that

1. State *ex rel.* Fernandez v. Houston, 34 La. Ann. 875.

2. Hurley v. Hamilton, 37 Minn. 160 (33 N. W. R. 912).

3. Wills v. Whittier, 45 Me. 544.

4. Slocum v. Wheeler, 1 Conn. 429.

5. Evans v. Haefner, 29 Mo. 141, 151.

6. Cox v. Thomas, 9 Gratt. 323, 327.

the land was exempt as his homestead, filed an affidavit of illegality against the levy. The statute provided that, in such cases, the officer should return the execution, affidavit and bond to "the next term of the court from which the execution issued" where the issue raised by the affidavit should be tried; but, in this case, the officer made return to the superior court, where the parties appeared and tried the case on the merits, and a judgment was rendered against the husband. The land was again advertised on the levy, and then the wife filed an affidavit of illegality against the levy, on the ground that it was the homestead of her husband and herself and family, and it was decided that the first judgment was void because the execution did not issue from the superior court.<sup>1</sup>

§ 223. **Taxation of exempt property.**—As taxing officers act judicially and have general and exclusive jurisdiction to levy taxes, an error in assessing exempt property ought not to be held void; and it was so held in Louisiana concerning an assessment on a school house owned by a church which was exempt by law.<sup>2</sup> But the contrary was held in New York. The statute provided that "no tax shall hereafter be assessed upon the capital of any bank," etc. It was held that a tax assessed on the capital of a bank was void, and all concerned in its enforcement trespassers.<sup>3</sup> A federal circuit judge said, that if a statute authorizes an officer to assess generally, excepting in plain terms, certain persons and things, and the persons and things are nevertheless taxed in violation of law, the assessment is void.<sup>4</sup> But I cannot agree with that distinguished judge. See section 546, *infra*.

§ 224. **Time of holding election.**—A Missouri statute authorized cities to adopt a local option law by an election held for that purpose, but prohibited such election being held within sixty days of any municipal election. Such an election was held within the prohibited time, and the law adopted, and a person was convicted for its violation before a justice and imprisoned. This was held void, and he was released on *habeas corpus*.<sup>5</sup> The statute in regard to the time of holding the election was simply overlooked by the trial court, and I think the case unsound.

1. Moore v. O'Barr, 87 Ga. 205 (13 S. E. R. 464).

2. First Presbyterian Church v. City of New Orleans, 30 La. Ann. 259.

3. National Bank of Chemung v. City of Elmira, 53 N. Y. 49, 53.

4. Emmons, J., in Pullan v. Kinsinger, 9 Am. Law Reg. N. S. 557, 560.

5. *In re* Wooldridge, 30 Mo. App. 612, 618.

## CHAPTER VIII.

### JURISDICTION TAKEN BY VIRTUE OF DEFECTIVE PLEADINGS, BONDS OR PRELIMINARY MATTERS, OR IN THEIR ABSENCE, OR BY VIRTUE OF WRONGFUL PROCEDURE.

SCOPE OF CHAPTER VIII, . . . . .	§ 225
PART I.—CIVIL PROCEEDINGS, GENERAL—PLEADINGS AND PRELIMINARY MATTERS, DEFECTIVE OR WANTING, . . . . .	226–236
PART II.—CIVIL PROCEEDINGS, SPECIAL, . . . . .	237–297
PART III.—CRIMINAL PLEADINGS, DEFECTIVE, . . . . .	298–321
PART IV.—PROCEDURE, WRONG, . . . . .	322–328

§ 225. *Scope of Chapter VIII.*—This chapter includes all cases of collateral attack on judicial proceedings where jurisdiction was taken by virtue of defective pleadings, bonds, or preliminary matters, or in their absence, or by virtue of wrongful procedure where the right of the tribunal to take jurisdiction upon proper pleadings, bonds, preliminary matters and procedure, is undoubted.

#### PART I.

#### CIVIL PROCEEDINGS, GENERAL—PLEADINGS AND PRELIMINARY MATTERS, DEFECTIVE OR WANTING.

<p>§ 226. Absence—Age—Appeal—Citizenship or residence—Cognovit.</p> <p>227. Condition—Consideration—Defects—Demand.</p> <p>228. Due, or premature action.</p> <p>229. Entitling of cause, wrong.</p> <p>230. Exhibition of license—Exhibits omitted—Fence—Herd law—Illegal note.</p> <p>231. Limitation, action barred by—Partly void—Prayer excessive.</p>	<p>§ 232. “Purchased” in confession—Request.</p> <p>233. Setting aside judgment—Severable cause—Street—Stockholder’s suit—Title to land before justice of the peace.</p> <p>234. Uncertainty.</p> <p>235. Venue, change of—Jurisdiction taken on imperfect.</p> <p>236. Void judgments—Other void matters.</p>
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§ 226. *Absence—Age—Appeal—Citizenship or residence—Cognovit.*  
—The failure of a petition for a divorce in Louisiana to show the *absence* of the defendant from the state,<sup>1</sup> or of a petition for par-

1. *Hunt v. Hunt*, 72 N. Y. 217 (28 Am. R. 129).

innocent purchaser who has lost his land with a very poor opinion of the courts. And yet many very able and conscientious courts feel constrained to give active aid to such transactions. In this list are included the supreme courts of California, Illinois, Kansas and Ohio. Thus an attachment was begun on a note before the days of grace had expired, and for that cause other creditors were allowed to intervene and defeat the claim, the court saying it was void as to them.<sup>1</sup> Of course they could not appear in the action for the defendant and demur to the complaint and try his case for him. But if the proceedings were void, the court would strike them off on motion of anybody. And a confession, by virtue of a power of attorney, on a note on the last day of grace was held void in both Illinois and Ohio;<sup>2</sup> and in the latter state a judgment entered in Pennsylvania on a warrant of attorney before the notes were due, was held void;<sup>3</sup> and the same ruling was made in Illinois, where a warrant of attorney, given with a note payable on demand, authorized a confession "at any time after the date thereof," and the confession was entered on the day of the date.<sup>4</sup> In Kansas, an attachment was issued, personal service had, and judgment ordering the attached property sold. The defendant was allowed to recover the value of the property from the plaintiff because the note was not due.<sup>5</sup> A judgment by confession in Illinois was held void, because the copy of the cognovit failed to show that the claim, being contingent, was due.<sup>6</sup> But in Texas, a justice's judgment rendered on a note before it was due, was held not void.<sup>7</sup> The supreme court of Indiana has steadily ruled that a judgment taken either adversely,<sup>8</sup> or by way of confession,<sup>9</sup> on a claim before it was due, was not void. And in New Jersey, a decree foreclosing a mortgage against infants was held not void because the record showed that the contingency on which it was to become due had not happened.<sup>10</sup> So an early case in Illinois held that the suing out of a *scire facias*

1. Davis v. Eppinger, 18 Cal. 378 (79 Am. D. 184).

2. Bannon v. People, 1 Ill. App. 496, 509; Lewis v. Moon, 1 Ohio C. Ct. 211, 214.

3. Spier v. Corll, 33 O. St. 236, 244.

4. White v. Jones, 38 Ill. 159, 163.

5. Connelly v. Woods, 31 Kan. 359.

6. Follansbee v. Scottish Am. M. Co., 7 Ill. App. 486, 497.

7. McNeill v. Hallmark, 28 Tex. 157.

8. Gall v. Fryberger, 75 Ind. 98, 102; De Haven v. Covalt, 83 Ind. 344, 346; Robertson v. Huffman, 92 Ind. 247, 251.

9. Calloway v. Byram, 95 Ind. 423, 426.

10. Shultz v. Sanders, 38 N. J. Eq. (11 Stew) 154, 156.



on a mortgage before the debt was due, did not make the judgment void.<sup>1</sup> See section 260, *infra*.

§ 229. **Entitling of cause, wrong.**—A cross-complaint by one defendant against his co-defendants did not name the court, and its caption was: "Henry S. Mayo v. John Horn *et al.*, No. 2586," and it complained of "all the co-defendants." It was held that the whole record could be examined in order to determine who the defendants to the cross-complaint were, and that the decree thereon was not void.<sup>2</sup> A transcript of a justice's judgment was filed in the county court and thus became a judgment of that court. Proceedings supplemental on that judgment were entitled: "In Justice's Court." This irregularity was held to be no defense in proceedings for contempt of an order made therein.<sup>3</sup>

§ 230. **Exhibition of license.**—A city ordinance authorized a fine against any peddler who refused to exhibit his license to the city inspector, marshal or watchmen. A peddler was charged before a justice with having failed to exhibit his license to another justice, and was convicted. This was held void.<sup>4</sup>

EXHIBITS OMITTED.—The failure to file the written instrument sued upon or a copy thereof with a justice of the peace,<sup>5</sup> or a copy of the cause of action with the declaration,<sup>6</sup> in violation of the statute, does not make the proceedings void.

FENCE—HERD LAW.—A justice's judgment for damages caused by trespassing animals, is not void because the complaint failed to show that the herd law was in force in that county, or that the premises were inclosed by a lawful fence.<sup>7</sup>

§ 231. **Limitation, action barred by.**—It was decided in Kansas that a judgment in an ordinary civil action was not void because the complaint showed that the cause of action was barred by the Statute of Limitations;<sup>8</sup> and with that decision I presume no one will quarrel. So it was held in Iowa, that an order to sell land, granted to an administrator nine years after the death of the decedent, was erroneous, but not void;<sup>9</sup> but an opposite ruling was made in Texas in respect to the validity of an order granted to

1. Rockwell v. Jones, 21 Ill. 279, 285.

2. Anderson v. Wilson, 100 Ind. 402, Brev. 392.

405.

3. People v. Oliver, 66 Barb. 570.

4. Stromburg v. Earick, 6 B. Mon. Pac. R. 911).

578, 580.

5. Nicholson v. Stephens, 47 Ind. N. W. R. 839).

185.

6. Farrar's Admr. v. Carmichael, 1

Brev. 392.

7. Hodgins v. Barton, 23 Kan. 740.

8. Head v. Daniels, 38 Kan. 1 (15

Pac. R. 911).

9. Stanley v. Noble, 59 Iowa 666 (13

an administrator to set aside property to the widow, when the estate had stood on the docket for ten years unrecognized.<sup>1</sup> So where a judge of the court of common pleas in New York had power to allow an *appeal* from a justice of the peace upon an application made within ten days after judgment, an appeal allowed upon an application made twenty-five days after, and the judgment thereon by default, were decided to be void.<sup>2</sup>

STAY OF EXECUTION.—In some states the defendant is permitted to have execution on a judgment stayed for a certain time by procuring some person to sign the record or give a bond to be spread upon the record, either of which operates as a judgment confessed against him. An Iowa statute authorized such a stay upon bond approved by the clerk within ten days after judgment. A bond taken by the clerk more than ten days after entry of judgment was held to be an erroneous confession of judgment, but not void, as the action of the clerk was that of the court.<sup>3</sup> Substantially the contrary was held in Indiana, although its statute was somewhat different, authorizing a stay for one hundred and eighty days and allowing it to be entered at any time before the one hundred and eighty days expired, and the execution, if issued, to be recalled. In two cases the clerk took bail for such a stay more than one hundred and eighty days after rendition of judgment, and in each it was held void.<sup>4</sup> All the bail did was to appear in court and confess judgment at an improper time.

PARTLY VOID.—A justice's judgment in Wisconsin on a complaint for labor, of which he did have jurisdiction, and for supplies, of which he did not, is not void.<sup>5</sup>

PRAYER EXCESSIVE.—As the prayer is always amendable, it would not seem that a demand for greater relief than the court has power to give, would affect the jurisdiction to grant relief within its power, and it was so held in a late case in Massachusetts. In that case the prayer for damages exceeded the jurisdiction of the justice, but, before the trial, he allowed it to be reduced by amendment to an amount within his jurisdiction, and then heard the evidence and rendered judgment for the plaintiff, and this was held not void.<sup>6</sup> A justice had jurisdiction

1. Marks v. Hill, 46 Tex. 345, 350.

2. Seymour v. Judd, 2 N. Y. 464.

3. Maynes v. Brockway, 55 Iowa 457 (8 N. W. R. 317).

4. Osborn v. May, 5 Ind. 217; Taylor v. Sanford, 8 Blackf. 169.

5. Johnson v. Iron Belt Min. Co., 78 Wis. 159 (47 N. W. R. 363).

6. Hart v. Waite, 3 Allen 532.

in New York, where the prayer for damages did not exceed one hundred dollars. The declaration prayed for "damages one hundred dollars and over." A judgment for sixty dollars was held not void. The court said the words "and over" were as meaningless as "etc." <sup>1</sup>

§ 232. "Purchased" in confession.—A judgment by confession is not void because the affidavit simply averred that defendants "are indebted to the plaintiff in the sum of three thousand three hundred dollars, which indebtedness arose on account of goods purchased in the year 1853," omitting to aver that they were purchased by the defendants of the plaintiff. <sup>2</sup>

RECEIVER.—The appointment of a receiver is not void because the bill was without equity. <sup>3</sup>

REQUEST.—A justice's judgment is not void for want of an allegation in the complaint that the goods were sold at the defendant's request. <sup>4</sup>

§ 233. Setting aside judgments.—The probate court in Minnesota was one of general and superior jurisdiction, and it had authority by statute to set aside the probate of wills "if procured by fraud, misrepresentation or through surprise or excusable inadvertence or neglect." It set aside a judgment of probate because no guardian *ad litem* was appointed to represent an infant heir. This was held void and to leave the original judgment in force. <sup>5</sup> But this case is wrong, I think. The court did have power to set aside judgments probating wills, but exercised that power in an improper case.

SEVERABLE CAUSE.—The federal statute authorized non-resident defendants in a state court to remove that part of the case concerning them into the federal court in cases where there could be a final determination of the controversy in regard to their rights without the presence of the resident defendants. In such a case, it was held that jurisdiction taken and judgment rendered in the federal court on the erroneous view that the cause was severable, were not void. <sup>6</sup> The California statute authorized property fronting on a *street* to be assessed for improvements thereon. The complaint to obtain a judgment against a lot on I street alleged

1. Rockwell v. Perine, 5 Barb. 573.

2. Read v. French, 28 N. Y. 285.

3. Comer v. Bray, 83 Ala. 217 (3 S. R. 554).

4. Aucker v. McCoy, 56 Cal. 524.

5. *In re Mousseau*, 30 Minn. 202 (14 N. W. R. 887).

6. Goodnow v. Burrows, 74 Iowa 256 (37 N. W. R. 322, 325).

that the improvement was on J street. This was held simply erroneous, and not void.<sup>1</sup>

**STOCKHOLDER'S SUIT.**—Where a stockholder sued for the corporation, the failure of the bill to show that he had made any proper effort to procure corporate action before suing, did not make the decree void.<sup>2</sup>

**TITLE TO LAND BEFORE JUSTICE.**—A statute of Indiana provided that, when the title to real estate should be put in issue by a verified answer before a justice of the peace, he should transfer the case to the circuit court. In an action to recover possession of real estate from an alleged tenant, he filed a verified answer that he was in possession lawfully and of right, as owner; that he had purchased the real estate of Jackson, one of the plaintiffs, and was put in possession under his contract of purchase. The justice sustained a demurrer to this answer, and after a trial rendered a judgment against the defendant upon which he was ousted from the land, and he sued the justice and all concerned for damages. The court said: "When this answer was filed, it became the duty of the justice to pass upon the question of its sufficiency, and whether or not it put in issue the title to real estate. The justice had jurisdiction to decide, and, having such jurisdiction, it involved the right to decide, either that it did or did not put in issue the title to real estate. The ruling that it did not was equally as binding upon the parties as a contrary ruling would have been."<sup>3</sup> See Sections 518 and 583, *infra*.

§ 234. **Uncertainty.**—A note promising to pay "one hundred and  $\frac{50}{100}$ " was filed as a cause of action before a justice in Indiana, the word "dollars" being omitted, and judgment was rendered for so many dollars, which was held not even erroneous.<sup>4</sup> But a revival of a judgment on *scire facias*, which fails substantially to identify the original judgment as to parties, dates and amounts, is void so far as the continuity of the lien is concerned.<sup>5</sup>

§ 235. **Venue, change of—Jurisdiction taken on imperfect.**—A cause was pending in the court of common pleas of Indiana, and the parties agreed in writing that the venue should be changed

1. Mayo v. Ah Loy, 32 Cal. 477, 480 (91 Am. D. 595).

2. Griswold v. Hazard, 141 U. S. 260, 290 (11 S. C. R. 972).

3. Alexander v. Gill, — Ind. — (30 N. E. R. 525).

4. Griffin v. Cox, 30 Ind. 242. See Section 260<sup>4</sup>.

5. Dietrich's Appeal, 107 Pa. St. 174.

to the circuit court of the same county, and that the parties should appear therein, and "that no orders or proceedings had in this court, except said complaint, the summons herein, and this order, shall be certified to said court." Upon the filing of this agreement, the common pleas ordered the cause transferred to the circuit court; and the same person being clerk of both courts, and having the records of both before him, simply docketed the cause in the circuit court books, and filed the papers in that court, but did not certify them, nor did he file therein a copy of the order granting the change. The defendant failing to appear in the circuit court, a judgment was taken against him by default, which was held void.<sup>1</sup> But this case does not seem to be sound. The circuit court found the cause docketed therein, and all the pleadings including the agreement for a change. It was this agreement which gave the court jurisdiction, and the want of certification was merely a want of proper evidence of its genuineness to which the defendant ought to have objected.

§ 236. **Void judgments as causes of action.**<sup>2</sup>—A judgment rendered on a void judgment, as a cause of action, is not void, although the record may plainly show that the court "made something out of nothing." The court has jurisdiction to grant the relief demanded in a proper case, and the defendant is before it and must object or the plaintiff may get a judgment that is worth something. A judgment of the district court in California rendered upon a justice's judgment, void because for an excessive amount, is not void.<sup>3</sup> The Pennsylvania statute gave jurisdiction to justices where the amount did not exceed one hundred dollars. A justice rendered judgment for one hundred and sixty-eight dollars. This was docketed in the common pleas court—a judicial proceeding making it a judgment of that court. This docketed judgment of the common pleas was held not void.<sup>4</sup> A judgment, rendered in New York after due service, on a judgment void for want of service, is not void.<sup>5</sup> A judgment against one partner in West Virginia was void for want of service, and

1. Rhoades v. Delaney, 50 Ind. 468.

2. It is probable that many of the cases here cited would more properly come under Chapters XII and XIII; but finding an accurate division impossible, I assume that the complaint shows the infirmity and consider them all here.

3. Moore v. Martin, 38 Cal. 428, 437.

4. Walker v. Lyon, 3 Pa. (3 P. & W.) 98; *accord*, Gees v. Shannon, 2 Watts 71.

5. Rocco v. Hackett, 15 N. Y. Super. (2 Bosworth) 579, 588.

he appeared specially and moved to set it aside for that cause, which motion was erroneously overruled. This was held to make the void judgment valid,<sup>1</sup> and correctly so, because he had his day in court on his motion, which the court did have jurisdiction to pass upon, and its erroneous ruling holding the judgment valid was not void. So a Kentucky judgment in partition is not void because the plaintiff's title was derived through a void judgment.<sup>2</sup> The revival of a void,<sup>3</sup> or a dormant,<sup>4</sup> judgment is not void. In attachment proceedings before a justice in Indiana, a personal judgment was rendered on constructive service, but this was revived in the circuit court after personal service, and a new personal judgment rendered. This was held not void.<sup>5</sup> When an administrator was sued before a justice in North Carolina and denied having assets, the statute required the justice to try and determine the validity of the claim and to render a judgment therefor, if valid, and then to transfer the whole matter to the county court where the plea concerning assets was to be tried. In such a case the justice tried and determined both issues, and awarded an execution which was levied on land of the deceased and returned to the county court; from that court a *scire facias* issued to the heirs, falsely reciting that there had been a plea of fully administered tried in that court and found against the administrator, and a judgment was rendered thereon for the sale of the land. It was held that the heirs ought to have made defense to the *scire facias*, and that the sale was not void.<sup>6</sup> A decree quieting title in Illinois based on a purchase at an administrator's sale, is not void because the decree ordering the sale was void for want of service on the heirs, as they were called upon to bring forward all their defenses.<sup>7</sup> Contrary to these decisions, and wrong as it seems to me, are decisions from Arkansas, Delaware and Louisiana. Thus a judgment in Arkansas reviving a judgment on a forfeited delivery bond, void for want of notice,<sup>8</sup> and one reviving a personal judgment in Delaware void because rendered on constructive service,<sup>9</sup> were held void. In this last case the court

1. Ferguson v. Millender, 32 W. Va. 30 (9 S. E. R. 38).

2. Prince v. Antle, — Ky. — (13 S. W. R. 436).

3. Martin v. Tally, 72 Ala. 23, 29; Comparet v. Hanna, 34 Ind. 74, 77; Buehler v. Buffington, 43 Pa. St. 278, 293.

4. Dunn v. Brogden, 68 Ga. 63.

5. Carpenter v. Doe, 2 Ind. 465.

6. Jennings v. Stafford, 1 Ired. Law 404, 406.

7. Kelly v. Donlin, 70 Ill. 378, 385.

8. Pile, *Ex parte*, 9 Ark. (4 Eng.) 336.

9. Frankel v. Satterfield, — Del. — (19 Atl. R. 898, 902).

said that no issue was made touching the validity of the judgment in the proceedings for revival, and that therefore they counted for nothing, thus confusing the doctrines of *res judicata* and collateral attack, as explained in section 17, *supra*. The defendant was invited to come in and show cause why the alleged judgment should not be revived, and if he made no issue it was his own fault. The plaintiff could not do it for him. It is held in Louisiana that a judgment of revivor adds no additional force to the original judgment which, if erroneous or void still remains so when revived.<sup>1</sup> Possibly some statute governs that matter there, but if not, the decisions are wrong on principle, because the plaintiff's allegations always are that he has a judgment for some specified amount, and the prayer is that it may be revived so as to continue it in force. If for any cause whatever he has no such valid judgment, the defendant is called upon to show that cause.

OTHER VOID MATTERS.—It may be laid down as a general rule that a judgment is never void because the cause of action is void. A judgment on a forthcoming bond, void for want of a seal;<sup>2</sup> or on a mortgage given by a married woman, void for want of a sufficient acknowledgment;<sup>3</sup> or one quieting title to land on a void parol trust,<sup>4</sup> is not void. So proceedings against a person to examine him in regard to his property subject to taxation, are not void because the tax is void.<sup>5</sup> A judgment on a void county,<sup>6</sup> or town,<sup>7</sup> bond, or a note void because executed on Sunday,<sup>8</sup> is not void.

VOID ORDINANCE.—A city in California had power to prescribe penalties not exceeding one thousand dollars for violation of its ordinances. An ordinance which fixed the penalty for visiting houses of ill-fame at from twenty dollars to one thousand dollars, and a conviction and fine of four hundred dollars, were held void on *habeas corpus* because the ordinance was unreasonable and

1. *McCutcheon v. Askew*, 34 La. Ann. 340.

2. *McComb v. Ellett*, 16 Miss. (8 Sm. & M.) 505, 517.

3. *Harpending's Exr. v. Wylie*, 13 Bush 158; *accord*, *Edmonson v. Nichols*, 22 Pa. St. 74—a mortgage by a person not under disability. *Murray*

*v. Weigle*, 118 Pa. St. 159 (11 Atl. R. 781)—a guardian's void mortgage.

4. *Wood v. Blythe*, 46 Wis. 650 (1 N. W. R. 341).

5. *State ex rel. Kellogg v. Gary*, 33 Wis. 93, 102.

6. *State ex rel. Wilson v. Rainey*, 74 Mo. 229, 235.

7. *United States v. Board of Auditors*, 28 Fed. R. 407.

8. *Jenness v. Berry*, 17 N. H. 549, 556.



void.<sup>1</sup> But surely that was a question the trial court was competent to decide.

**VOID WILL.**—Although a will which lacks the statutory number of witnesses, when presented for probate affirmatively shows that it is a void piece of paper, yet the cases all agree that its probate is simply erroneous and not void.<sup>2</sup> So, where a clause appended to a will below the signature of the testator and subscribing witnesses, was admitted to probate in New York as a part of the will, it was decided that it could not be treated as void collaterally in ejectment.<sup>3</sup> A written instrument was signed by a person in Mississippi and acknowledged before a justice of the peace as his act and deed. It recited that, for good-will and affection to his brothers and sisters, and for other considerations and “services to me rendered, I do hereby give, grant, bargain, sell, deliver, and convey to each of the following-named brothers and sisters the following property”—giving their names and describing the property—and then continuing: “This deed is to take effect, so far as the handing over of the property, at my death; and I reserve the right to revoke it at any time during my life, by filing in the clerk’s office a written revocation under my hand and seal.” It was held that the probate of this instrument as a will was not void.<sup>4</sup> The Pennsylvania statute provided that “every will shall be in writing, and, unless the person making the same shall be prevented by the extremity of his last sickness, shall be signed by him at the end thereof or by some person in his presence and by his express direction, and in all cases shall be proved by the oaths or affirmations of two or more competent witnesses, otherwise said will shall be of no effect.” An alleged will presented for probate was not signed, and was accompanied by two affidavits showing that before it was drawn up ready for the signature of the deceased, he died, yet it was admitted to probate. This was held void in a collateral action of ejectment.<sup>5</sup> The court said that the probate of a deed in the usual form as a will, would be void. This case seems to me unsound. True, the alleged will and accompanying affidavits showed that it was never

1. *In re Ah Yon*, 88 Cal. 99 (25 Pac. R. 974).

2. *Leatherwood v. Sullivan*, 81 Ala. 458, 462 (1 S. R. 718); *Dublin v. Chadbourn*, 16 Mass. 433; *Vanderpoel v. Van Valkenburgh*, 6 N. Y. 190;

*Vaughan v. Doe*, 1 Leigh 287; *Parker v. Brown*, 6 Gratt. 554.

3. *Wells v. Stearns*, 42 N. Y. Supr. (35 Hun) 323.

4. *Wall v. Wall*, 28 Miss. 409, 413.

5. *Wall v. Wall*, 123 Pa. St. 545 (16 Atl. R. 598; 6 Am. Prob. R. 180).

legally completed, but it was no more incomplete than if it lacked the necessary number of witnesses. The petition presented was simply bad on demurrer or motion to reject, and the heirs ought to have made defense. The same court, in an earlier case, made a similar ruling. A probate record showed, that, on the first page of a paper was a complete will written and signed by the testator, and duly witnessed; that a blank page followed, and that on the third page were written certain directions to the widow, to whom all the property had been devised, which were signed by the testator but not witnessed; and that these directions were probated as a part of the will. This part was held void.<sup>1</sup> This case is inconsistent with those in notes 2 and 3 on page 224, and is wrong, in my opinion.

## PART II.

### CIVIL PROCEEDINGS, SPECIAL.

Title A.—Preliminaries wanting, . . . . .	§ 237-241	Title B.—Pleadings, defective, . . . . .	§ 242-291
		Title C.—Bond, defective, . . . . .	292-297

### TITLE A.

#### PRELIMINARIES WANTING.

§ 237. Scope of Title A.	§ 240. Contempt proceedings, premature—Garnishment—Married woman.
238. Attachment proceedings, premature—Bail.	241. Sewer rate—Street assessment—Tax judgment.
239. Bond for costs, omitted—Clerk in insolvency.	

§ 237. **Scope of Title A.**—Certain preliminary matters are frequently required to be done or to exist before the commencement of special civil proceedings. The effect upon the proceedings collaterally, occasioned by defects in, or the absence of, such preliminary matters, will be considered in this title. On principle, it is difficult to see how the jurisdiction is touched by such defects or omissions.

§ 238. **Attachment proceedings, premature.**—Where the Kentucky statute provided that an attachment might issue at or after the commencement of the action, which was done by filing a petition and causing a summons to issue, such proceedings were held void where the writ issued before the summons.<sup>2</sup> So it was

1. Bowlby v. Thunder, 105 Pa. St. 173, 179.      2. Hall v. Grogan, 78 Ky. 11.

decided in Arkansas that the issuing of a writ of attachment by a justice of the peace before the filing of the complaint—simply upon the affidavit—made the proceeding void, even though the complaint was filed the same day.<sup>1</sup> I think both these cases are wrong. The court got jurisdiction by the seizure of the property, and the premature issuing of the writ was merely an error in practice that caused no harm. The error was waived by a failure to move to quash the writ.

**BAIL.**—The Ohio statute does not authorize proceedings to be taken against bail for stay of execution until after execution has been issued and returned against defendant. But such proceedings and judgment (before a justice) without the issue of an execution, are not void.<sup>2</sup>

§ 239. **Bond for costs, omitted.**—A cost bond was required by an Ohio statute “before the township trustees shall take any steps toward locating or establishing any ditch,” to secure the costs in case the ditch should be refused. The failure to file such a bond was held to make the proceeding void, and an assessment made was enjoined.<sup>3</sup> But the failure of a non-resident plaintiff to give a cost-bond before a justice in Wisconsin, as required by statute, does not make the proceedings void.<sup>4</sup>

**CLERK IN INSOLVENCY.**—The premature appointment of a clerk in proceedings of insolvency in Massachusetts, does not make them void.<sup>5</sup> The Ohio case seems to me to be clearly wrong.

§ 240. **Contempt proceedings, premature.**—A justice of the peace in New York could not punish a witness for refusing to answer a question until the party at whose instance he attended made an affidavit that his testimony was so far material, that without it, he could not safely proceed with the trial. Where a witness refused to answer, and the justice committed him without any affidavit, the conviction was held void and the justice a trespasser.<sup>6</sup> Irregularities in the examination of an applicant for letters of administration do not make the proceedings void.<sup>7</sup>

1. *Butler v. Wilson*, 10 Ark. (5 Eng.) 313, 316.

2. *Moore v. Robison*, 6 O. St. 302, 305.

3. *Sessions v. Crunkilton*, 20 O. St. 349, 359.

4. *Conrad v. Cole*, 15 Wis. 545; *Al-*

*ford v. Jacobson*, 46 Wis. 574 (1 N. W. R. 233).

5. *Whithead v. Mallory*, 4 Gray 180.

6. *Rutherford v. Holmes*, 12 N. Y. Supr. (5 Hun) 317—*affirmed* 66 N. Y. 368, 371.

7. *Dictum* in *Farley v. McConnell*, 7 Lans. 428, 430.

**GARNISHMENT.**—A statute of another state authorized garnishment proceedings after a return of “no property found” on an execution. It was held that, the proceeding being special and statutory, unless the record showed such a return, the judgment was void.<sup>1</sup> The court admits that if the trial court had determined that point, even incorrectly, its judgment could not be controverted. The court overlooked the point, that assuming to act was a judicial determination of all jurisdictional points.

**MARRIED WOMAN.**—A judgment against a married woman, founded on an award, is not void because her husband did not sanction her agreement to arbitrate, as required by law.<sup>2</sup>

**RECEIVER PREMATURE.**—The appointment of a receiver is erroneous, but not void, when made in supplementary proceedings which were begun before the return of the execution.<sup>3</sup>

§ 241. **Sewer rate.**—An English statute required a presentment of a jury in order to enable commissioners of sewers to change a rate, and a change made without a presentment was held void.<sup>4</sup>

**STREET ASSESSMENT.**—A confirmation of a street assessment in New York is not void because the resolution of the city council ordering the improvement was invalid.<sup>5</sup>

**TAX JUDGMENT.**—After a return by the sheriff that no goods or chattels of a delinquent taxpayer could be found whereon to levy, the statute authorized proceedings in the county court to recover a judgment for his taxes. It was held that a judgment without such return was void.<sup>6</sup> It seems to me the owner was called upon to make defense.

1. *Gunn v. Howell*, 27 Ala. 663 (62 Am. D. 785, 789).

2. *Taylor v. Harris*, 21 Tex. 438.

3. *Palmer v. Colville*, 18 N. Y. Supp. 509.

4. *Wingate v. Wait*, 6 M. & W. 739.

5. *Dolan v. Mayor*, 62 N. Y. 472, 474.

6. *Thatcher v. Powell*, 6 Wheaton 119, 127, relying upon *Francis's Lessee v. Washburn*, 5 Haywood 294.

## TITLE B.

## PLEADINGS, DEFECTIVE.

Sub-title I.—Matters of form, § 242-255	Sub-title II.—Matters of substance, . . . . . § 256-291
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## SUB-TITLE I.

## MATTERS OF FORM.

§ 242. Scope of, and principle involved in, sub-title I.	§ 249. Time of executing or filing papers—Filing.
243. Address of petition, wrong.	250. Venue omitted—Venue changed—Transcript imperfect.
244. Filing omitted—Heading omitted.	251. Verification of pleadings, principle involved.
245. "Information and belief" in attachment affidavit.	252. Verification, affiant improper.
246. "Information and belief" in capias proceedings.	253. Verification, jurat, wanting.
247. "Information and belief" in affidavits in other special proceedings.	254. Verification, official before whom made, wrong.
248. Prayer, alternative—Omitted.	255. Verification prematurely made.

§ 242. Scope of, and principle involved in, sub-title I.—The collateral validity of special civil proceedings founded upon pleadings defective in matters of form, is considered in this sub-title. As such defects never injuriously affect or mislead the parties, nor interfere with the power of the court to grant the proper relief, on principle, they ought not to make the proceedings void.

§ 243. Address of petition, wrong.—No case has ever held that a defective address in the complaint made the judgment void. Thus, a petition in insolvency addressed to the "judge" instead of the "court," does not make the discharge void.<sup>1</sup> A complaint was entitled: "In the supreme court of the county of Yuba." There was no such court. The court in which it was actually filed was the "superior" court of that county. A temporary injunction was issued, which writ purported to come from the superior court, and was served and disobeyed, for which the defendants were imprisoned. It was held on *habeas corpus* that the sentence was not void for this defect in the complaint.<sup>2</sup> Where a court had statutory powers to sell land of a decedent to pay debts, and also chancery jurisdiction, a petition to sell land addressed to the court "in chancery sitting," will not make the

1. Brewster v. Ludekins, 19 Cal. 162, 170.

2. Fil Ki, *Ex parte*, 79 Cal. 584 (21 Pac. R. 974).

order to sell void, as it will be considered an error of form.<sup>1</sup> An Ohio court had both probate and chancery jurisdiction, and an administrator's petition to sell land was in the form of a bill in equity, addressed to the equity side of the court. The order to sell was held not to be void because of this informality;<sup>2</sup> and the same ruling was made concerning attachment proceedings where the affidavit gave the names of the parties, but did not name the court.<sup>3</sup> So where the oath of an administrator that he would faithfully perform his duties, omitted the name of the estate in the body, but gave it in the caption, it was held that this defect did not make the appointment void.<sup>4</sup> A road petition was addressed to the county auditor, instead of to the board of supervisors as required by statute, but this did not make the action of the board void, as he was its clerk.<sup>5</sup>

§ 244. **Filing omitted—Heading omitted.**—The omission in attachment proceedings to mark the complaint “filed,”<sup>6</sup> or because they are exceedingly informal,<sup>7</sup> does not make them void. But in Illinois, where the statute prescribed the form of a collector's report which constituted a declaration to recover taxes, it was held that, in order to give jurisdiction, the report must conform, substantially, to the form prescribed;<sup>8</sup> and that the omission of the prescribed heading made the judgment of foreclosure in the circuit court void.<sup>9</sup> These cases seem clearly wrong.

§ 245. **“Information and belief” in attachment affidavit.**—Whether or not an attachment founded on an affidavit verified on information and belief, is void, is a question upon which the cases differ. A late case in Arkansas holds that such a defect is amendable, and that it does not make the proceeding void.<sup>10</sup> I think this the better view. The same ruling was made in an early case in Illinois,<sup>11</sup> but the affidavit was amendable by statute. But in Wisconsin where the statute required the affidavit to be

1. Goudy v. Hall, 36 Ill. 313, 316 (87 Am. D. 217).

2. Cadwallader v. Evans, 1 Disney 585, 588.

3. Cooper v. Reynolds, 10 Wall. 308.

4. Heirs of Herriman v. Janney, 31 La. Ann. 276, 280.

5. State v. Barlow, 61 Iowa 572 (16 N. W. R. 733).

6. Betancourt v. Eberlin, 71 Ala. 461, 466; Johnson v. Gage, 57 Mo. 160, 164.

7. Van Kirk v. Wilds, 11 Barb. 520, 524.

8. Spellman v. Curtenius, 12 Ill. 409, 413.

9. Morgans v. Camp, 16 Ill. 175; Pickett v. Hartsock, 15 Ill. 279, 282.

10. Sannoner v. Jacobson, 47 Ark. 31, 44 (14 S. W. R. 458), *denying* Steuben Co. Bank v. Alberger, 78 N. Y. 252.

11. Booth v. Rees, 26 Ill. 45, 48.

sworn to positively, a verification on hearsay and belief was held void.<sup>1</sup>

An early Wisconsin statute required an affidavit in attachment to state "the nature and amount of the plaintiff's demand, and the circumstances upon which the belief of such facts is founded." An affidavit stated that affiant had "good reason to believe and do believe" that the defendant was indebted to an amount specified on a promissory note for three hundred and fifty-two dollars and twenty-one cents and interest, and for three dollars and ninety-four cents for money paid, laid out and expended, etc. On this, an attachment was issued, land seized, and in due time sold and conveyed. This was held void in ejectment because the affidavit was made on information and belief.<sup>2</sup> The New Brunswick statute authorized an attachment to issue upon the affidavit of the plaintiff that the debtor had absconded or concealed himself, etc., and "the departure or concealment of the debtor to be verified by affidavit under oath of two witnesses to the satisfaction of the judge." In a case where these latter affidavits were made on information and belief, and only tended inferentially to show a departure or concealment, these defects were held to make the whole proceeding void for failing to state *facts* showing such departure or concealment.<sup>3</sup> But where the New York statute required an affidavit for attachment to show the causes "to the satisfaction of the judge granting the same," an affidavit on information and belief, and giving the sources of the same, is not void.<sup>4</sup> But in an early case, where the statute authorized an attachment on the affidavits of two witnesses, stating certain named grounds, and "the facts and circumstances" to establish such grounds, the affidavits stated the grounds as the affiants *verily believed*, but no knowledge of any facts or circumstances, and this was held void.<sup>5</sup> The defendants in all these cases were in court, and their property was held on a writ issued on an informal affidavit. If they were not satisfied to waive the point and try the cases on the merits, they ought to have had the affidavits quashed.

§ 246. "Information and belief" in *capias* proceedings.—The cases on the specific question considered in this section, are all from

1. *Streisguth v. Reigelman*, 75 Wis. 212 (43 N. W. R. 1116).      wick, 229, 232, by three judges against two.

2. *Talbot v. Woodle*, 19 Wis. 174, 177.

4. *Buell v. Van Camp*, 119 N. Y. 160 (23 N. E. R. 538).

3. *Ex parte Moore*, 23 New Bruns-

5. *Cadwell v. Colgate*, 7 Barb. 253, 255.



New York. An early statute required an affidavit for an arrest in a civil case to furnish *evidence* of the necessary grounds to the satisfaction of the officer. An affidavit in such a case alleged the proper grounds *on information and belief*. The defendant when brought before the commissioner moved to quash the affidavit for insufficiency, which motion was overruled, and he then gave bond and forfeited it. In a suit on the bond, the whole proceeding was held void, because the affidavit was sworn to on *information and belief*. It was said not to be *evidence*.<sup>1</sup> This case decides that the affidavit must be perfect in order to give the court any jurisdiction to decide at all; that the court has no power to hold a defective affidavit to be good. It quotes with approval from Cowen & Hill's Notes, page 1201: "That where the matter constituting jurisdiction is the same with that which is to be judicially heard and determined on the trial of the very issue in the cause; in other words, whenever such matter makes a part of the merits, it is not the subject of collateral objection, but is reversible by direct proceedings only." The rule laid down by those learned authors is considered in section 63, *supra*, and for the reasons there given, I think it is unsound. The question before the court is, Has the court power to grant relief upon this affidavit? The granting of relief is necessarily an adjudication that the affidavit is sufficient for that purpose both in form and substance. Just why the court has power to adjudicate upon and conclude the *merits*, but not the *form*, or just why the defendant is not called upon to make his objections to matters of form as well as matters of substance, no court has ever very clearly pointed out. In the same case, on page 188, it is said: "The officer has no power to dispense with the affidavit, or any of its requisites; and his decision in favor of the sufficiency of an affidavit destitute of the matters required by the statute, would not be conclusive, *because without the proper affidavit he would have no jurisdiction to decide*." But why cannot the first judge decide the point as well as the second? If a judge of the court of appeals should sit and try such a case, and hold an affidavit somewhat irregular, good, why ought not his decision to have the same respect as that of the justice of the peace before whom the collateral suit is prosecuted for trespass for enforcing the first judgment? So where the statute required the petitioner to state the facts

1. Broadhead v. McConnell, 3 Barb. 175, 190.

and circumstances within his knowledge, showing the grounds of his application, an affidavit alleging that "he has a good cause of action against the defendant, and that he believes there will be danger of losing the said debt unless warrant issue forthwith," makes the proceeding void.<sup>1</sup> But where the statute, in certain cases, required the affidavit to show that defendant "is about to remove his property from the state with intent to defraud his creditors," an allegation of such fraudulent intent "on information and belief," was held not to make the proceeding void;<sup>2</sup> and it was also held that an affidavit to hold to bail in a civil case made on information and belief, was erroneous, but not void.<sup>3</sup>

§ 247. "Information and belief" in affidavits in other special proceedings. — In civil proceedings other than attachment and *capias*, the courts do not quite so readily hold them void because the affidavit is made on information and belief. Thus, in New York, where an affidavit to obtain letters of *administration* alleged the material facts of the petition to be true to the best of the affiant's knowledge and belief, it was held that the appointment was not void, and that land sold by the administrator could not be recovered in ejectment,<sup>4</sup> and this was affirmed by the court of appeals.<sup>5</sup> So, where a petition for the appointment of an *administrator* in Texas alleged that affiant verily believed the person to be dead, this was held sufficient to admit proof of his death, and not to make the appointment void.<sup>6</sup>

An affidavit made by an agent stated the amount due on a *confession*, but did not state his means of knowledge of that fact. This was irregular and erroneous, but it did not make the judgment void.<sup>7</sup> A Kentucky statute required commissioners appointed to ascertain the propriety of selling a *ward's* land to state positively in their report whether or not the interest of the ward required a sale. In such a case where they reported that they "believed" a sale would be to his interest, the sale was held erroneous, but not void.<sup>8</sup> And where an affidavit in proceed-

1. Loder v. Phelps, 13 Wend. 46.

2. Hall v. Munger, 5 Lans. 100.

3. Harman v. Brotherson, 1 Denio 537. See the next section for contrary cases.

4. Sheldon v. Wright, 7 Barb. 39, 41.

5. Sheldon v. Wright, 5 N. Y. 497,

512. See section 242, *supra*, for another reason why this sale was valid.

6. Pleasants v. Dunkin, 47 Tex. 343, 355.

7. Pirie v. Hughes, 43 Wis. 531, 534.

8. Furnish v. Austin, — Ky. — (7 S. W. R. 399).

ings supplementary to execution in New York, was made on "information and belief," when the statute required "proof," the proceeding was decided to be valid collaterally, and a protection to the affiant in an action for false imprisonment.<sup>1</sup>

An affidavit filed before a justice to authorize a seizure of a horse as being kept for the use or benefit of a slave, was deficient in alleging the facts on belief instead of positively, but the judgment was held not void.<sup>2</sup>

§ 248. **Prayer.**—AN ALTERNATIVE prayer in a petition to sell land of a decedent, which the court has no power to grant, does not make the order to sell void.<sup>3</sup>

PRAYER OMITTED.—To omit any prayer for relief in a combined complaint and affidavit in attachment, is irregular, but amendable, and not void.<sup>4</sup> So, where the statute required a poor debtor's petition for discharge to pray to take the oath therein prescribed, a prayer "to take the prescribed by the statute," omitting the word "oath" before "prescribed," did not make the discharge void.<sup>5</sup>

And where a road petition stated that it was much needed, but did not pray for its establishment, this did not make the order of establishment void.<sup>6</sup>

§ 249. **Time of executing or filing papers.**—The execution of the bond and the taking of the oath of office by an administrator two days before his appointment;<sup>7</sup> or the execution of an affidavit in attachment too long before using;<sup>8</sup> or the failure of a poor debtor to sign his petition until after the service of citation,<sup>9</sup> does not make the proceedings void.

FILING.—It would not seem that a mere irregularity concerning the time or order of the filing of papers touches the jurisdiction so as to render the proceedings void, but the majority of the cases so decide. But it has been held that the failure to file a complaint before the issuing of the summons;<sup>10</sup> or the filing of the

1. *Miller v. Adams*, 7 N. Y. Supr. (7 Lans.) 131, 134; *Cooman v. Board of Education of Rochester*, 44 N. Y. Supr. (37 Hun) 96; *Fleming v. Tourgee*, 16 N. Y. Supp. 2.

2. *Peake v. Cantey*, 3 McCord 107.

3. *Stuart v. Allen*, 16 Cal. 474, 479 (76 Am. D. 551).

4. *Sannoner v. Jacobson*, 47 Ark. 31 (14 S. W. R. 458).

5. *Fernald v. Noyes*, 30 N. H. (10 Foster) 39.

6. *State v. Barlow*, 61 Iowa 572 (16 N. W. R. 733).

7. *Morris v. Chicago, Rock Island and Pacific R. Co.*, 65 Iowa 727 (23 N. W. R. 143).

8. *Doe v. Rue*, 4 Blackf. 263.

9. *Neal v. Paine*, 35 Me. 158, 160.

10. *Dictum* in *Millette v. Mehmke*, 26 Minn. 306.

affidavit and bond in attachment and acting thereon four months before filing the petition;<sup>1</sup> or the failure to file a warrant of attorney and take judgment until the next term after that specified therein,<sup>2</sup> does not make the proceeding void. On the contrary, two cases in Illinois hold that, where an administrator gave notice that, at a certain term, he would file a petition to sell land, which he failed to do until the next term, the order to sell was void.<sup>3</sup> So the failure to file a bill of items of an account before process issues from a justice;<sup>4</sup> or issuing a writ of attachment before process issued,<sup>5</sup> or an order of arrest two days before filing the complaint;<sup>6</sup> or the failure to file the declaration in attachment at the time prescribed,<sup>7</sup> has been held to make the proceeding void. The failure of a tax assessor to file the assessment in court for thirty-three days after the time prescribed by law,<sup>8</sup> or to apply for judgment until the next term after that prescribed;<sup>9</sup> or the premature verification of such assessment before the time allowed for corrections had expired,<sup>10</sup> makes the proceeding void. But just how any of those irregularities affected the jurisdiction, those learned courts did not point out, and I cannot. Jurisdiction over the subject-matter was undoubted, and the defendants were in court; and in all such cases it is fundamental that a failure to object at the proper time waives all errors in practice, even on appeal or error. The Illinois administration cases are the most plausible. But as the process and service brought both parties into court, if the administrator did not file his petition at the proper time, the defendants ought to have moved to compel him to do so or dismiss. That would have been no hardship on them, and would have saved an innocent purchaser from having to pay their ancestor's debts for nothing. See section 238, *supra*.

§ 250. Venue omitted from an affidavit in attachment,<sup>11</sup> or by a tax assessor,<sup>12</sup> does not make the proceeding void.

1. Bowers v. Chaney, 21 Tex. 363, 368.

2. Lewis v. Smith, 2 Serg. & R. 142, 156.

3. Morris v. Hogle, 37 Ill. 150 (87 Am. D. 243); Schnell v. Chicago, 38 Ill. 382 (87 Am. D. 304).

4. Pendleton v. Fowler, 6 Ark. (1 Eng.) 41.

5. Low v. Henry, 9 Cal. 538, 552.

6. *Ex parte* Cohen, 6 Cal. 318.

7. Melloy v. Burtis, 124 Pa. St. 161 (16 Atl. R. 747)—Mitchell, J., *dissenting*.

8. Marsh v. Chesnut, 14 Ill. 223.

9. Brown v. Hogle, 30 Ill. 119, 141.

10. Westfall v. Preston, 49 N. Y. 349, 354.

11. Crowell v. Johnson, 2 Neb. 146, 153.

12. National Bank of Chemung v. City of Elmira, 6 Lans. 116, 123.

**VENUE CHANGED—TRANSCRIPT IMPERFECT.**—A change of venue was taken to another county and perfected. The cause was then sent back to the original county, and irregularly tried before the transcript was returned; but this did not make the judgment void.<sup>1</sup> A special act of the legislature of Mississippi transferred a pending administration from one probate court to another, and provided that “a full, true and complete copy of the record of all the proceedings” should be transmitted to the new court. The copy sent was not full and complete, but this did not affect the jurisdiction of the new court so as to make its acts void.<sup>2</sup>

**§ 251. Verification of pleadings, principle involved.**—The statutes require many kinds of petitions to be verified. This includes generally all complaints and petitions in special proceedings, the bill in equity, the libel in admiralty, and, in some states, the complaint or petition in all causes. Such verification adds no allegation to the pleading and tenders no issue. Its only object is to show the good faith of the petitioner. In other words, if he will not swear that he believes his cause to be just, the law does not care to bother with it. But when the adversary comes in, such verification is of no moment. It is not even evidence. The justice of the cause must then be proven by competent evidence. Like any other formal matter, its absence is waived by a failure to object. And if its entire absence does not affect the jurisdiction, of course mere defects in it cannot. It was expressly held in a well-considered case in Missouri, that the verification to a guardian's petition to sell land was merely evidence, and did not affect the jurisdiction, and that the order to sell was not void because the petition was verified by the attorney instead of the guardian; that all that could be said was that the order was granted on insufficient evidence.<sup>3</sup> In an early case in Nebraska an administrator's petition to sell land was not verified by oath. The court said: “The affidavit to the petition was not an element of jurisdiction without which the court could not act. It was, at most, merely a formal part of the petition—a preliminary form in commencing suit; and its omission amounts to one of those irregularities which cannot be collaterally called in question, even if the proceedings had taken place before an

1. Littleton v. Smith, 119 Ind. 230 (21 N. E. R. 886).

2. Learned v. Matthews, 40 Miss. 210, 221.

3. Castleman v. Relfe, 50 Mo. 583, 587; *accord, dictum* in Pfirman v. Wattles, 86 Mich. 264 (49 N. W. R. 40).

inferior tribunal." <sup>1</sup> In accord with the Nebraska case, that the failure to verify an administrator's petition to sell land does not make the sale void, are cases from Alabama, Iowa, Michigan and North Carolina.<sup>2</sup> So the failure of an administrator to take an oath to perform his duties, as required by statute, before the issuing of letters to him;<sup>3</sup> or the failure to verify the petition for the appointment of an administrator *de bonis non*,<sup>4</sup> does not make the appointment void. The want of an oath to an affidavit in attachment,<sup>5</sup> or in confession;<sup>6</sup> or the failure to verify a guardian's petition to sell land,<sup>7</sup> or a petition in partition by heirs in the orphans' court;<sup>8</sup> or the omission of a receiver to take the oath of office,<sup>9</sup> in each case contrary to the statute, does not make the proceeding void. The failure to verify a petition for a *divorce*, in violation of the statute, does not make the decree void.<sup>10</sup> But where an insolvent in Massachusetts did not make the oath required by statute, that his schedule was true, and that he had surrendered all his property, his discharge was held void.<sup>11</sup>

SIGNATURE TO AFFIDAVIT.—It has been held that the signature of the affiant is not a necessary part of an affidavit,<sup>12</sup> and therefore that its omission does not make proceedings in attachment void; and where a petitioner in insolvency failed to separately sign his lists of assets, losses and liabilities, but fastened them together and signed at the end of all, that did not make

1. Johnson v. Jones, 2 Neb. 126, 138; Carlisle v. Gunn, 68 Miss. 243 (8 S. approved in Trumble v. Williams, 18 R. 743).  
Neb. 144 (24 N. W. R. 716, 718).

2. Spragins v. Taylor, 48 Ala. 520; Den *ex dem.* Vanderveer v. Gaston, 24 N. J. L. (4 Zabr.) 818, 820; Myers v. Davis, 47 Iowa 325, 329; Dean v. Thatcher, 32 N. J. L. (3 Vr.) Overton v. Cranford, 7 Jones' Law 415 (78 Am. D. 244); *dictum* in Stradley v. King, 84 N. C. 635, 638; Ellsworth v. Hall, 48 Mich. 407 (12 N. W. 470, 472; Hopkins v. Howard, 12 Tex. 7.

3. Gallagher v. Holland, 20 Nev. 164 (18 Pac. R. 834).  
7. Richardson v. Parrott's Heirs, 7 B. Mon. 379, 382; Lampton v. Usher's Heirs, *id.* 57, 61.

4. Moore v. Willamette, 7 Or. 359, 368; accord, Murzynouski v. Delaware, L. & W. R. Co., 15 N. Y. Supp. 841.  
8. Waters v. Bates, 44 Pa. St. 473, 475.

5. Budd v. Long, 13 Fla. 288, 310; Foster v. Jones, 1 McCord, 116—no affidavit as to the sum due; *contra* Adkins v. Brewer, 3 Cowen 206, and 9. Dayton v. Borst, 20 N. Y. Super. (7 Bosworth) 115, 119.

6. Redus v. Wofford, 12 Miss. (4 Sm. & M.) 579, 591; Agricultural Association v. Madison, 77 Tenn. (9 Lea) 407; *contra*, Hargadine v. Van Horn, 72 Mo. 370—by three judges against two.

10. McCraney v. McCraney, 5 Iowa 232, 254; Rush v. Rush, 46 Iowa 648.  
11. Cox v. Austin, 11 Cush. 32.  
12. Redus v. Wofford, 12 Miss. (4 Sm. & M.) 579, 591; Agricultural Association v. Madison, 77 Tenn. (9 Lea) 407; *contra*, Hargadine v. Van Horn, 72 Mo. 370—by three judges against two.

his discharge void.<sup>1</sup> The cases cited in this section concerning sales by administrators and guardians and the discharge of insolvents more properly come in Chapter XIV, sections 660 to 791, touching the loss of jurisdiction. But as the courts have drawn no such distinction in deciding them, they are cited here.

§ 252. **Verification, affiant improper.**—A guardian's sale is not void because the petition was verified by his attorney;<sup>2</sup> nor is an administrator's sale void because the petition was verified by an attorney in fact;<sup>3</sup> nor because the name of the administrator was signed thereto by his attorney;<sup>4</sup> nor is a judgment in attachment void because the affidavit was made by an attorney without showing the absence of the applicant, and when he was, in fact, present;<sup>5</sup> nor because the maker of the affidavit was not "disinterested" as required by statute;<sup>6</sup> nor because the affiant did not profess to be the agent of the plaintiff, nor to make it on his behalf.<sup>7</sup> On the contrary, where the statute required the affidavit to be made by "the plaintiff, his agent or attorney," and it failed to show who the affiant was, the proceeding was held void.<sup>8</sup> The Wisconsin statute required the affidavit to be made by "the plaintiff, or some one in his behalf." Where a corporation was plaintiff, the affidavit failed to show that the affiant was its agent or officer, or that he acted in its behalf, and for this defect the proceedings were held void;<sup>9</sup> and the same ruling was made in a later case in the same state where the affidavit read that affiant "on behalf of Ignatz Schierl, being duly sworn, on oath says, that," etc. The court held that he did not swear but merely recited that he was acting on behalf of the plaintiff.<sup>10</sup> That learned court seems to me to be a long distance from correct principle on this point. And where the affidavit in attachment was signed "Horn & Hughes,"<sup>11</sup> and a warrant for confession was signed by two of the joint debt-

1. Brewster v. Ludekins, 19 Cal. 162, 171.

2. Castleman v. Relfe, 50 Mo. 583, 587.

3. Rugle v. Webster, 55 Mo. 246, 249.

4. Spragins v. Taylor, 48 Ala. 520.

5. Westcott v. Sharp, 50 N. J. L. 392 (13 Atl. R. 243).

6. Van Alstyne v. Erwine, 11 N. Y. 331, 341.

7. Gilkeson v. Knight, 71 Mo. 403, 405.

8. Manley v. Headley, 10 Kan. 88, 94.

9. Wiley v. C. Aultman & Co., 53 Wis. 560 (11 N. W. R. 32).

10. Miller v. Chicago, M. & St. P. Ry. Co., 58 Wis. 310 (17 N. W. R. 130).

11. Norman v. Horn, 36 Mo. App. 419, 421.



ors, who also signed the names of the other two,<sup>1</sup> the proceedings were held void. An early case in New York held that it was erroneous for a justice to issue a writ of attachment on the oath of the plaintiff—the statute required satisfactory proof—but that such error did not make the proceeding void.<sup>2</sup> A judgment on a claim against an estate is not void because the affidavit attached did not show who the affiant was.<sup>3</sup> But where the statement to a confession was signed by the defendant's attorney,<sup>4</sup> or the name of the defendant was signed by one purporting to be his attorney,<sup>5</sup> the judgment was held void in ejectment under the California statute which required the statement to be signed by the defendant.

§ 253. *Verification, jurat, wanting.*—When the order appointing an administrator in New York is attacked collaterally because of the want of a jurat to the affidavit attached to the petition for appointment, it may be shown by parol that an oath was taken and the jurat omitted by inadvertence.<sup>6</sup> The same ruling was made in Illinois where the jurat to an affidavit in attachment wanted the officer's signature.<sup>7</sup> He was allowed to swear in the collateral action that he did administer the oath. But on the same point in Wisconsin, involving the validity of the appointment of a guardian for an insane person, the court, on appeal, reversed the order of appointment for such omission, and ordered the application to be dismissed for want of jurisdiction,<sup>8</sup> and in the next case the appointment was held void in a collateral action.<sup>9</sup> I think these Wisconsin cases wrong, and that the cases from New York and Illinois, which assume that the omission of the jurat affected the jurisdiction, are also wrong. A judgment of confession is not void because the surname of the notary was omitted from the jurat attached to the statement, where his full name appeared in the seal attached.<sup>10</sup>

§ 254. *Verification, official before whom made, wrong.*—Because an administrator qualifies before a notary instead of the clerk,<sup>11</sup> or

1. *Dictum* in Chapin v. Thompson, 20 Cal. 681, 687.

2. Van Steenbergh v. Kortz, 10 Johns. 167.

3. Cannon v. McDaniels, 46 Tex. 303, 309.

4. Reynolds v. Lincoln, 71 Cal. 183 (12 Pac. R. 449).

5. French v. Edwards, 5 Sawyer 266, 268.

6. Sheldon v. Wright, 5 N. Y. 497, 499.

7. Kruse v. Wilson, 79 Ill. 233, 235.

8. Royston's Appeal, 53 Wis. 612 (11 N. W. R. 36).

9. Royston v. Wilson, 53 Wis. 625 (11 N. W. R. 41).

10. Grattan v. Matteson, 54 Iowa 229 (6 N. W. R. 298).

11. Pickens v. Hill, 30 Ind. 269, 271.

swears to his petition to sell land before the clerk instead of the judge;<sup>1</sup> or because an assessor was sworn before a deputy clerk instead of a justice of the peace;<sup>2</sup> or because a petitioner in insolvency swore to his schedule before the clerk instead of the judge,<sup>3</sup> in each case contrary to the statute, does not make the proceeding void. An insolvent's petition for discharge was sworn to before the clerk, without appearing to have been done in open court as required by the statute. Objection was taken to this defect on motion to discharge. The court allowed a new affidavit to be filed, and continued the cause for further hearing, at which time a discharge was granted. This was held irregular, but not void; and the discharge was held to protect the sureties on the insolvent's bond.<sup>4</sup> On the contrary, an insolvent's discharge was held void in New York because granted by the chief justice upon a petition sworn to before another officer instead of himself.<sup>5</sup>

§ 255. **Verification prematurely made.**—A statute of New York required an insolvent who desired to be released from imprisonment, to make a petition showing his assets and liabilities, and to serve a copy on the creditor fourteen days before the time fixed for the hearing, at which latter time he was required to indorse his petition with a prescribed affidavit. A debtor indorsed the prescribed affidavit on the petition at the time of the filing, and did not reswear to it at the time of the hearing, and for this irregularity his discharge was decided to be void.<sup>6</sup> On the 29th day of August, 1864, a person applied to a circuit court commissioner in Michigan to recover the possession of land from one holding over after a deed was executed in foreclosure proceedings, and the jurat to his petition was dated August 29, 1861. On September 2, 1864, he recovered judgment. This judgment was held to be void because the affidavit showed on its face that it was made three years before filing, and it was also held that parol evidence was inadmissible to show that the oath was administered on August 29, 1864.<sup>7</sup> These two cases look to me like technicality run to seed.

1. *Den ex dem. Obert v. Hammel*, 18 N. J. L. (3 Harr.) 73, 77. 306; *accord*, *Baker v. Everhart*, 65 Cal. 27 (2 Pac. R. 495).

2. *National Bank of Chemung v. City of Elmira*, 6 Lans. 116, 123. 6. *Bulymore v. Cooper*, 2 Lans. 71 —*affirmed* 46 N. Y. 236. See section 265, *infra*.

3. *Kohlman v. Wright*, 6 Cal. 230.

4. *Fritts v. Doe*, 22 Pa. St. 335.

5. *Small v. Wheaton*, 4 E. D. Smith, 33.

7. *Allen v. Carpenter*, 15 Mich. 25,

SUB-TITLE II.

MATTERS OF SUBSTANCE.

§ 256. Principle involved in sub-title II.

Division A.—Attachment and garnishment, . . . . .	§ 257-264	Division D.—Condemnation, confiscation, exemption and forfeiture proceedings, . . . . .	§ 272-274
Division B.—Bankruptcy, insolvency and poor debtors' proceedings, . . . . .	265-267	Division E.—Probate petitions to sell, mortgage, etc. . . . .	275-288
Division C.— <i>Capias</i> proceedings, . . . . .	268-271	Division F.—Tax proceedings, . . . . .	289-291

§ 256. Principle involved in sub-title II.—A judgment in special civil proceedings is not necessarily void because founded on a pleading bad in substance—one which fails to state facts sufficient to constitute a cause of action, and which is subject to general demurrer or motion to quash. If the object of the petitioner can be ascertained from the allegations, no matter how defective they are or how many necessary ones are omitted—the court having power to grant the relief sought, and having the parties before it—the judgment is not void.

AMENDABLE.—A judgment is never void for defects in a petition which is amendable.<sup>1</sup>

COLORABLE ALLEGATIONS are considered somewhat in sections 61 and 66, *supra*. The cases all agree that if the allegations tend to show, or colorably or inferentially show, each material fact necessary to constitute a cause of action, they will shield the judgment from collateral attack. I agree that that is true, but not that it is necessary. Thus, where an administrator's petition to sell land stated the statutory grounds informally,<sup>2</sup> or inaccurately, and so as to be amendable;<sup>3</sup> or an affidavit in attachment has a tendency to show all things necessary,<sup>4</sup> or to make out a case in all its parts,<sup>5</sup> or the case required by the statute;<sup>6</sup> or "where a court or officer has such a degree of evidence before him as fairly to require the exercise of judgment upon its weight and effect;"<sup>7</sup> or

1. Dollarhide v. Parks, 92 Mo. 178, 188 (5 S. W. R. 3); Kruse v. Wilson, 79 Ill. 233, 237; Moore v. Mauck, 79 Ill. 391, 394; Booth v. Rees, 26 Ill. 45, 49.	5. Schoonmaker v. Spencer, 54 N. Y. 366.
2. Moffitt v. Moffitt, 69 Ill. 641, 647.	6. Skinnion v. Kelly, 18 N. Y. 355.
3. Doe v. Hardy, 52 Ala. 291, 295.	7. Von Rhade v. Von Rhade, 2 Thomp. & Cook, 491, 495; <i>approved</i> Donnelly v. West, 66 How. Pr. 428, 430.
4. Kissock v. Grant, 34 Barb. 144, 148.	

where matters are stated from which each necessary fact may be inferred,<sup>1</sup> the judgment will not be void.

The Alabama statute authorized a sale of decedent's lands when they could not be "fairly and equitably divided." The petition set forth the condition of the lands, and, as a conclusion, averred that "it is manifest that the said lands cannot be equitably divided." It was held that the petition was demurrable, but that the sale was not void.<sup>2</sup>

The Michigan statute authorized the appointment of a guardian for a person insane or "mentally incompetent to have the charge and management of his property," . . . or for one who by "idleness . . . shall so spend, waste or lessen his estate as to expose himself or his family to danger of want or suffering." The petition alleged that the defendant "is unable to provide suitable and comfortable maintenance for his family; . . . is not of sufficient ability to manage his personal affairs; . . . and that he is in the habit of making foolish bargains, and squanders what he may earn." It was held that an appointment based on this petition was void.<sup>3</sup>

#### DIVISION A.

##### ATTACHMENT AND GARNISHMENT.

§ 257. Principle involved in division A.	§ 261. Intent to defraud.
258. "Absconds"—Alternative.	262. Just—Last resided.
259. Amount of claim.	263. Nature of claim or demand or cause of action.
260. "Any of his property"—Apprehensive—"Dollars"—Due.	264. Non-residence — Obvious — Secretly departed—Vexing—Voluntarily leaving.

§ 257. Principle involved in division A.—Attachment proceedings are merely auxiliary to a civil action. The jurisdiction over the subject-matter depends upon the allegations of the complaint in such action, and the jurisdiction over the person depends either on the service made in such action or on the seizure of the *res* by the writ of attachment. The writ of attachment is as strictly judicial as the summons. It is either issued by the court in the first instance, or is approved and confirmed by it before final judgment. Before the writ issues, and in order to justify it, an

1. Fitch v. Miller, 20 Cal. 352, 384; Wellshear v. Kelley, 69 Mo. 343, 350. 3. Partello v. Holton, 79 Mich. 372 (44 N. W. R. 619).

2. Bibb v. Bishop Cobb's Orphan Home, 61 Ala. 326, 329.

affidavit alleging certain specified things to be true, and a bond, is required to be filed. This affidavit, so far as it relates to the character, nature or amount of the plaintiff's claim, is not jurisdictional, as it tenders no issue not already tendered by the complaint in the action. It simply evidences the good faith of the plaintiff in asking for the proceeding. The only new issue tendered is in regard to the non-residence of the defendant or his intent to defraud; and, on principle, if the non-residence or intent to defraud is stated even inferentially or in a manner so colorable as to challenge judicial attention, or to set the judicial mind in motion, that will shield the proceeding from collateral attack. But the only extra force of the judgment in attachment is to fasten its lien on the property from the date of the attachment, instead of from its own date; and as the seizure of the property brings it within the *de facto* power and control of the court so far as the rights of the parties to the action are concerned, and makes it the duty of the court to determine all the rights of all the parties therein, it would not seem, on principle, that any error in regard to those rights would make the proceeding void. The court has the *de facto* custody of the property by virtue of a *de facto* writ, and the parties are before it. Has the plaintiff any lien upon it, or has he none? Is the writ of attachment valid, or is it not? Those are questions which the court has jurisdiction to decide, and which it must decide, and it is submitted that an erroneous decision is not void. In an early Kentucky case it was said: "The code does not declare that the clerk's order of attachment shall be void unless the requisite affidavit is filed, nor that the jurisdiction of the court is to depend upon the filing of the affidavit. The case seems to be within the general rule that the proceedings of a court having jurisdiction of the person or subject are not void, however erroneous they may be. The jurisdiction of the court in attachment cases depends upon the actual or constructive service of process upon the defendant, and not upon the plaintiff's affidavit, nor upon the clerk's order."<sup>1</sup> And in a late case it was said: "An action is commenced by filing a petition and causing a summons to issue or a warning order to be made; and when once properly commenced, the jurisdiction of the court to proceed is acquired; and it is difficult to see why the statement of the grounds for a

1. *Allen v. Brown*, 4 Met. (Ky.) 342, 346; *approved Bailey v. Beadles*, 7 Bush 383.

mere provisional remedy should control the jurisdiction, when the granting of an attachment and its levy, merely, would not authorize the court to proceed and render a judgment."<sup>1</sup>

The Supreme Court of the United States held that jurisdiction in attachment was obtained by a seizure of the *res*, and said: "The affidavit is the preliminary to issuing the writ. It may be a defective affidavit, or possibly the officer whose duty it is to issue the writ may have failed in some manner to observe all the requisite formalities; but the writ being issued and levied, the affidavit has served its purpose, and, although a revisory court might see in some such departure from the strict direction of the statute sufficient error to reverse the judgment, we are unable to see how that can deprive the court of the jurisdiction, acquired by the writ levied upon defendant's property."<sup>2</sup> In an Indiana case it was said: "Where the defendant in the main action is personally served with process, the attachment is not the foundation of the jurisdiction, but is a conservatory measure allowed to the plaintiff for the purpose of securing his demand." "Where the proceeding is *ex parte* without any service upon or appearance by the defendant, jurisdiction is acquired over him *through an attachment of his property*."<sup>3</sup> That is precisely my idea. The allegations of the complaint give jurisdiction over the subject-matter—the right to collect an alleged note, for example—and the *seizure of the property* gives jurisdiction over the person; and when jurisdiction over both subject-matter and person is once obtained, neither errors in obtaining nor in retaining it will make the proceedings void. If the writ of attachment was improvidently issued without the necessary affidavit and bond, or upon defective ones, the defendant must call the attention of the court to those matters and obtain an order for the officer to surrender his property. It must not be lost sight of that the proceedings in attachment have nothing to do with the merits of the cause of action. Their only use is to aid the plaintiff in obtaining satisfaction of a meritorious cause of action, and the only use of the affidavit is to show the plaintiff's good faith. In so far as the merits of the controversy are concerned—namely, the justice of the cause of action—it adds nothing to the issues tend-

1. Paul v. Smith, 82 Ky. 451, 456.

3. Schoppenhast v. Bollman, 21 Ind.

2. Cooper v. Reynolds, 10 Wall. 308, 280, 285, *quoting* from Drake on Attachments, § 692.  
319; *approved*, Mudge v. Steinhart, 78 Cal. 34 (20 Pac. R. 147, 149).

ered by the complaint. The only new issue it does tender concerns the conduct or residence of the defendant, which, as above observed, does not touch the merits of the plaintiff's cause of action, but merely his right to that particular remedy; but if the omission from the complaint of an allegation necessary to show a meritorious cause of action does not make it void, *a fortiori*, the omission of a material allegation from the affidavit for a mere auxiliary remedy, ought not to make it void. Three New York cases hold that the affidavit in attachment is not jurisdictional where there is personal service, and that defects therein do not make the proceedings void,<sup>1</sup> while a Wisconsin case holds that if the affidavit is so defective that perjury cannot be assigned thereon, they are void.<sup>2</sup> But it seems to me that the rule adopted in Illinois, that if the affidavit is amendable, it is not void,<sup>3</sup> is more reasonable. A case in the court of appeals of New York held that a total omission of one of the statutory requirements, as that the contract sued upon was made in the state, made the proceedings void;<sup>4</sup> but in a later case it was held that, although the affidavit failed to show what proportion the defendant's ready means bore to his debts, and was also weak on the point as to the intent of defendant in absenting himself, it was not void.<sup>5</sup>

§ 258. **Absconds.**—That the defendant “so absconds or conceals himself that the ordinary process of law cannot be served,” being a cause for attachment in Tennessee, proceedings had by virtue of an affidavit that defendant “hath absconded or so conceals himself *from said county* that the ordinary process of law cannot be served upon him,” were held void because he might have been living publicly in another county.<sup>6</sup>

ALTERNATIVE.—The proceedings are not void because the affidavit alleged that the defendant “conceals or absents” himself,<sup>7</sup> or that the claim “is due upon contract express or implied;”<sup>8</sup> but where it alleged that defendant had disposed of “his property, or any part thereof,” in the language of the

1. *Brown v. Guthrie*, 46 N. Y. Supr. (39 Hun) 29, 31; *Carr v. Van Hoesen*, 33 N. Y. Supr. (26 Hun) 316; *In Matter of Griswold*, 13 Barb. 412.

2. *Miller v. Munson*, 34 Wis. 579.

3. *Kruse v. Wilson*, 79 Ill. 233, 237; *Moore v. Mauck*, *id.* 391, 394; *Booth v. Rees*, 26 Ill. 45, 49.

4. *Staples v. Fairchild*, 3 N. Y. 41.

5. *Van Alstyne v. Erwine*, 11 N. Y. 331, 340.

6. *Conrad v. McGee*, 9 Yerger (17 Tenn.) 428.

7. *Boothe v. Estes*, 16 Ark. 104, 111.

8. *Klenk v. Schwolm*, 19 Wis. 111.



statute, that was held to make it void in Wisconsin, because perjury could not be predicated upon it.<sup>1</sup> So, where the affidavit to a petition of an insolvent stated that the petitioner had not disposed of any part of his estate for the benefit of himself *and* family, instead of himself *or* family, as required by the New York statute, the discharge was held void.<sup>2</sup> I think the first and last three cases wrong. The petitions were *colorable*, but insufficient on demurrer or motion to quash. See the next section.

§ 259. **Amount of claim.**—The attachment statutes generally require the affidavit to state the amount of the plaintiff's claim, either positively or on belief, or "as near as may be," or "over and above all legal set-offs," or "counterclaims" or "discounts." As these allegations go merely to the good faith of the affiant, and as they tender no new issue and are of no benefit to defendant, it would not seem that their absence would affect the jurisdiction, collaterally, and so it was held in Alabama;<sup>3</sup> and in a late case in Missouri, where the affidavit failed to state that the demand was just, or the amount due over and above all credits and set-offs, and simply stated that defendant was a non-resident, upon which both a writ of attachment and notice for publication were ordered, and judgment rendered by default, it was held to be amendable, like a defective petition, and not void.<sup>4</sup> So, where the claim was stated to be six hundred and twenty dollars, "or thereabouts;"<sup>5</sup> or six thousand and fifty dollars, omitting "as near as may be,"<sup>6</sup> it was held not void. But an omission of the clause "over and above all legal set-offs,"<sup>7</sup> or "discounts,"<sup>8</sup> was held to make the proceedings void. A like ruling was made where the New York statute required the amount to be stated "over and above all counterclaims" known to the plaintiff, and the affidavit was made by an agent who used the words "known to deponent" instead of plaintiff.<sup>9</sup> Another

1. Goodyear Rubber Co. v. Knapp, 61 Wis. 103 (20 N. W. R. 651).

2. Merry v. Sweet, 43 Barb. 475, 478; Hale v. Sweet, 40 N. Y. 97.

3. Martin v. Hall, 70 Ala. 421.

4. Burnett v. McClury, 92 Mo. 230 (4 S. W. R. 694); the contrary was held in Bray v. McClury, 55 Mo. 128, 133—Wagner, J., *dissenting*.

5. Davis v. Baker, 88 Cal. 106 (25 Pac. R. 1108).

6. Grover v. Buck, 34 Mich. 519.

7. Wells v. Parker, 26 Mich. 102; Whitney v. Brunette, 15 Wis. 61, 67.

8. Kelly v. Archer, 48 Barb. 68, 70.

9. Murray v. Hankin, 37 N. Y. Supr. (30 Hun) 37—Davis, P. J., *dissenting*; *contra*, Carr v. Van Hoesen, 33 N. Y. Supr. (26 Hun) 316.

case in the same court held that the entire omission of this clause made the attachment void.<sup>1</sup>

§ 260. "**Any of his property.**"—An affidavit in attachment in Wisconsin followed the exact language of the statute, alleging that the defendant "has assigned . . . *any* of his property with intent to defraud," etc., and this was held to be void because perjury could not be predicated upon it;<sup>2</sup> but where the affiant alleged that he was *apprehensive* instead of that he *verily believed* that defendant would dispose of his property, this was held to be no cause in Iowa even to reverse the main case on error. The court said: "The whole object of this writ, is to seize and hold the property of the defendant, or its equivalent, to abide the event of the suit. If the plaintiff recovers, the property is by operation of law to be considered as having been levied upon by execution. . . . As soon as the judgment is rendered the efficacy of the writ of attachment is expended, and although the proceedings under it may have been irregular, those in the primary suit have not thereby been vitiated so as to be reached by writ of error."<sup>3</sup>

"DOLLARS."—The omission of the word "dollars" from the affidavit does not make it void.<sup>4</sup>

DUE.—An affidavit in attachment in the federal court failed to allege that the claim was due, for which defect the supreme court of Michigan held the proceedings void,<sup>5</sup> but its decision on this point was reversed by the Supreme Court of the United States.<sup>6</sup> An old case in South Carolina held that a judgment in foreign attachment issued on a note not due was void, and it was set aside on the motion of a junior attacher,<sup>7</sup> and precisely the same ruling was made in California;<sup>8</sup> so it was held in Kansas in such a case that the defendant, though personally served, might recover from the plaintiff the value of the property sold.<sup>9</sup> Where the Wisconsin statute required the affidavit to state that the claim was "due," a statement that the

1. *Donnell v. Williams*, 28 N. Y. Supr. (21 Hun) 216.

2. *Miller v. Munson*, 34 Wis. 579 (17 Am. R. 461).

3. *Carothers v. Click, Morris* (Iowa) 54.

4. *De Bebian v. Gola*, 64 Md. 262 (21 Atl. R. 275). See section 234, *supra*.

5. *Mathews v. Densmore*, 43 Mich. 461 (5 N. W. R. 670).

6. *Matthews v. Densmore*, 109 U. S. 216 (3 S. C. R. 126).

7. *Walker v. Roberts*, 4 Rich. L. 561.

8. *Davis v. Eppinger*, 18 Cal. 378 (79 Am. D. 184).

9. *Connelly v. Woods*, 31 Kan. 359.

defendant was "indebted" was held, collaterally, to mean that the claim was due.<sup>1</sup> But where the affidavit before a judge of the common pleas in New York failed to state, except inferentially, that the defendant owed the claim *personally*, or that he had absconded with intent to defraud, this was held to make it void.<sup>2</sup>

§ 261. *Intent to defraud.*—The courts of New York, holding that the omission of any material allegation required by the statute makes the proceedings void, so hold when the affidavit in attachment fails to allege an intent to defraud creditors.<sup>3</sup> The statute of that state required the affidavit to state the *facts and circumstances* to establish the grounds showing a fraudulent departure or concealment. Where the affidavit stated that the deponent was acquainted with the defendant, who had been a stage-line proprietor, and that he had sold out and broken up his business, and had either departed or kept himself concealed, and that his landlord had sold his goods for the payment of rent, it was held that these allegations sufficiently tended to show the necessary facts and circumstances to shield the proceedings collaterally;<sup>4</sup> but the contrary was held where the affidavit alleged that defendant had left secretly with intent not to return and without the knowledge of his family, leaving but a small amount of property, and that his place of business was locked up.<sup>5</sup> The Missouri statute authorized a writ of attachment against one "about to remove from the state with intent to change his domicile," but to warrant its issuance on Sunday required the additional statement that he is "about fraudulently to secrete or remove his effects." A writ was issued on Sunday on an affidavit sufficient in all respects except that it omitted the latter clause, and this was held to make the proceedings void.<sup>6</sup>

§ 262. *Just.*—Proceedings in attachment are not void because the affidavit fails to allege that the claim is "just,"<sup>7</sup> or "justly

1. Trowbridge v. Sickler, 42 Wis. 417, 419.

2. Castellanos v. Jones, 5 N. Y. 164, 168.

3. Miller v. Brinkerhoff, 4 Denio 118 (47 Am. D. 242).

4. Matter of Faulkner, 4 Hill 598.

5. Kelly v Archer, 48 Barb. 68, 70.

6. Updyke v. Wheeler, 37 Mo. App. 680, 684.

7. Cooper v. Reynolds, 10 Wall. 308; Ludlow v. Ramsay, 11 Wall. 581; *accord* concerning an affidavit to a claim filed in the probate court, Rogers v. Wilson, 13 Ark. (8 Eng.) 507, 509; *contra*, Endel v. Leibrock, 33 O. St. 254, 267, where the affidavit not only failed to allege that the claim was just, but was verified on *belief* only.

due ;" <sup>1</sup> or uses the words "justly indebted" instead of "just ;" <sup>2</sup> or fails to state that plaintiff has no *lien* as security.<sup>3</sup>

**LAST RESIDED.**—The New York statute authorized the writ where a person, with fraudulent intent, was about to depart from the county where he "last resided," and the omission of these words was held to make the proceedings void ;<sup>4</sup> but the contrary was held in Indiana.<sup>5</sup> In another case in New York on the same statute, it was said : "If the justice might construe the affidavit as meaning that the county of Oneida was the last place of residence of the defendant, he acquired jurisdiction, and the attachment cannot be held void in a collateral proceeding."<sup>6</sup> Where the affidavit stated, by way of recital, that the plaintiff was a resident of New York City, but failed to aver so, positively, the proceedings were held void.<sup>7</sup>

**§ 263. Nature of claim or demand or cause of action.**—The attachment statutes only authorize the writ on certain specified claims, demands or causes of action, and always require the affidavit to state the nature of the cause sued upon in order to show a right to the writ. The cases, with one single exception, hold that a failure to observe this requirement makes the proceedings void. Thus, they are void when the affidavit fails to state what the cause of action is,<sup>8</sup> or to specify "the nature of the demand,"<sup>9</sup> or that a cause exists ;<sup>10</sup> and a like ruling was made where the Michigan statute required the affidavit to state that the claim "is due upon contract, express or implied, or upon judgment," whereas it merely stated that the claim "is now due and upon contract"—the court holding that it ought to have stated the character of the contract.<sup>11</sup> It is difficult to see even an *error* in that affidavit, let alone any want of jurisdiction. The statute of Michigan authorized an attachment against logs for "any labor or services in falling, cutting, hauling, banking, driving or running

1. Lee v. Figg, 37 Cal. 328, 336 (99 Am. D. 271), this being in confession of judgment.

2. Boyd v. Gentry, 12 Heisk. (59 Tenn.) 625, 627.

3. Scrivener v. Dietz, 68 Cal. 1 (8 Pac. R. 609).

4. Garrison v. Marshall, 44 How. Pr. 193, 195 ; Tucker v. Malloy, 48 Barb. 85, 89.

5. Cornwell v. Hungate, 1 Ind. 156.

6. Ketchum v. Vidvard, 4 Thomp. & Cook, 138, 140.

7. Payne v. Young, 8 N. Y. 158.

8. Maples v. Tunis, 11 Humph. 108 (53 Am. D. 779) ; Jacobs v. Hogan, 85 N. Y. 243.

9. Stewart v. Mitchell, 10 Heisk. (57 Tenn.) 488 ; Sullivan v. Fugate, 1 Heisk. (48 Tenn.) 20.

10. Hisler v. Carr, 34 Cal. 641, 646.

11. People *ex rel.* Tracy v. Blanchard ; 61 Mich. 478 (28 N. W. R. 669).

any logs or timber," upon an affidavit showing, among other things, "that the indebtedness is due for or on account of such labor or service on such logs or timber as entitles the plaintiff to a lien thereon." The affidavit alleged that plaintiffs "performed labor" upon logs described, without saying what kind. This was held void, in trover, although the owners had appeared and pleaded to the merits.<sup>1</sup> The Ohio statute authorized an attachment to issue for "a debt or demand arising upon contract, judgment or decree." The petition and affidavit showed that the cause of action arose from a breach of duty but failed to show that such breach was connected with a contract, judgment or decree; and this was held to make the judgment (by default) void.<sup>2</sup> The Indiana statute required the affidavit to state the nature of the claim. This was done, and service made by publication, but before the judgment another note became due, and it was included in the complaint, and judgment by default taken on all, without any new affidavit. This was held not void.<sup>3</sup> So it was held in Pennsylvania that a decision holding the income of a *cestui que trust* not subject to attachment, could not be questioned collaterally.<sup>4</sup>

§ 264. **Non-residence**, being a ground for attachment, an affidavit which reads that deponent "applies for an attachment on the ground that the defendants are non-residents," is informal but sufficient to shield the proceedings from collateral attack;<sup>5</sup> but where the Kansas statute made non-residence of the state a ground, an allegation "that the defendant is a foreign corporation *or* a non-resident of Brown county," was held to make the proceedings void.<sup>6</sup>

OBVIOUS.—Where the statutory meaning is obvious or inferential from the affidavit, the proceedings are not void for incorrect language. Thus, where the affidavit was made by an attorney in fact for the plaintiff, an allegation that the debt was due the deponent,<sup>7</sup> was held obviously to mean plaintiff; and where the affidavit failed to state that the property described had been

1. Woodruff v. Ives, 34 Mich. 320.

2. Pope v. Hibernia Ins. Co., 24 O. St. 481, 485.

3. Schoppenhast v. Bollman, 21 Ind. 280, 286.

4. Brook's Estate, 8 Pa. Co. Court R. 514, 518.

5. Bascom v. Smith, 31 N. Y. 595.

6. Dickenson v. Cowley, 15 Kan. 269, 273.

7. Russell v. Work, 35 N. J. L. (6 Vr.) 316.

attached and that the plaintiff sought to subject it to attachment, these matters were said to be plainly inferential.<sup>1</sup>

**SECRETLY DEPARTED.**—The fact that defendant had secretly departed from the state with intent to defraud his creditors, being a cause for attachment in New York, one issued on an affidavit that he had *recently* departed from the state with all the avails of himself and partner, is void.<sup>2</sup>

**VEXING.**—But the proceedings are not void in Alabama for a failure to aver that the attachment was “not sued out for the purpose of vexing or harassing the defendant.”<sup>3</sup>

**VOLUNTARILY LEAVING.**—The Kentucky statute authorized an attachment on the ground “that he or they have voluntarily left the county of his or their residence; have been absent therefrom for thirty days, and during said period of time have been, and continued voluntarily, within the so-called confederate states or their military lines.” An affidavit alleged that the defendant “has voluntarily left the county of his residence; has been absent therefrom for thirty days, and during said period of time has been and continued in the so-called confederate states or their military lines”—omitting to state that he had continued “voluntarily” within the so-called confederate states. This was held not to make the sale void.<sup>4</sup>

#### DIVISION B.

##### BANKRUPTCY, INSOLVENCY AND POOR-DEBTORS' PROCEEDINGS.

§ 265. Amount of debts—“Attached on contract”—Consideration of claim.	266. Names of creditors—Partners, individual assets of. 267. Premature new petition.
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§ 265. **Amount of debts.**—Where the New York statute required the consent of creditors holding two-thirds of the indebtedness of an insolvent in order to warrant his discharge, it was held void when granted on a petition which failed to show that those holding the necessary amount had consented,<sup>5</sup> or where the amount due one creditor was left blank;<sup>6</sup> and the same ruling was made when the petition showed affirmatively that those holding the necessary amount had not consented.<sup>7</sup>

1. Long v. Fife, 45 Kan. 271 (25 Pac. R. 594).

2. Decker v. Bryant, 7 Barb. 182, 188.

3. Martin v. Hall, 70 Ala. 421.

4. Paul v. Smith, 82 Ky. 451, 455—Hines, C. J., *dissenting*.

5. Frary v. Dakin, 7 Johns. 75.

6. Stanton v. Ellis, 12 N. Y. 575 (64 Am. D. 512).

7. Morrow v. Freeman, 61 N. Y.

515. See sections 276 and 277, *infra*.

“ATTACHED ON CONTRACT.”—The failure of a petition in involuntary insolvency, in Massachusetts, to allege that the estate of the debtor had been “attached on contract,” or a provable demand, does not make the proceeding void.<sup>1</sup>

CONSIDERATION OF CLAIM.—In such cases the New York statute required “the true cause and consideration” of the claim of the petitioner to be shown, and a petition stated that one claim was founded “upon certain promissory notes and sundry transactions between Payson and Maxwell,” but the proceeding was decided not to be void;<sup>2</sup> but where an affidavit of one of the necessary number of creditors stated that a sum named was justly due him on two notes given for a specified amount, the failure to state the consideration was held to make the discharge void.<sup>3</sup>

A MATERIAL ALLEGATION omitted from an insolvent’s petition, was held by the court of appeals of New York to make the discharge void.<sup>4</sup> I cannot agree with these decisions. There was no want of jurisdiction over the person, for all parties were before the court. The *right to a discharge* was the subject-matter. The power of the court to investigate that matter was full, complete and exclusive. Its power was not affected because the petition was not sufficient before a court *that knew the law*. Perhaps that court did not know all the law, and perhaps it overlooked the facts as shown in the petition. But the petition stated facts sufficient “to set the judicial mind in motion,” and nothing further is necessary to shield the proceedings collaterally.

§ 266. **Names of creditors.**—The California statute required the petition in insolvency to state the names of all creditors, if known. The petition gave the name of the person to whom a note had been indorsed, but did not state that he did not then know the real holder. It had been assigned to another person. It was held that this defect in the petition made the discharge void as to the real holder of the note.<sup>5</sup> But where an insolvent’s petition for a discharge, in Massachusetts, did not

1. Partridge v. Hannum, 2 Metc. 236, 244, *affirming* 2 Lans. 71. See 369, 571. section 255, *supra*.

2. Devlin v. Cooper, 27 N. Y. Supr. 410. 5. McAllister v. Strode, 7 Cal. 428, 431; *accord*, Judson v. Atwill, 9 Cal. 477, which also holds that the debtor cannot prove that he did not know the name of the holder.

3. Gillies v. Crawford, 2 Hilton 338.

4. Bullymore v. Cooper, 46 N. Y.



contain the names or places of residence of all the creditors, as required by statute, the discharge was held not void.<sup>1</sup>

**PARTNERS, INDIVIDUAL ASSETS.**—A petition in insolvency in California, filed by partners, jointly, gave a list of the firm assets but was silent as to individual assets, and for that defect the discharge was decided to be void.<sup>2</sup> But, as a judgment is never void, if, by possibility, it may have been right, the presumption was conclusive that there were no individual assets.

**§ 267. Premature new petition.**—A Massachusetts statute provided that “where a defendant or debtor has given notice of his desire to take the oath for the relief of poor debtors, no new notice of the same shall be given until the expiration of seven days from the service of the former notice, unless the former notice was insufficient in form or service.” Where the first notice and service were sufficient, this statute made a new action, brought within seven days, premature. How that would touch the jurisdiction of the court, it is difficult to see, yet the supreme court of that state has held it jurisdictional. The greater the distance which the creditor resided from the court the longer the time he had to be served before the hour fixed for hearing. Upon the calling of a case, the creditor was absent and the return failed to show whether or not he had been served in time, and the debtor caused a new notice to issue; and after that, the officer amended his return so as to show the first service sufficient. On the return day of the second notice the debtor was discharged, and this was held void, because the first notice was not, in fact, insufficient.<sup>3</sup> In another case a magistrate adjudged the service on the first notice to be insufficient, and issued a new one, on which the debtor was discharged. The validity of this discharge coming collaterally before the supreme court, it was contended by counsel for the debtor that the decision of the magistrate on a close question of law was conclusive, though erroneous, but the court declined so to hold, although it admitted that a statement of Chief Justice Bigelow in a former case<sup>4</sup> would seem to countenance that view; and because the supreme court differed with the magistrate it held his decision void.<sup>5</sup> So, a discharge, granted on a new notice, issued six days after the first, was held void

1. *Williams v. Coggeshall*, 11 Cush. 442, 446. *Accord*, as to same defect in bankruptcy, is *Burnside v. Brigham*, 8 Metc. 75.

2. *Meyer v. Kohlman*, 8 Cal. 44, 47.

3. *Safford v. Clark*, 105 Mass. 389; *accord*, *Hastings v. Partridge*, 124 Mass. 401.

4. *Skinner v. Frost*, 6 Allen 285.

5. *Millett v. Lemon*, 113 Mass. 355.

because the first was not actually insufficient.<sup>1</sup> But where the creditor's attorney induced the magistrate to believe that a notice really sufficient was insufficient, by reason of which he issued a new one on which the debtor was discharged, it was held that the conduct of his attorney estopped him from attacking the new proceeding because of the actual sufficiency of the old.<sup>2</sup> These decisions take from the poor debtors' court all judicial discretion on the point in question, and reduce it to the level of a mere ministerial office, and authorize all other courts to sit and review its errors of law, and I do not think they are sound. The appointment of a *provisional* assignee in bankruptcy is not void for a mere error.<sup>3</sup>

# DIVISION C.

## CAPIAS PROCEEDINGS.

§ 268. Colorable allegations.	Fraudulent refusal to pay—
269. General allegations.	Freeholder — Intent to de-
270. Material allegations omitted—	fraud—Justify belief.
“Absconds” — Amount —	271. Affidavit wanting.

§ 268. Colorable allegations.—An affidavit for an arrest in a civil case,<sup>4</sup> or a petition for a *ne exeat*,<sup>5</sup> which makes a colorable charge of fraud, or which tends to show each necessary fact,<sup>6</sup> is not void. Where the New York statute authorized arrests in cases of tort shown by affidavit, allegations making a colorable case in tort were held sufficient to protect the plaintiff and all others concerned when sued for damages.<sup>7</sup> An affidavit for arrest in a civil case which sets forth the admissions of the defendant that he owned certain property, and also his declarations that he has parted with it, which declarations the affiant alleges to be false as he verily believes, is sufficient to give the court jurisdiction.<sup>8</sup> But one which alleged that defendant “obtained a settlement for house rent by giving me a fraudulent order which I received in good faith, otherwise should not have settled for said rent,” was held void.<sup>9</sup> It seems to me that enough was alleged

1. Browne v. Hale, 127 Mass. 158.  
2. Grant v. Clapp, 106 Mass. 453.  
3. Raymond v. Morrison, 59 Iowa 371 (13 N. W. R. 332).  
4. In Matter of Prime, 1 Barb. 340, 349.  
5. Bassett v. Bratton, 86 Ill. 152, 156.  
6. *Ex parte* Davis, 17 Neb. 436 (23 N. W. R. 361).

7. Landt v. Hilts, 19 Barb. 283, 289.  
8. Wheaton v. Fay, 62 N. Y. 275—Folger, J., *dissenting*. It seems strange that so able a judge would dissent on so plain a case. There was something to examine, at least.  
9. Mudrock v. Killips, 65 Wis. 622 (28 N. W. R. 66).

“to set the judicial mind in motion.” The Kansas statute authorized an arrest in a civil proceeding in case “the defendant fraudulently contracted the debt.” The affidavit alleged that the “defendant has said he did not intend paying the plaintiff, and that he never did intend to pay him from the time the debt was contracted to the present time.” The defendant was arrested and brought before the justice, who heard the cause and rendered a judgment on the merits for the plaintiff, and issued an execution on which the defendant was further imprisoned. The defendant sued the justice, the plaintiff, and his attorney, for false imprisonment, and it was held that the proceedings before the justice were void and no protection. The court held that an affidavit failing to state any statutory cause gave no jurisdiction, and that the affidavit failed in that respect.<sup>1</sup> But this affidavit was at least colorable. The Kansas statute required the affidavit to state one or more specified acts, and also “a statement of the facts claimed to justify the belief in the existence” of the alleged grounds for arrest. The affidavit filed before the justice alleged that “the defendant has disposed of his property with intent to defraud his creditors. He is justified in the belief of the above facts from the following considerations: That the defendant, living at Lawrence, lately sold all his property known to affiant, and converted the same into money, and has left Lawrence, his late place of business and residence, and made no provision for the payment of his debts.” On this affidavit the defendant was arrested. He afterwards sued the plaintiff for false imprisonment. The court said the affidavit was obviously insufficient; but that the justice acted judicially in the matter, and that the affidavit was sufficient to challenge judicial examination, and that the decision of the justice was not void.<sup>2</sup> In an early English case where the allegation was that affiant “suspected” instead of “believed” that defendant would run away, an arrest was held to make all parties trespassers.<sup>3</sup> In a case in New York, the affidavit charged that the debtor “had assigned, removed or disposed of, or was about to dispose of his property with intent to defraud his creditors,” and then proceeded: “That deponent’s reasons for believing so are as follows: That the said Benjamin P. Vredenburgh has recently had left to

1. *Hauss v. Kohlar*, 25 Kan. 640.

3. *Bouchier’s Case*, 2 Strange 993.

2. *Gillett v. Thiebold*, 9 Kan. 427,  
432.

him by the will of his father, Peter Vredenburg, deceased, the sum of six hundred dollars, and refuses to appropriate any part of said legacy towards paying any part of deponent's demand; that deponent therefore caused a summons to be issued by a justice of the peace, and to be served upon said Vredenburg, in order to collect said demand; that said Vredenburg declared to the officer who served said summons that he would be damned if he would pay this deponent one cent, because deponent had sued him." On this affidavit a warrant was issued and Vredenburg was arrested, and he afterwards sued the affiant for false imprisonment. The court admitted that the rule was, that, if the affidavit tended to establish the charge that the debtor had disposed of his property with intent to defraud his creditors, or that he was about to do so, it would give the court jurisdiction and protect all parties; but it held that the affidavit had no such tendency, and that the proceeding was void.<sup>1</sup> The Wisconsin statute authorized the arrest of a defendant in a civil case upon an affidavit "that the defendant has committed a trespass, or other wrong, specifying the nature thereof, to the damage of the plaintiff." And where the affidavit charged that the defendant "obtained a settlement for house rent by giving me a fraudulent order, which I received in good faith; otherwise should not have settled for said rent," the arrest was held void.<sup>2</sup> I think the last two cases unsound.

§ 269. **General allegations.**—An affidavit for an arrest in a civil case in Oregon, alleged that "defendant has been guilty of fraud in contracting the said debt," following the language of the statute, but defective in failing to set out the facts constituting the fraud. This was decided not to make the judgment void on *habeas corpus*.<sup>3</sup> But in Illinois, where the affidavit alleged that the claim "will be in danger of being lost unless the defendant be held to bail," in the exact language of the statute, the defendant was discharged on *habeas corpus* because the affidavit did not state facts from which fraud could be inferred.<sup>4</sup> This case accords with one in New York, which held the proceedings void for failure to state the facts and circumstances showing the grounds of the application.<sup>5</sup> It seems quite clear to me that the Oregon

1. Vredenburg v. Hendricks, 17 Barb. 179.

2. Mudrock v. Killips, 65 Wis. 622 (28 N. W. R. 66).

3. Barton v. Sanders, 16 Or. 51 (16 Pac. R. 921).

4. *Ex parte* Smith, 16 Ill. 347, 349.

5. Whitney v. Shufelt, 1 Denio 592.

case is right, and the latter two wrong, because they fail to discriminate between a direct and a collateral attack.

§ 270. **Material allegations omitted—"Absconds."**—The Vermont statute authorized writs of *capias* against a debtor "about to *abscond* from the state." An affidavit alleged that the debtor was "about to *leave* the state." The debtor was arrested, gave bail and suffered judgment by default. On *scire facias* against the bail, it was held that the whole proceeding was void because the word "abscond" meant a secret leaving while the word "leave" did not.<sup>1</sup> It seems very plain that this case is wrong.

**AMOUNT.**—An English statute required an affidavit for an arrest in a civil case to state the exact amount due; but the proceedings were held not void because the amount was stated to be "20*l.* and upwards;"<sup>2</sup> but for an omission to state the amount due, a conviction was held void on *habeas corpus* in Florida.<sup>3</sup>

**FRAUDULENT REFUSAL TO PAY.**—An Illinois statute authorized a *capias* to issue on an affidavit showing facts from which a fraudulent refusal to pay a judgment could be inferred. The affidavit was that defendant "withholds his money or secretes his property from the officers, so that the debt cannot be levied." In an action against the sheriff for an escape, the proceedings were held void.<sup>4</sup>

**FREEHOLDER.**—The New York statute did not authorize *capias* proceedings before justices against freeholders of the county. But such proceedings were held valid collaterally, although the affidavit failed to allege that defendant was not a freeholder of the county.<sup>5</sup>

**INTENT TO DEFRAUD.**—A Massachusetts statute, in *capias* proceedings, required the affidavit to allege that the defendant had property not exempt from being taken on execution "which he does not intend to apply to the payment of the plaintiff's claim." The absence of the allegation in the quotation was held to make the proceeding void.<sup>6</sup>

**JUSTIFY BELIEF.**—An Ohio statute required the affidavit to contain "a statement of the facts claimed to justify the belief in the existence" of the alleged fraudulent conduct. The omission

1. Aiken v. Richardson, 15 Vt. 500.

4. Gorton v. Frizzell, 20 Ill. 291,

2. Riddle v. Pakeman, 2 C. M. & R. 295.

30 (5 Tyrwh. 721).

5. Harrison v. Clark, 11 N. Y. Supr.

3. *Ex parte* Hays, 25 Fla. 279 (6 (4 Hun) 685.

S. R. 64).

6. Stone v. Carter, 13 Gray 575.

to state such facts was held to make the proceeding void and the plaintiff a trespasser.<sup>1</sup>

**SCHEDULES.**—The failure of a petition in bankruptcy to give a schedule of the debts and assets, does not make the proceeding void.<sup>2</sup> The insolvency statute of Maine required the debtor to make and sign “a list of creditors and schedule of assets,” *annex* them to his affidavit, and swear that “My assets and liabilities are correctly stated in the schedule hereunto *annexed*, and signed by me.” A discharge was decided not to be void because the schedules were not annexed to the affidavit.<sup>3</sup> See section 283, *infra*.

§ 271. **Affidavit wanting.**—A person was arrested and imprisoned for debt by order of a court of the Island of Jersey without an affidavit being made. On *habeas corpus*, it was held that the order was irregular but not void; that the proper remedy was to apply to the trial court for a release.<sup>4</sup> In a late case in a federal circuit court, it was said that, conceding the arrest of an alleged lunatic on a warrant issued without oath, in proceedings to inquire of his lunacy, to be in violation of the constitution, that does not make the trial and judgment declaring him a lunatic void.<sup>5</sup> I think these are two sensible decisions. A person under arrest in court, or his friends who are defending him, ought to call attention to the fact that no written charge has been filed. The want of such written charge in no way affects the merits of the trial. All parties assume its existence without looking for it. But an order of arrest by a justice in a civil case without any affidavit was held void in Vermont.<sup>6</sup> See sections 327 and 328, *infra*.

1. *Spice v. Steinruck*, 14 O. St. 213, 219.

2. *Dictum* in *Mount v. Manhattan Co.*, 41 N. J. Eq. 211 (3 Atl. R. 726).

3. *Cobbossee National Bank v. Rich*, 81 Me. 164 (16 Atl. R. 506, 508).

4. *Dodd's Case*, 2 De Gex & Jones, 510, 530 (59 Eng. Ch. 509, 528).

5. *Sprigg v. Stump*, 8 Fed. R. 207, 215—*Sawyer and Deady, JJ.*

6. *Muzzy v. Howard*, 42 Vt. 23.

## DIVISION D.

## CONDEMNATION, CONFISCATION, EXEMPTION AND FORFEITURE PROCEEDINGS.

§ 272. Highway established—Description of route—"Householders"—Material allegation omitted—Name of road corporation.

§ 273. Railway location, description of route by reference—Refusal to relinquish right of way.

274. Confiscation against married woman—"Voluntarily"—Exemption from execution—Forfeiture of gaming device.

§ 272. Highway established—Description of route.—In a collateral attack on a judgment for uncertainty in the description of land, the same rules govern as in an attack on a deed;<sup>1</sup> hence, a judgment locating a highway is not void because the petition described one terminus as "beginning at *or near*" a certain described house, as the words "or near" will be rejected as surplusage.<sup>2</sup> In this case an amendment showed that the point of beginning was at a stake forty-two feet from the house, still the court held that so small a variation did not make the proceedings void.<sup>3</sup> But where a petition to lay out a highway in Oregon terminated it "thence *southerly* to intersect the county road *near* the foot of the Nevil hill *near* the south line of John A. Jehus' land claim," it was held void.<sup>4</sup> On principle, I think the New Hampshire case right and the Oregon case wrong. In a late case in Indiana, a petition to establish a highway, correctly carried the description to a point near a marsh, and then proceeded, "thence running in a southwesterly direction about sixty-nine rods around said marsh, on the most *suitable* ground," to a point named. The judgment of the board establishing the road was held impervious to collateral attack.<sup>5</sup> But where a petition for the location of a highway described its course to a certain point, and "thence northwest fourteen rods, with an angle of about ten degrees," an order laying it out by this description was held void because there was no way to determine which way from the northwest line the angle was to run.<sup>6</sup> As the variation was so small and the distance so short, the maxim *de minimis non curat lex* ought to have been applied.

1. Proctor v. Andover, 42 N. H. 348, 353.

2. Id.

3. S. C. 42 N. H. 348, 360. See sections 273 and 280, *infra*.

4. Johns v. Marion County, 4 Or. 46, 50.

5. Adams v. Harrington, 114 Ind. 66 (14 N. E. R. 603).

6. Smith v. Weldon, 73 Ind. 454, 456.



"HOUSEHOLDERS."—An Iowa statute required a petition to the commissioners' court for a road to be signed by householders. An order establishing a road was held valid collaterally, although neither the petition nor the record showed that the signers to the petition were thus qualified.<sup>1</sup>

MATERIAL ALLEGATION OMITTED.—An Indiana statute authorized the court to establish as lawful "all public highways which have been used *as such* for twenty years or more." It was held that the order establishing such a road was not void because the petition omitted the words "as such," and that a witness in that proceeding could commit perjury.<sup>2</sup>

NAME OF ROAD CORPORATION.—An Indiana statute authorized the board of county commissioners to organize gravel-road companies on the presentation of articles of association, stating among other things "the name which they assume." The articles presented were headed "Fairview Turnpike," but no name was stated in the body, and no reference to the heading made. An order organizing the corporation was held void for this defect.<sup>3</sup> But the board had the same duty to perform and was as competent in law as the supreme court, and they held that the words at the head indicated the name which the petitioners intended to adopt for the corporation. But the absence of any name was simply the omission of one material allegation, which, according to numerous cases in that court, did not make the judgment void.

§ 273. **Railway location, description of route by reference.**—A judgment condemning land for a railway is not void for uncertainty of description in the petition when it refers to a map and profile in the clerk's office which give a correct description.<sup>4</sup>

REFUSAL TO RELINQUISH RIGHT OF WAY.—A judgment condemning land for a railroad was held void in Missouri because the petition failed to aver that the defendant "refused to relinquish the right of way"—the court saying that that was a jurisdictional fact.<sup>5</sup> But this decision seems to confound a fact necessary to constitute a cause of action with the question of jurisdiction, which is the right to condemn. On the same principle, that court ought to hold a judgment on a note void where the complaint fails to aver that it is unpaid, because both

1. *Keyes v. Tait*, 19 Iowa 123.

2. *Weston v. Lumley*, 33 Ind. 486, 492.

3. *Piper v. Rhodes*, 30 Ind. 309.

4. *St. Joseph Hydraulic Co. v. Cin-*

*cinnati, Wabash and Mich. Ry. Co.*, 109 Ind. 172 (9 N. E. R. 727). See sections 279 and 280, *infra*.

5. *Ellis v. Pacific R. R. Co.*, 51 Mo.

200, 203.

the statute and the common law are imperative that no action will lie on a paid note. Non-payment is a condition precedent to the right to invoke the jurisdiction of the court just as much as non-relinquishment was in that case.

§ 274. **Confiscation against married woman—"Voluntarily."**—A judgment forfeiting the lands of a married woman was erroneous because it failed to show that she voluntarily remained with the enemy or gave them aid, but it was decided not to be void.<sup>1</sup>

**EXEMPTION FROM EXECUTION.**—A petition for exemption described the articles too generally, as a stock in trade of the value of eight hundred and fourteen dollars and fifty cents, consisting of watches, jewelry, fancy goods, fixtures, etc., but the judgment allowing the exemption was held to be void collaterally.<sup>2</sup>

**FORFEITURE OF GAMING DEVICE.**—A Missouri statute authorized a judge or justice, on satisfactory information being produced that any device was kept or used for gaming, to issue his warrant for its seizure and destruction. A warrant issued in such a case by a judge failed to recite that the device was kept or used for gaming. This was held void, and to make the sheriff a trespasser because the defect appeared in his warrant.<sup>3</sup> The proceedings were bad on a motion to quash, but I do not see why they were void.

#### DIVISION E.

##### PROBATE PETITIONS TO SELL, MORTGAGE, ETC.

§ 275. Principle involved in division E.

276. Amounts and values, gross and not itemized.

277. Amounts and values, omitted.

278. Circumstances and condition—"Debts."

279. Description of land in petition, defective.

280. Description of land by reference to other papers—Donation.

281. "Estate of decedent."

§ 282. Evidence, instead of facts—Exhaustion of personalty.

283. Exhibits and schedules, omitted.

284. Limitations, claim barred by.

285. Material allegation omitted—Inconsistent positions of supreme court of Alabama—"Orphan"—Two petitions.

286. Necessity for sale.

287. Object or purpose in selling, unlawful.

288. Premature petition to sell—Residence—Same or similar import—Surplusage.

§ 275. **Principle involved in division E.**—The administration of the estate of a decedent, as was decided by the supreme court of

1. *Kemp v. Kenndy*, 1 Peters C. C. 30, 36.

2. *Bartlett v. Russell*, 41 Ga. 196.

3. *McCoy v. Zane*, 65 Mo. 11.

Minnesota,<sup>1</sup> is one indivisible judicial proceeding from the order appointing the administrator to that of his final discharge. The proceeding is one purely *in rem*, and all parties in interest—heirs, devisees, legatees, distributees and creditors—are necessarily in court all the time. Petitions to sell and mortgage land are simply motions in a pending cause, and, on principle, no want of form or substance ought to make the sale void. The adverse parties are given the opportunity to examine and object to the petition when it is filed, and are given another opportunity to object to the entire proceeding on motion for confirmation of the sale, and the court is always open to their petitions and motions to compel the administrator to do his duty in the *interim* between the order to sell and the confirmation, and as the purchaser furnishes the money to pay their ancestor's debts, equity and good conscience loudly demand an estoppel against their proceeding afterwards, in a collateral action, to recover the land thus sold. A statute of Texas authorized a sale of a ward's land when the ward "has not sufficient means for his proper support and education, or to pay the debts against his estate." The petition alleged that the ward's land was timbered, and that trespassers were cutting off the timber and depreciating its value, and that therefore the best interests of the ward would be subserved by a sale, and on this petition a sale was ordered and made. This was held not to be void. The court said: "In the matter before us it is not contended that the county court did not have jurisdiction of the subject-matter, in that it had power to order and confirm a sale of lands belonging to a minor's estate, nor is it denied that its jurisdiction had attached as to the estate of the minors being administered therein."<sup>2</sup> It will be seen that the court had power to grant the relief sought in a proper case, but no rightful power in the case presented by the petition. In other words, the petition failed to state a cause of action, and was bad in substance.

§ 276. **Amounts and values, gross and not itemized.**—An administrator's sale of land was held void in New York because the petition gave the gross amounts of the assets and debts, instead of an itemized statement, as required by statute;<sup>3</sup> but the same court had held that a confession of judgment was not void for the same

1. *Culver v. Hardenburgh*, 37 Minn. 225 (33 N. W. R. 792).

2. *Weems v. Masterson*, 80 Tex. 45 (15 S. W. R. 590).

3. *Van Nostrand v. Wright*, Hill & D. 260.

failure to comply with a like statute.<sup>1</sup> So it was decided in California that a discharge of an insolvent was not void for the failure of the petition to set forth the items of property and losses with sufficient particularity.<sup>2</sup> See section 265, *supra*.

§ 277. **Amounts and values, omitted.**—Where the defects here considered have been passed upon in other kinds of proceedings, they are either included herein or referred to. The statutes almost uniformly require an administrator's petition to sell land to pay debts, to state their amount, as near as may be, and the value of the personal property, but the failure of such a petition to state the amount of the debts;<sup>3</sup> or a statement that "the debts and charges amount to over one hundred dollars;"<sup>4</sup> or the failure to state the value of the personal property;<sup>5</sup> or the failure of an applicant for letters of guardianship to show the amount of the assets of the ward, as required by statute,<sup>6</sup> does not make the proceedings void. The Iowa supreme court said: "Jurisdiction is called into exercise by the filing of the petition and the service of notice. The court of necessity must determine the sufficiency of the petition."<sup>7</sup> An administrator's petition to sell land in Illinois alleged that there were no *available* assets with which to pay debts, but failed to state that he had filed an inventory and appraisement of the personal estate, and that it was insufficient to pay them. The court said: "The petition stated enough to require the court to act in the premises—to set it in motion, and that was sufficient to give the court jurisdiction; and whatever was done under it was not in the exercise of a usurped power, but of one conferred by law; and although the court may have exercised that power erroneously, its orders are binding till reversed."<sup>8</sup> But it was held in New York that an insolvent's discharge was void because the amount due one creditor was left blank in the schedules.<sup>9</sup> A justice had authority to entertain replevin wherein the value did not exceed three hundred dollars. The affi-

1. *Germon v. Swartwout*, 3 Wend. 282.

2. *Bennett v. His Creditors*, 22 Cal. 38, 42.

3. *Myers v. Davis*, 47 Iowa 325, 329; *Read v. Howe*, 39 Iowa 553, 559; *Moffitt v. Moffitt*, 69 Ill. 641, 646.

4. *Little v. Sinnett*, 7 Iowa 324, 331.

5. *Morrow v. Weed*, 4 Iowa 77 (66 Am. D. 122); *contra*, *Gregory v. Taber*,

19 Cal. 397, 409 (79 Am. D. 219), and *Gregory v. McPherson*, 13 Cal. 562, 576, relying on *Bloom v. Burdick*, 1 Hill 130, 133.

6. *Lee v. Ice*, 22 Ind. 384.

7. *Read v. Howe*, 39 Iowa 553, 559.

8. *Iverson v. Loberg*, 26 Ill. 179 (79 Am. D. 364).

9. *Stanton v. Ellis*, 12 N. Y. 575 (64 Am. D. 512).

davit did not allege the value, and the jury found it to be seventy-five dollars. For this defect in the affidavit, the justice was held to be a trespasser.<sup>1</sup> It seems to me that the court might have held that the record, as a whole, showed the cause to be within the jurisdiction of the justice. Nothing tends more to bring the courts into disrepute than to hold the judge personally responsible for a bald technicality which the record shows to be without merit. It encourages the idea, already too prevalent, that a trial in court is a mass of tricks and jugglery in which the most *astute* counsel comes out ahead. For these reasons, the courts themselves ought to be astute in finding ways to uphold their righteous judgments. The same point was decided the same way by a federal court sitting in New York, which held a justice's judgment in replevin void for want of an affidavit showing the "actual value," although the cause had been tried on the merits,<sup>2</sup> and the actual value was within the jurisdiction. Where the statute required an administrator's petition to sell land to set forth "the amount of the personal estate that has come into his hands," a petition verified by the attorney and referring to the "inventory and appraisement" for the amount of the personal estate, made the sale void.<sup>3</sup> See section 273, *supra*.

§ 278. **Circumstances and condition.**—The failure of a guardian's petition to sell land to show the circumstances and condition of the estate, does not make the sale void.<sup>4</sup>

"DEBTS."—But where an administrator's petition to sell land in Alabama alleged "that the personal property of the estate of said decedent is insufficient to pay the debts of the said estate," without any direct allegation that there were debts,<sup>5</sup> and where a guardian's petition to sell land in North Carolina failed to show that it was to pay such a debt as the statute authorized a sale to be made to pay,<sup>6</sup> the sales were held void. But the petition in the Alabama case did show inferentially that there were debts, and that is sufficient to establish the fact collaterally. Where an administrator's sale was ordered in Illinois on a petition and transcript showing that debts had been allowed in another state,

1. McClure v. Hill, 36 Ark. 268.

2. Daily v. Doe, 3 Fed. R. 903, 907 (35 N. W. R. 80).

—Choate, J.

3. Pryor v. Downey, 50 Cal. 388, 495 (7 S. R. 919).  
395, 399 (19 Am. Rep. 656).

4. Fender v. Powers, 67 Mich. 433

5. Abernathy v. O'Reilly, 90 Ala.

6. Coffield v. McLean, 4 Jones Law  
15; Spruill v. Davenport, 3 id. 42.

this was held valid collaterally.<sup>1</sup> The discharge of a poor debtor in Massachusetts was held void because his petition failed to allege as required by *statute*, that he was unable to pay the debt for which he was imprisoned,<sup>2</sup> notwithstanding the fact that the creditor appeared and examined him.<sup>3</sup>

DEFECTS in a petition by a guardian to sell land,<sup>4</sup> or in an affidavit for a restraining order,<sup>5</sup> or in a petition for the appointment of an administrator,<sup>6</sup> or in a bankruptcy petition, schedules and affidavit<sup>7</sup> do not make the proceedings void.

§ 279. **Description of land in petition, defective.**—A California statute required an administrator's petition to sell land to describe *all* the lands owned by decedent, and the condition and value of the respective portions and lots. For a description, the petition referred to the inventory which described six parcels, two of which descriptions were void for uncertainty. One properly described was sold, and this was held void because all were not properly described.<sup>8</sup> It seems to me that the court might have held, without much strain on the law, that so small and obscure an error was waived by a failure to object to the order to sell. In marked contrast with this case, is one from Texas, where the statute required both the petition and the order to sell to describe the land. A petition asked leave to sell "any land and as much land" of the decedent as would suffice to pay his debts, and the order to sell was in the same words. On this order, land was sold and the sale confirmed, and this was held not void—the court saying: "Though there may have been irregularity in the order of the probate court, it was not such as to render the proceeding absolutely void, and it cannot therefore be collaterally impeached."<sup>9</sup> An administrator's petition to sell land in Kansas, simply described it as "situated in Miami county." The statute required it to give "a description of the real estate to be sold." The order of sale, made on default, gave a correct description of the land, as did the subsequent proceedings and deed. In ejectment by the heirs, the court said: "Whether the petition is in proper form or sets forth sufficient facts, are matters for the

1. Hobson v. Ewan, 62 Ill. 146, 154.

2. Webster v. French, 11 Cush. 304. 547.

3. Simpson v. Bowker, 11 Cush. 306.

4. Watts v. Cook, 24 Kan. 278.

5. *In re* Perry, 30 Wis. 268, 273.

6. Johnson v. Johnson's Estate, 66 Mich. 525 (33 N. W. R. 413)

7. Wright v. Watkins, 2 G. Greene

8. Wilson v. Hastings, 66 Cal. 243 (5 Pac. R. 217); *accord*, Haynes v. Meeks, 20 Cal. 288, 317, where only the lot intended to be sold was described.

9. Wells v. Polk, 36 Tex. 120, 126.

determination of the court in the exercise of its jurisdiction. Of course, if a mere blank paper is filed as a petition, jurisdiction would not attach, because there would be nothing for the court to act upon; but when a petition contains sufficient matters to challenge the attention of the court as to its merits, and such a case is thereby presented as authorizes the court to deliberate and act, although defective in its allegations, the cause is properly before it, and jurisdiction is not wanting. This principle underlies all judicial proceedings. The omission of a fuller description of the land in the petition was clearly unintentional, and its mere omission, the petition being otherwise sufficient, did not invalidate the proceedings in the probate court, or render void the deed. The allegation that the land was situate in Miami county was some description, and no property was ordered sold but what was situate in that county.”<sup>1</sup> The same liberal and just rule—just because it calls upon the heirs to make their objections before and not after final judgment, and prevents them from swindling *bona fide* purchasers out of their land under the forms of law—obtains in Alabama. An administrator’s sale of land in that state was decided not to be void because the petition and order to sell described it by section, township and range, without stating the county or land district,<sup>2</sup> or because it was described as a certain quarter section in the county, omitting the township and range,<sup>3</sup> or as “section 12, T. 17, R. 21,”<sup>4</sup> or as the residence of the decedent, or by naming the abutting owners, or the former owner;<sup>5</sup> or where it was incomplete but good as far as it went and capable of amendment.<sup>6</sup> An administrator’s petition to sell land in Kentucky described it as “a tract of — acres of land lying in this county, and the same whereon he resided at the time of his death.” An order to sell was made with the same description, but land lying in another county was sold, reported and confirmed. This was held void.<sup>7</sup>

§ 280. Description of land by reference to other papers.—An administrator’s petition to sell land described it as the “undivided

1. Bryan v. Bauder, 23 Kan. 95, 97; accord, Rowe v. Palmer, 29 Kan. 337, 340. 4. Wright’s Heirs v. Ware, 50 Ala. 549.

2. Doe v. Hardy, 52 Ala. 291, 296; accord, Howbert v. Heyle, 47 Kan. 58 (27 Pac. R. 116) — county not named. 5. De Bardelaben v. Stoudenmire, 48 Ala. 643, 647.

6. Smitha v. Flournoy’s Admr. 47 Ala. 345.

7. Blackwell v. Townsend, — Ky. — (16 S. W. R. 587).

3. Doe v. Jackson, 51 Ala. 514.



one-half of the Sharp and Sproul tract," situated in San Francisco, giving a description by metes and bounds, excepting certain parcels theretofore conveyed and marked on a map filed with the inventory. In ejectment seventeen years afterwards, this map could not be found, but the sale was held valid.<sup>1</sup>

A guardian's petition to mortgage the interest of his ward to raise money so as to prevent the administrator of the ancestor of the ward from selling it, did not contain a description of the land, but referred to the administrator's petition to sell, which did contain such description. This was held sufficient to protect the order to mortgage, and the mortgage made, when assailed collaterally.<sup>2</sup> So, an administrator's sale of land is not void because the petition referred to the inventory on file for the amount of personal assets on hand,<sup>3</sup> or for the value of the land, although the inventory was made five months before;<sup>4</sup> nor because the petition alleged that the administrator had applied all the assets that came to his hands towards the payment of debts "as by the accounts and vouchers on file in this court will more particularly appear," when, in fact, the accounts and vouchers showed no such thing, and there were no debts to pay.<sup>5</sup>

**DONATION.**—An Indiana statute authorized railroad companies to *purchase* the land of *infants* "at a *price* to be agreed upon" with the guardian. It was said that a *donation* of the land of the ward by an order of court would be void.<sup>6</sup>

§ 281. "**Estate of decedent.**"—The statute of Alabama authorized the probate court to make an order to sell lands upon petition by the administrator, showing certain things, and also "setting out and particularly describing in such petition the *estate*" proposed to be sold. The word *estate*, as construed by the court, meant an interest descendible to the heirs. An administrator filed his petition in due form, except that, instead of alleging that the decedent died seized in fee simple, it alleged that he held the land by virtue of a certain contract, giving a copy. The probate court construed this contract to pass the title to him, subject to

1. *Richardson v. Butler*, 82 Cal. 174 (23 Pac. R. 9).

2. *West v. Cochran*, 104 Pa. St. 482.

3. *Stuart v. Allen*, 16 Cal. 474, 500 (76 Am. D. 551).

4. *Silverman v. Gundelfinger*, 82 Cal. 548 (23 Pac. R. 12).

5. *McCormack v. Kimmel*, 4 Ill. App. 121, 125.

6. *Dictum* in *Indiana, Bloomington and Western Ry. Co. v. Brittingham*, 98 Ind. 294, 299.

certain payments to be made, and ordered it to be sold, and ordered the administrator to pay the unpaid balance, all of which was done and confirmed. In a collateral suit to compel the administrator to account, the supreme court construed the contract differently, holding it void, and that the petition based on it did not show any descendible estate, and that, therefore, the order to sell was void.<sup>1</sup> After the administrator had received the funds he was estopped from refusing to account. Besides, the probate court was just as competent to construe the contract as the supreme court.

§ 282. **Evidence, instead of facts**, set forth in an administrator's petition to sell land, which tends to show the necessary matters, with a statement by him that he is satisfied of their truth, will shield the order from a collateral assault.<sup>2</sup>

**EXHAUSTION OF PERSONALTY.**—The statutes of Florida and Tennessee authorized the probate court to order a sale of a decedent's lands "after the personal estate is exhausted;" and in each state an order to sell made upon a petition which alleged that "the personal estate is wholly insufficient" to pay the debts, was held void.<sup>3</sup> But the contrary was held in Arkansas,<sup>4</sup> and this I consider the better view. The petition was simply bad on demurrer. The California statute, as construed by the supreme court, required an administrator *de bonis non*, in his petition to sell land, to state fully in regard to the personal property, not only in his hands, but also that which had come into the hands of his predecessor in the trust, and what had become of it, so far as he could. An order of sale granted on a petition alleging that he had received nothing, and that his predecessor had disposed of all of the personal property, without showing how, was held void in ejectment.<sup>5</sup> This seems like sticking in the bark. And where the personal estate was not mentioned in the petition to sell, nor brought to the attention of the court in any manner, a like ruling was made.<sup>6</sup>

§ 283. **Exhibits and schedules, omitted.**—An omission to file

1. *Pettit's Admr. v. Pettit's Distributees*, 32 Ala. 288, 304.

2. *King v. Kent's Heirs*, 29 Ala. 542, 553.

3. *Hays v. McNealy*, 16 Fla. 409, 413; *accord*, *Kindell v. Titus*, 56 Tenn. (9 Baxter) 727, 739; *Parchman v. Charlton*, 1 Coldw. 381.

4. *Adams v. Thomas*, 44 Ark. 267, 269.

5. *Haynes v. Meeks*, 20 Cal. 288, 317.

6. *Sloan v. Sloan*, 25 Fla. 53 (5 S. R. 603, 607).

exhibits, schedules and copies of papers with the complaint, never makes the proceedings void. All the cases agree on this point. A Missouri statute required an administrator's petition to sell land to be accompanied by a "true account of his administration, a list of the debts due to and by the deceased, and an inventory of the real estate and of the remaining personal estate with its appraised value, and all other assets in his hands, the whole verified by the affidavit of the executor or administrator." A sale was ordered and made on a petition in which the amount of the lists and inventories was stated, but which was not accompanied by those lists or inventories. In a collateral attack on the sale, Mr. Justice Gamble, speaking for the court, said: "The petition asks for the action of the court; the other papers, which are to accompany the petition, are intended to give evidence to the court of the necessity or propriety of the action, which the party seeks in the petition. The action of the court is upon the petition, and consists in granting or refusing its prayer. Now, it is not believed that upon any reasonable grounds, the jurisdiction of the court can be made to depend upon the fact, that the petition is accompanied by all the accounts and other exhibits directed to be filed. . . . The jurisdiction is acquired by filing a petition praying the court to do an act or make an order, which, under the statute, the court is competent to do. Whether the petition is in proper form or sets forth sufficient facts, or is accompanied with the proper evidence, the court will decide in the exercise of its jurisdiction." <sup>1</sup> See section 275, *supra*.

§ 284. **Limitations, claim barred by.**—The bar created by the statute of limitations is in the nature of a defense to the cause of action, the same as payment, failure of consideration, etc. To hold that such bar touches the jurisdiction of the court seems to me to be a confusion of ideas. The court has the parties before it and the power to hear and determine whether or not the claims mentioned in the petition are valid, and to give the relief prayed for, which gives it jurisdiction under the best approved definition. The supreme court of Massachusetts first decided that an administrator's sale of land to pay debts barred by that statute was void;<sup>2</sup> and the high and well-deserved respect enter-

1. *Overton v. Johnson*, 17 Mo. 442, 449, 450—A. D. 1853; *accord*, *Grayson v. Weddle*, 63 Mo. 523, and *Howard v. Bennett*, 13 Tex. 309—where the petition was not accompanied with a schedule of the debts.  
2. *Wellman v. Lawrence*, 15 Mass. 326; *Thompson v. Brown*, 16 Mass.

tained for that court caused the supreme courts of Michigan<sup>1</sup> and New Hampshire<sup>2</sup> to follow it on this point without much consideration. But this doctrine was subsequently doubted in New Hampshire,<sup>3</sup> and denied in Georgia;<sup>4</sup> and a late case in Iowa expressly disapproved the Massachusetts decisions, and held that a judgment against a decedent's estate on a barred claim was not void.<sup>5</sup>

§ 285. **Material allegation omitted—Inconsistent positions of supreme court of Alabama.**—The omission from an administrator's petition to sell land of all the statutory grounds was held to make the sale void in Alabama and Oregon.<sup>6</sup> But the allegations of the petition will be construed liberally in Alabama, and every intendment made in its favor, in order to uphold a sale collaterally.<sup>7</sup> In an earlier case, the same court held that the omission of any material allegation from the petition made the sale void;<sup>8</sup> but precisely the opposite was held in Indiana and Iowa,<sup>9</sup> and sound public policy as well as the weight of authority are with the latter cases. In a later case in Alabama, an administrator's petition to sell land showed the existence of a will, but failed to allege that it contained no power of sale, which made it demurrable, because, in that event, the statute required the sale to be made according to, and by virtue of, such power. A sale ordered and made on that petition was held void.<sup>10</sup> How the supreme court of Alabama can reconcile its decisions cited in this section with those cited in sections 311 and 313, *infra*, concerning criminal proceedings, it is difficult to conceive. Certainly the rights of heirs to land are no more sacred than the right to personal liberty; and it is quite evident that more than one material averment was omitted from the affidavits

172; *Heath v. Wells*, 5 Pick. 139 (16 Am. D. 383).

1. *Hoffman v. Beard*, 32 Mich. 218.

2. *Godkin v. Sanford*, 3 N. H. 491.

3. *Merrill v. Harris*, 26 N. H. 142 (57 Am. D. 359).

4. *McDade v. Burch*, 7 Ga. 559 (50 Am. D. 407).

5. *Weber v. Noth*, 51 Iowa 375 (1 N. W. R. 652), denying *Robinson v. Hodge*, 117 Mass. 222, and *Dawes v. Shed*, 15 Mass. 6, and *Gookin v. Sanborn*, 3 N. H. 491.

6. *Sermon v. Black*, 79 Ala. 507; *Wright v. Edwards*, 10 Or. 298.

7. *Bolling v. Smith*, 79 Ala. 535, 538; *Whitlow v. Echols*, 78 Ala. 206, 208.

8. *Wilburn v. McCalley*, 63 Ala. 436, 445.

9. *McKeever v. Ball*, 71 Ind. 398; *accord*, *Read v. Howe*, 39 Iowa 553, 560, where the petition was defective "in some material respects."

10. *Wilson v. Holt*, 83 Ala. 528 (3 S. R. 321, 326).

there held good collaterally. In *Ex parte Sam*,<sup>1</sup> where the charge was that "Henry Sam did take his cow Cherry without his knowledge or consent," every material averment necessary to distinguish a charge of larceny from one of trespass was omitted, yet that learned court held it not void. The most that can be said of that case is, that it made some approach towards a charge of larceny by alleging a taking without consent; and as the prayer (implied) was that he be punished for larceny, he was called upon to make his defense. Under the rule recognized in that case, and the other cases cited in sections 311-313, *infra*, and 156-160, *supra*, I doubt if there ever was a petition by an administrator or guardian that was insufficient collaterally—that did not inform the heirs or wards that a sale was desired and give some reason why it should be had, or state something "to set the judicial mind in motion." The statute of New York required an administrator's petition to sell land to show five things. Such a petition showed that an inventory had been filed, and that there were debts which the personal estate was insufficient to pay, and that recourse to the real estate was necessary, which was an accurate statement of one of the five necessary grounds, and a partial statement of two others. The sale ordered on that petition was held void, notwithstanding the fact that another statute provided that no such sale should be invalidated for any irregularity, error, defect or omission when the petition showed that an inventory had been filed and that there were debts which the personal estate was insufficient to discharge, and that recourse to the real estate was necessary.<sup>2</sup>

"ORPHAN."—Where the records of a county court in Kentucky binding out a child as an apprentice, failed to show that he was an orphan, or that he had no parents or relatives who would bring him up in moral courses, the order was held void.<sup>3</sup> I think this case is unsound.

TWO PETITIONS being found in a probate record, and both taken together being sufficient to authorize an order to sell, it will be presumed that the one was an amendment of the other.<sup>4</sup>

1. *Ex parte Sam*, 51 Ala. 34. See section 311, *infra*.

2. *Ackley v. Dygert*, 33 Barb. 176, 440. 190.

3. *Chaudet v. Stone*, 4 Bush 210.

4. *Arnett v. Bailey*, 60 Ala. 435.

§ 286. **Necessity for sale.**—The statutes of several states require the petition of an administrator or guardian to sell land to show its necessity. It was held in Alabama, at first, that a sale made on a petition defective in this particular was void;<sup>1</sup> but afterwards the contrary was ruled.<sup>2</sup> In Kentucky, when a guardian's petition to sell land was filed, the statute required the matter to be referred to commissioners to make a report, and required them to report the value of all the real and personal estate of the ward, and the propriety of the sale. Where the report failed to show the extent, value and profits of the ward's estate, or the necessity for a sale, it was held void, and was set aside on motion of the purchaser.<sup>3</sup> The Texas statute authorized a sale "when it becomes necessary," but did not provide what the petition should allege. Under this statute, it was decided that the failure of the petition to show any necessity for a sale did not make it void;<sup>4</sup> and where the petition failed to show any debts, and simply alleged that it would be advantageous to sell—there being debts which made a sale necessary—the sale was held valid collaterally.<sup>5</sup> A Michigan statute required a guardian's petition to sell land to set forth the condition of the estate of the ward, and the facts and circumstances tending to show the necessity or expediency of a sale. The petition described the land and stated that a part was improved and a part wild and yielding no income, and that a sale was necessary to pay certain debts, and that it would be better to sell the land, pay the debts, and put the balance on interest. The sale made upon this petition was decided not to be void.<sup>6</sup> The Oregon statute authorized a guardian to sell his ward's land on petition showing "the condition of the estate of his ward, and the facts and circumstances under which it is founded tending to show the necessity or expediency of such sale." The petition showed that the personal property was not sufficient to support the ward (who was in an asylum), and that the condition of the estate was such that it was necessary to sell the real estate to maintain him. This was said to be insufficient on demurrer, but

1. *Ikelheimer v. Chapman's Adm'r*, 32 Ala. 676; *Wilson v. Armstrong*, 42 Ala. 168 (94 Am. D. 635).

2. *Todd v. Flournoy's Heirs*, 56 Ala. 99 (28 Am. R. 758, 766).

3. *Mattingly's Heirs v. Read*, 3 Met. (Ky.) 524 (79 Am. D. 565).

4. *Kleinecke v. Woodward*, 42 Tex. 311.

5. *Gillenwater v. Scott*, 62 Tex. 670,

673.

6. *Nichols v. Lee*, 10 Mich. 526, 529.

not to make the sale void collaterally.<sup>1</sup> An Indiana statute authorized the construction of ditches "when the same shall be conducive to the public health, convenience or welfare, or when the same will be of public benefit or utility," upon a petition "setting forth the necessity thereof," among other things. The petition failed to state any facts showing the "necessity thereof." On a collateral attack, it was held that the petition was amendable and the judgment not void.<sup>2</sup> So the sale by an administrator of a patent right of decedent without showing any necessity, is not void.<sup>3</sup> An Alabama statute authorized a sale of land by an administrator when the personal property was insufficient to pay debts, or when it would be "more beneficial for the estate to sell lands than *slaves*." Where the petition alleged that it "is necessary to sell property to pay the debts of the estate," and that "it would be more to the interest of all the parties to sell the house and lots than the *personal estate*," the sale was held void.<sup>4</sup> The court admitted that, in collateral proceedings, "the language of the petition should be construed most favorably for the maintenance of the decree, for public policy favors the upholding of such sales, and of the titles acquired under them;" but it was unable to uphold the petition, and a *bona fide* purchaser lost his land. I am unable to agree with the court. The administrator filed a complaint against the heirs asking an order to sell land to raise money to pay debts. The heirs were called upon to show any reason they had why he should not have such order. If his complaint did not specifically show that he was entitled to that relief, it was demurrable, but that did not make it void. It was, at least, colorable. No one could doubt concerning the general character of the petition. An early case in Louisiana held that a purchaser at a succession sale was not bound to look beyond the order to see whether there was any necessity for the sale.<sup>5</sup> The Utah statute authorized an administrator to procure an order to sell land to pay debts when the personal estate was insufficient. A petition for that purpose alleged "that in order to settle up the business of the estate of said deceased, to pay certain debts

1. Sprigg v. Stump, 8 Fed. R. 207, 219—Sawyer and Deady, JJ.

2. Coolman v. Fleming, 82 Ind. 117, 120.

3. May v. Board of Comrs, 30 Fed. R. 250.

4. Robertson v. Bradford, 70 Ala. 385.

5. Valderes v. Bird, 10 Rob. (La.) 396.



and demands due and owing by said estate," a sale of real estate was necessary. An order to sell and sale made on that petition were held void.<sup>1</sup> I think this case unsound.

§ 287. **Object or purpose in selling, unlawful.**—Where the object or purpose in making the sale, as shown in the petition, is one not recognized in the statute, is the sale void? If the judgment is not void when the petition affirmatively shows that no cause of action ever existed, as is shown in section 236, *supra*, concerning actions on void judgments and bonds, and the probate of void wills, I am unable to see why such a sale should be void. In all such cases jurisdiction exists to grant the relief sought in a proper case, but the allegations show that the case is not a proper one. That does not touch the jurisdiction. An administrator's petition to sell land in Missouri showed that the only purpose was to pay costs of administration and taxes, but this was held not to make the sale void.<sup>2</sup> Possibly one of these purposes was legal. So, an administrator's sale of land in New Jersey, made on a petition alleging it to be necessary to pay debts *and expenses*, when the statute authorized it for the purpose of paying debts only, is not void.<sup>3</sup> On the other hand, sales to pay costs of administration,<sup>4</sup> or for the support of the ward,<sup>5</sup> when the statute did not so authorize, were held void. A petition by an administrator in Alabama to sell land, alleged "that the estate is entirely solvent, and that it would be of infinite benefit to the heirs of said estate to sell, without delay, the real estate belonging to said estate." As the statute only authorized a sale to "pay debts," or "to make a more equal distribution" among the heirs, the sale was decided to be void.<sup>6</sup> See section 291, *infra*.

§ 288. **Premature petition to sell.**—The statute of Michigan did not authorize the sale of a decedent's lands until after the homestead rights of the widow were terminated, yet a sale prematurely ordered by the probate court subject to the widow's rights, was held valid collaterally.<sup>7</sup>

1. Needham v. Salt Lake City, — Utah — (26 Pac. R. 920).

2. Camden v. Plain, 91 Mo. 117 (4 S. W. R. 86, 89). See section 291, *infra*.

3. O'Hanlin v. Den *ex dem.* Van Kleeck, 20 N. J. L. (1 Spencer) 31, 50; *affirmed*, Den *ex dem.* Van Kleeck v. O'Hanlon, 21 N. J. L. 582, 586.

4. Duncan v. Veal, 49 Tex. 603, 610.

5. Beal v. Harmon, 38 Mo. 435, 439; Blackburn v. Bolan, 88 Mo. 80.

6. Heirs of Bishop v. Hampton, 15 Ala. 761, 766.

7. Showers v. Robinson, 43 Mich. 502 (5 N. W. R. 988). See section 289, *infra*.

tangible assets, but whether or not it would also increase their value was a question the assessors had to decide.

**LIEN.**—An Arkansas statute authorized persons “seized or having the care of lands” to pay the taxes and to have a lien adjudged therefor against the land. Where the complaint failed to show that plaintiff was seized or had the care of lands, a decree in his favor would be erroneous,<sup>1</sup> but not void.<sup>2</sup> It will be seen that all the material allegations were omitted. A decree fixing a lien for a street improvement in Kentucky is not void because the complaint failed to allege that the ordinance ordering the improvement had been published, and that the city engineer had given notice of the time and place he would inspect the work.<sup>3</sup>

“**PERSONALLY EXAMINED.**”—A special statute of New York, which applied to the city of Brooklyn, required the assessor’s affidavit to state, in addition to the averments prescribed by the general statute, that the assessors “have together personally examined, within the year past, each and every lot and parcel of land, house, building or other assessable property within the ward” assessed. The omission of this clause from the affidavit was held to make an assessment void.<sup>4</sup> This was an omission of one material allegation from the affidavit, and for the reasons given in section 285, *supra*, I think the case unsound.

§ 291. **Object or purpose of assessment, unlawful.**—In an old English case, commissioners had been given authority to make assessments on the lands within a certain district for the purpose of repairing certain designated roads. The commissioners, in addition to the roads so authorized to be repaired, repaired others and laid a general assessment for the purpose of paying for the repairing of all. In an action of trespass for seizing the goods of plaintiff on this assessment, it was held that he could not recover; that the assessment was simply too high, and that he ought to have appealed.<sup>5</sup> The commissioners had power to lay assessments, but not for that purpose.

1. Peay v. Field, 30 Ark. 600.

4. Brevoort v. Brooklyn, 89 N. Y.

2. Moore v. Woodall, 40 Ark. 42, 128, 135.

48.

5. Bonnell v. Beighton, 5 T. R. 182.

3. Dunn v. German Security Bank, See section 287, *supra*.

— Ky. — (3 S. W. R. 425).

## TITLE C.

## BOND, DEFECTIVE.

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| § 292. Scope of, and principle involved<br>in, title C.<br>293. Approval, defective.<br>294. Condition, defective. | § 295. Obligee, improper — Penalty,<br>insufficient.<br>296. Sureties, improper—Unsealed.<br>297. Bond wanting. |
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§ 292. **Scope of, and principle involved in, title C.**—At some stage of special proceedings, the statutes generally require the officer or party to give a bond with certain prescribed conditions, penalty and surety, and this title treats of the collateral effect on the proceedings occasioned by defects in, or the absence of, such bond. On principle, it is difficult to see just where this bond touches the jurisdiction of the tribunal. We now assume that it has power to grant the relief demanded, and that the allegations of the petition are sufficient to call that power into exercise, and that all parties in interest are before it, and that the only thing lacking to authorize rightful motion is the bond. But this bond is solely for the protection of the defendant; and to permit him to contest the cause on the merits without objection in respect to the bond, and then, after he is defeated and his property sold, to allow him to recover it from an innocent purchaser, because of defects in, or the absence of, the bond, seems like trifling with the courts, and certainly is a travesty on justice. Surely this bond has nothing to do with the jurisdiction over the person—that is obtained by service of process or appearance; and I presume no one would doubt that the parties might effectually waive it by a stipulation entered of record, which they could not do if it were necessary to give jurisdiction over the subject-matter. It was expressly held by the supreme court of Ohio, that an attachment bond was designed for the exclusive benefit of the defendant; that he might waive it, and that the proceedings were not void because of its absence.<sup>1</sup> So, the failure to require an injunction bond does not make the order void so as to be no contempt to disobey it;<sup>2</sup> and where a guardian's sale of land had been made without giving the additional bond required by stat-

1. O'Farrell v. Stockman, 19 O. St. 6 Neb. 163, 166, *citing* Ward v. Howard, 12 O. St. 158.

2. Young v. Rollins, 90 N. C. 125, 133; *dictum* in Sledge v. Blum, 63 N. C. 374, 376.

ute, the supreme court of Iowa said: "In the absence of a sale bond, it would doubtless be error to approve the sale; but where the jurisdiction attached, and the sale has been approved, it cannot, we think, be successfully attacked in a collateral proceeding."<sup>1</sup> Precisely the same ruling was made in Indiana, Kansas and Ohio,<sup>2</sup> and by the Supreme Court of the United States<sup>3</sup> (following the last Ohio case), touching the validity of such a sale made in Ohio; and the same ruling, concerning a sale of land by an administrator without giving an additional bond, was made in Alabama, Massachusetts and Pennsylvania.<sup>4</sup> It has been repeatedly held that the failure of an administrator,<sup>5</sup> or guardian,<sup>6</sup> to give a bond, or the giving of one without surety,<sup>7</sup> did not make his appointment and acts void. In some states, there are statutes expressly making sales by administrators and guardians void collaterally, unless the required bond is given. Those statutes and the cases thereon are considered in Chapter XV, *infra*. A statute of Kentucky provided that "before judgment shall be rendered against a defendant constructively summoned, and who has not appeared, a bond shall be executed" to the effect, that if the judgment shall be vacated, the property or money shall be refunded; but a failure to execute that bond does not make the judgment void;<sup>8</sup> and a like ruling on a like statute touching attachment proceedings against unknown heirs, was made in an earlier case.<sup>9</sup> The principle, that the bond in such cases is not jurisdictional, was recognized in an early case in the Supreme Court of the United States, where a sale in partition was attacked collaterally because a bond to secure the purchase money had not

1. Hamiel v. Donnelly, 75 Iowa 93 (39 N. W. R. 210); *accord*, Bunce v. Bunce, 59 Iowa 533 (13 N. W. R. 705, 707).

2. Dequindre v. Williams, 31 Ind. 444, 462; Watts v. Cook, 24 Kan. 278; Arrowsmith v. Harmoning, 42 O. St. 254; Mauarr v. Parrish, 26 O. St. 636.

3. Arrowsmith v. Gleason, 129 U. S. 86, 96 (9 S. C. R. 237).

4. Wyman v. Campbell, 6 Porter 219 (31 Am. D. 677); Perkins v. Fairfield, 11 Mass. 227; Lockhart v. John, 7 Pa. St. 137; Dixcy's Executors v. Lanning, 49 Pa. St. 143.

5. *Ex parte* Maxwell, 37 Ala. 362 (79

Am. D. 62); Leatherwood v. Sullivan, 81 Ala. 458 (1 S. R. 718); *dictum* in Barclay v. Kinsey, 72 Ga. 725, 735; *dictum* in Mobberly v. Johnson's Exr., 78 Ky. 273, 276; Spencer v. Cahoon, 4 Dev. L. 225.

6. Cuyler v. Wayne, 64 Ga. 78, 87; Russell v. Coffin, 8 Pick. 143, 149; Howerton v. Sexton, 104 N. C. 75 (10 S. E. R. 148).

7. Jones v. Gordon, 2 Jones Eq. 352; Davis v. Lanier, 2 Jones L. 307.

8. Thomas v. Mahone, 9 Bush 111, 125.

9. Atcheson v. Smith, 3 B. Mon. 502, 504.

been given to the heirs, in violation of a statute, but the court said the point was immaterial, as the money was actually paid.<sup>1</sup> The decision was not placed on the ground of estoppel.

§ 293. **Approval, defective.**—The failure of the judge of probate in Wisconsin to approve an administrator's bond, which the statute required;<sup>2</sup> or the approval of a guardian's bond by the clerk, when the Indiana statute directed it to be done by the court,<sup>3</sup> does not make the appointment void; nor does the want of a formal approval of a bond given by a guardian to obtain an order to sell land in Wisconsin, make the sale void.<sup>4</sup>

§ 294. **Condition, defective.**—The want of proper conditions in an executor's bond does not make his appointment void,<sup>5</sup> because the appointment is an adjudication that the bond is lawful.<sup>6</sup> An attachment is not void because the bond given by the plaintiff, an administrator, erroneously purported to bind the personal effects of the decedent, instead of himself personally;<sup>7</sup> but in New York, where an attachment bond covenants to pay a certain sum of money, or do something else in a certain event, instead of to pay a certain sum upon a certain specified condition;<sup>8</sup> or where it omits a material condition required by the statute,<sup>9</sup> the whole proceeding is void for want of jurisdiction.

DEFECTIVE attachment bonds do not avoid the proceedings in Michigan, as a statute permits a new bond to be given when the old is defective;<sup>10</sup> nor in Pennsylvania, because the bond there is not regarded as jurisdictional.<sup>11</sup>

§ 295. **Obligee, improper.**—The order appointing a guardian is not void because the bond was made payable to the wards, instead of to the probate court as required by statute;<sup>12</sup> nor is a guardian's sale of land in Iowa void because the sale bond was erroneously made payable to the county instead of the parties.<sup>13</sup>

1. *Thompson v. Tolmie*, 2 Peters 157, 166.

2. *Cameron v. Cameron*, 15 Wis. 1, 5 (82 Am. D. 652).

3. *Peelle v. State*, 118 Ind. 512 (21 N. E. R. 288).

4. *Emery v. Vroman*, 19 Wis. 689, 700.

5. *Dictum* in *Morgan v. Dodge*, 44 N. H. 255, 261.

6. *Mumford v. Hall*, 25 Minn. 347, 354.

7. *Atkinson v. Foxworth*, 53 Miss. 741, 747.

8. *Homan v. Brinckerhoof*, 1 Denio 184; *Van Loon v. Lyons*, 61 N. Y. 22.

9. *Kelly v. Archer*, 48 Barb. 68, 70.

10. *Adams v. Kellogg*, 63 Mich. 105 (29 N. W. R. 679, 682).

11. *Billings v. Russell*, 23 Pa. St. 189 (62 Am. D. 330).

12. *Kelley v. Morrell*, 29 Fed. R. 736.

13. *Pursley v. Hayes*, 22 Iowa 11 (92 Am. D. 350).

**PENALTY, INSUFFICIENT.**—The order appointing an administrator *de bonis non*,<sup>1</sup> or the order for an administrator's sale,<sup>2</sup> is not void because the penalty of the bond was insufficient; and the same ruling was made where the penalty of the bond given by a purchaser of the real estate of a minor at a partition sale, was in an amount equal to the value of the land instead of double that amount;<sup>3</sup> but where the penalty of an attachment bond in California was "not exceeding one hundred dollars" instead of "all damages," without limit, the proceedings were held void;<sup>4</sup> and in New York, where an appeal bond from a justice to the common pleas was required to have a penalty double the amount of the judgment appealed from, it was held that an appeal, and trial and judgment on the merits in the common pleas, without objection, on a bond of less than that amount, was entirely void, and left the justice's judgment in force.<sup>5</sup> It seems that the doctrine of estoppel had not yet reached that state.

§ 296. **Sureties, improper.**—The appointment of an administrator is not void because his bond has but one instead of two sureties,<sup>6</sup> or one non-resident instead of two resident sureties;<sup>7</sup> nor is a guardian's sale of land void because he gave a bond with but one surety, when the statute required more than one;<sup>8</sup> and the same ruling was made in Pennsylvania in regard to an attachment bond.<sup>9</sup>

**UNSEALED.**—An attachment issued from the marine court of New York on an unsealed bond, was held void.<sup>10</sup> This case seems to me to confound the question of jurisdiction with an error in practice.

§ 297. **Bond wanting.**—It is held in Maine and Mississippi, that the failure of an administrator,<sup>11</sup> and in Maine, Massachusetts and

1. *Cunningham v. Thomas*, 59 Ala. 158, 163.

2. *Boon v. Bowers*, 30 Miss. 246 (64 Am. D. 159).

3. *Tate v. Bush*, 62 Miss. 145, 152.

4. *Hisler v. Carr*, 34 Cal. 641, 646. I think this case is wrong for reasons given in section 292, *supra*.

5. *Latham v. Edgerton*, 9 Cowen, 227.

6. *Bloom v. Burdick*, 1 Hill 130, 134; *Billings v. Russell*, 23 Pa. St. 189 (62 Am. D. 330); *contra, dictum* in *M'Wil-*

*liams v. Hopkins*, 4 Rawle 382; *contra, Bradley v. Com.*, 31 Pa. St.

522.

7. *Johnson v. Clark*, 18 Kan. 157, 167.

8. *Marquis v. Davis*, 113 Ind. 219 (15 N. E. R. 251).

9. *Kramer v. Wellendorf* (Pa.), 10 Atl. R. 892).

10. *Tiffany v. Lord*, 65 N. Y. 310.

11. *Moody v. Moody*, 11 Me. 247, 252; *Currie v. Stewart*, 26 Miss. 646; *Currie v. Stewart*, 27 Miss. 52 (61 Am. D.

Mississippi, that the failure of a guardian<sup>1</sup> to give the additional bond required by the statute before selling land, makes the sale void ; and the same ruling was made in Massachusetts touching a decree of the judge of probate assigning the whole of the real estate of an intestate to the eldest son on condition that he pay to the other children the value of their respective shares within three years, without taking security as directed by statute.<sup>2</sup> A special statute in Mississippi ordered an administrator to sell land after giving a bond that he would "observe the rules and directions of law for the sale of real estate by administrators, and that he will well and truly account for the proceeds of said sale, and that the said proceeds shall be vested in such other property as the said administrator shall deem most for the interest of said widow and orphan jointly." The administrator gave a bond omitting the last clause as to investing the proceeds in other property, and was then ordered to sell the land, which he did. In a direct proceeding in equity to set aside the sale after the administrator was discharged, this omission in the bond was held to make the purchaser responsible for the proper application of the purchase money by the administrator.<sup>3</sup>

The omission to give an attachment bond in Indiana and New York,<sup>4</sup> and an injunction bond in Ohio,<sup>5</sup> were held to make the proceedings void. The Ohio statute provided that "No injunction shall operate until the party obtaining the same gives an undertaking," and it "shall bind the party from the time he has notice thereof, and the undertaking required by the applicant therefor is executed." With such a statute, expressly making the bond a condition precedent to the operation of the judgment, it is hardly a correct use of terms to say that the omission of the bond makes it void. It is simply of no force, because incomplete.

500); *Washington v. McCaughan*, 34 Miss. 304, 307; *Hamilton v. Lockhart*, 41 Miss. 460, 479.

1. *Williams v. Morton*, 38 Me. 47 (61 Am. D. 229); *Williams v. Reed*, 5 Pick. 480; *Rucker v. Dyer*, 44 Miss. 591; *Vanderburg v. Williamson*, 52 Miss. 233; *contra*, *Howbert v. Heyle*, 47 Kan. 58 (27 Pac. R. 116)—relying on *Watts v. Cook*, 24 Kan. 278.

2. *Newhall v. Sadler*, 16 Mass. 122, 128.

3. *Williamson v. Williamson*, 3 Sm. & M. 715 (41 Am. D. 636).

4. *Barkeloo v. Randall*, 4 Blackf. 476 (32 Am. D. 46); *Adkins v. Brewer*, 3 Cow. 206; *contra*, *Chambers v. McKee*, 1 Hill (S. C.) Law 229.

5. *Diehl v. Friester*, 37 O. St. 473. In speaking of this case in *Arrow-smith v. Harmoning*, 42 O. St. 254, 263, the court said that "by express terms of the statute the injunction could not operate until bond was given."



A late decision in Indiana holds that the failure to give an injunction bond does not make the proceedings void.<sup>1</sup>

PART III.

CRIMINAL PROCEEDINGS, DEFECTIVE.

Title A.—Preliminary mat-	Title B.—Pleadings, defect-
ters, . . . . . § 298-300	ive, . . . . . § 301-321

TITLE A.

PRELIMINARY MATTERS.

298. Examination, preliminary.	300. Grand jury, talesmen selected
299. Grand jury impaneled by wrong	irregularly.
judge—Fictitious indictment	
—Number of grand jurors.	

§ 298. **Examination, preliminary.**—A statute of Michigan provided that, on a preliminary examination before a justice of a person charged with crime, the “evidence given by the several witnesses examined, shall be reduced to writing by the magistrate or under his direction, and shall be signed by the witnesses, respectively;” and that, in case the accused were bound over, the magistrate should certify and return the examination to the clerk of the court before which the accused should be bound to appear. In such a case, the witnesses neglected to sign their respective examinations, but they were duly returned to court, where an information was filed, and plea of not guilty entered by the court on defendant’s standing mute, and the trial was begun; after this, he moved to quash the information, upon the ground that there had been no preliminary examination as required by statute, which motion was overruled, and he was convicted and sentenced to prison. On error, the judgment was “that the conviction must be set aside, and the respondent *discharged from custody.*”<sup>2</sup> From the fact that the court ordered the defendant to be discharged from custody and not held for a new examination or trial, I judge that it considered the proceedings void. If so, I am unable to see where the want of jurisdiction was. The court had power to punish for the crime charged, and had the accused before it. If the preliminary proceedings were irregular, that would not affect the jurisdiction. In a late Nebraska case,<sup>3</sup> a

1. Lewis v. Rowland, — Ind. — (29 N. E. R. 922).

2. People v. Chapman, 62 Mich.

280 (28 N. W. R. 896, 890)—Sherwood, J., *dissenting* vigorously.

3. White v. State, 28 Neb. 341 (44 N. W. R. 443).

conviction on information was reversed for defects in the preliminary examination—the statute forbidding the court to proceed *by information*, unless there was such examination—and the above case of *People v. Chapman* was commented on, the court saying: “I do not think, however, that it follows that the accused must necessarily be discharged from custody. If the authorities of Douglas county claim the right to take him back there, and a complaint under oath is made against him before a magistrate for the commission of the offense, I see no reason why they may not do so.”

§ 299. **Grand jury impaneled by wrong judge.**—Where the grand jury was impaneled by an attorney appointed as special judge without authority, and returned an indictment, a conviction was held not void.<sup>1</sup>

**FICTITIOUS INDICTMENT.**—A conviction in Nevada on a fictitious indictment never returned by the grand jury, but presented to the court by fraud or mistake, was held not void on *habeas corpus*.<sup>2</sup>

**NUMBER OF GRAND JURORS.**—It was held in Texas, that an indictment found by fourteen instead of twelve grand jurors, and all proceedings thereunder, were void;<sup>3</sup> but where the statute required the grand jury to consist of not less than seventeen nor more than twenty-three members, thirteen of whom could find an indictment, it was decided that a conviction was not void because the grand jury was composed of fifteen, and the indictment found by thirteen.<sup>4</sup> So a conviction for contempt in California for refusing to appear before the grand jury, is not void because that body was illegally impaneled.<sup>5</sup>

§ 300. **Grand jury, talesmen selected irregularly.**—When a full grand jury failed to appear in Alabama, the statute required the court to order the sheriff to fill it up from the qualified citizens of the county. In a case of that kind, the record recited: “By order of court a sufficient number of names to complete the grand jury from the bystanders in the court room was placed upon slips and regularly drawn, and the grand jury stood as fol-

1. *State v. Fenderson*, 28 La. Ann. 82.

2. *Ex parte Twohig*, 13 Nev. 302.

3. *Harrell v. State*, 22 Tex. App. 692 (3 S. W. R. 497); *Ex parte Swain*, 19 Tex. App. 323.

4. *In re Wilson*, 140 U. S. 575, 579; (11 S. C. R. 870).

5. *Ex parte Haymond*, 91 Cal. 545 (27 Pac. R. 859).

lows," naming them. They found an indictment, upon which the defendant was tried and convicted without objection to the regularity of the grand jury. On appeal, the court held the whole proceeding *absolutely void*, and said that the trial did not put him in jeopardy.<sup>1</sup> I think this case unsound.

A person of African descent was tried and convicted of murder. He applied to the federal court to be released on *habeas corpus* upon the ground that persons of African descent had been excluded from the grand and petit jury in violation of the constitution of the United States. There was no objection to the law itself. The court said: "Whether the grand jurors, who found the indictment, and the petit jurors, who tried the appellant, were or were not selected in conformity with the laws of New York, was a question which the trial court was competent to decide. . . . It often occurs, in the progress of a criminal trial in a state court, proceeding under a statute not repugnant to the constitution of the United States, that questions arise which involve the construction of that instrument and the determination of rights asserted under it." The court then says that it is the duty of the state court to grant the defendant every right conferred upon him by the constitution of the United States, and that the remedy for a denial is an appeal.<sup>2</sup>

## TITLE B.

### PLEADINGS, DEFECTIVE.

Sub-title I.—Matters of form, § 301-303	Sub-title II.—Matters of substance, . . . . . § 304-321
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## SUB-TITLE I.

### MATTERS OF FORM.

301. Duplicity—Information and belief—Name fictitious.	303. Verified by improper person—Verification wanting.
302. Transcript on change of venue, seal omitted—Transcript wanting.	

§ 301. Duplicity in an indictment does not make the conviction void.<sup>3</sup>

INFORMATION AND BELIEF.—A criminal proceeding before a justice of the peace is not void because the affidavit was made on

1. *Finley v. State*, 61 Ala. 201.

2. *In re Wood*, 140 U. S. 278, 285.

3. *In re Lane*, 135 U. S. 443, 448 (10

S. C. R. 760).

information and belief.<sup>1</sup> An affidavit before a justice of the peace in New York was made "upon information and belief only, without setting forth any facts," and a warrant was issued and the person arrested. It was held that the justice grossly erred in holding that the affidavit charged a crime, but that it was not void, and would protect him and the affiant in an action for false imprisonment.<sup>2</sup> A Wisconsin statute required dogs to be licensed. An affidavit was filed before a justice, alleging that one Carter was then "the keeper of a male dog over six months of age, and that he keeps the same in violation of 'an act to regulate and license the keeping of dogs,' and that Carter is guilty of said offense, as he is *informed and believes*, by not having said dog registered and collared, as required by said act," etc., giving venue. This was held informal, but not void, and a protection to the justice. It was said that the affidavit charged the offense positively, and then gave the reasons only on information and belief.<sup>3</sup> A conviction for a contempt is not void on *habeas corpus*, because the material matters were charged on information and belief.<sup>4</sup>

NAME FICTITIOUS.—A complaint and warrant against "John Doe or Richard Roe, whose other or true name is to your complainant unknown," are void. He ought to be so described that he could be identified.<sup>5</sup>

§ 302. Transcript on change of venue, seal omitted.—On a change of venue in a criminal case in Arkansas, the seal of the court was omitted from the transcript of the record. On account of this defect, it was held that the court to which the change was taken acquired no jurisdiction, and that the impaneling of a jury there did not put the defendant in jeopardy.<sup>6</sup> But how the want of a seal to the transcript affected the jurisdiction of the court, I cannot understand. The court ordered the cause to be docketed on incompetent evidence, to which the defendant ought to have objected and excepted.

TRANSCRIPT WANTING.—The Indiana statute provided that, when a change of venue should be taken to another county in a

1. *In re Lewis*, 31 Kan. 71; *Cave v. Mountain*, 1 M. & G. 257, 263 (39 E. C. L. 747, 751).

2. *Campbell v. Ewalt*, 7 How. Pr. 399.

3. *Carter v. Dow*, 16 Wis. 298.

4. *In re Acock*, 84 Cal. 50 (23 Pac. R. 1029).

5. *Com. v. Crotty*, 10 Allen 403.

6. *Ball v. State*, 48 Ark. 94, 105 (2 S. W. R. 462, 466).

criminal case, the clerk should transmit to the court of the other county "a transcript of the proceedings and orders of court," together with the original papers in the case, when "the jurisdiction of the latter court is complete." In such a case, it seems that the court to which the change was taken tried the defendant, without objection, on the papers alone without having any "transcript of the proceedings and orders of court." This trial was held to be "*coram non judice* and absolutely void."<sup>1</sup> It was error to proceed before the transcript arrived, but it seems to me that there was enough to amend by. Several civil cases cited in section 250, *supra*, are contrary, and, in my opinion, sounder.

§ 303. **Verified by improper person.**—A conviction was decided to be void in Vermont because the affidavit was made by a private person instead of an officer,<sup>2</sup> and the same ruling was made in Connecticut because it was made by an officer instead of a private person,<sup>3</sup> in each case contrary to a statute. These were mere irregularities of practice that caused no harm to any one and, in my opinion, did not touch the jurisdiction.

VERIFICATION WANTING.—It was decided in Texas that a conviction was not void because the complaint was not verified by oath, and that it was perjury to corruptly swear falsely on the trial.<sup>4</sup> The decision was put upon the ground that the court does not fail to acquire jurisdiction because the complaint is bad in substance, and that a conviction thereon will bar another trial. I disagree slightly with that court. It seems to me that the complaint is not even bad in substance; that the oath is a mere form to show the good faith of the complainant in making the charge; that it adds no allegation and tenders no issue; and that its omission causes no harm to defendant on the trial. But a conviction by a justice was held void in Georgia where one Mary Thorpe was the affiant and W. H. Woodhouse was the justice, and the jurat read thus: "Sworn to and subscribed before me this 24th day of January, 1881, Mary Thorpe, W. H. Woodhouse."<sup>5</sup> The same point was ruled the other way in Kansas, where an administrator was appointed on an application in which the oath of the applicant was blended with his oath as adminis-

1. *Fawcett v. State*, 71 Ind. 590, 595.

2. *In re Baker*, 56 Vt. 14.

3. *Allen v. Gray*, 11 Conn. 95, 102.

4. *Anderson v. State*, 24 Tex. App. 705 (7 S. W. R. 40), *citing* Reg. v. Scotton, 5 Q. B. 493, to the contrary.

5. *Thorpe v. Wray*, 68 Ga. 359, 362.

trator, and in which his name was signed below instead of above the jurat.<sup>1</sup> Sections 251-255, *supra*, treat of the effect of defective and omitted verification in civil proceedings.

## SUB-TITLE II.

## MATTERS OF SUBSTANCE.

## § 304. Principle involved in sub-title II.

§ 304. Principle involved in sub-title II.—If a criminal charge is colorable;<sup>2</sup> or “sufficient to set the judicial mind in motion,”<sup>3</sup> or to call upon it to act;<sup>4</sup> or makes some approach towards charging a criminal offense;<sup>5</sup> or intimates the facts necessary to constitute the offense and a purpose to declare thereon;<sup>6</sup> or tends to show a criminal offense,<sup>7</sup> no matter how informal and defective;<sup>8</sup> or has a legal tendency to prove each requirement of the statute,<sup>9</sup> it will shield the proceedings from collateral attack. So a conviction is not void because made on a defective affidavit;<sup>10</sup> nor because the information “shows no offense against the law;”<sup>11</sup> or is inartificially drawn and bad on motion to quash;<sup>12</sup> or only states facts sufficient to constitute a civil cause of action.<sup>13</sup> A conviction for perjury in making a false affidavit is not void because an affidavit upon that subject was not authorized by law,<sup>14</sup> nor because the court had no jurisdiction over the case in which the false testimony was given.<sup>15</sup> With some of the cases herein, which hold that the allegations must tend to show each material fact necessary to constitute the crime in order to shield the proceedings from collateral attack, I cannot agree. If an

1. Johnson v. Clark, 18 Kan. 157, 166.

2. Vosburgh v. Welch, 11 Johns. 175.

3. State v. Gachenheimer, 30 Ind. 63, 64.

4. Pratt v. Bogardus, 49 Barb. 89, 94.

5. *Dictum* in Baldwin v. Hamilton, 3 Wis. 747, 751.

6. *Ex parte* Ah Men, 77 Cal. 198 (19 Pac. R. 380, 381).

7. Lewis v. Rose, 6 Lans. 206.

8. *In re* Kowalsky, 73 Cal. 120 (14 Pac. R. 399).

9. Johnson v. Maxon, 23 Mich. 129.

10. Prohibitory Amendment Cases,

24 Kan. 700, 724; United States v. Eldredge, 5 Utah 161 (13 Pac. R. 673), and 5 Utah 189 (14 Pac. R. 42).

11. State v. Cox, 25 Tex. 404; State v. Ake, 41 Tex. 166; Jones v. State, 15 Tex. App. 82; Hester v. State, *id.* 418.

12. *Ex parte* Prince, 27 Fla. 196 (9 S. R. 659); Semler, Petition of, 41 Wis. 517, 523.

13. McLaughlin v. Etchison, 127 Ind. 474 (27 N. E. R. 152); *contra*, *Ex parte* Prince, *supra*.

14. *Ex parte* Harlan, 1 Oklahoma — (27 Pac. R. 920).

15. Black, J., *arguendo* in Passmore Williamson's Case, 26 Pa. St. 9, 19.

injury to person or property is charged (or if such injury can be inferred from the charge), which, if done unlawfully or feloniously, constitutes a crime, the name of the owner of the property or of the person injured, dates, amounts, values, times and places, means used and intent of defendant may be left blank, without affecting the jurisdiction over the subject-matter, *which is the alleged injury*. There is never any want of jurisdiction over the person, as the court has the defendant in actual custody, and it matters not how it got him. If it can be gathered from the charge, for instance, that he stole a horse, and the attorneys engaged are so careless as not to call attention to the defects, but proceed and try the case on the merits, it seems like trifling with the courts to hold the proceedings void. This is not a mere opinion of mine, but is the rule I believe to be deducible from all the cases.

## DIVISION A.

## CHARGE DEFECTIVE IN PARTICULAR CRIMES.

§ 305. Affray—Assault and battery— Billiard-table keeper.	§ 313. Larceny, e t c. — Possession — Property or not?
306. Breach of the peace, attempt to provoke.	314. Limitation, crime barred by.
307. Burglary—Cheat and defraud.	315. Malicious mischief.
308. Disorderly person—Disturbing public meeting.	316. Name of owner or person in- jured — Non - repair — Ob- structing highway.
309. "Facts and circumstances."	317. Place or venue.
310. False pretenses—Fornication— Intoxication.	318. Profane swearing — Runaway slave.
311. Larceny, estoppel against the state—Feloniously, omitted.	319. Sunday labor.
312. Larceny or loan?—Lost prop- erty, finder of.	320. Time—Time, impossible.
	321. Trespass — Unlawfully—Value, omitted.

§ 305. **Affray.**—The failure to allege that both parties fought in an affray does not make the proceeding void.<sup>1</sup>

**ASSAULT AND BATTERY.**—A conviction before a justice on a charge that the defendant "did then and there unlawfully commit an assault and battery" upon a person named, is not void.<sup>2</sup> An affidavit before a justice in Alabama was uncertain, containing allegations proper both for assault and battery and for surety of the peace. The accused was tried and bound over to keep the peace, and committed for want of bonds. He sued the justice for false imprisonment, but it was decided that the justice had

1. Fritz v. State, 40 Ind. 18.

2. State v. George, 53 Ind. 434.



to construe the affidavit, and that an erroneous conclusion did not make the proceeding void.<sup>1</sup> It was held in North Carolina that the omission to state in an affidavit for assault and battery before a justice, that it was made without collusion with the accused, which the statute required, made the proceedings void.<sup>2</sup> This seems to me to be unsound.

**BILLIARD-TABLE KEEPER.**—An affidavit in Michigan for unlawfully keeping a billiard table for hire, alleged that defendant kept it “in his house,” and that persons resorted there for the purpose of playing billiards “with the knowledge and consent” of defendant, and that he had incurred the statutory penalty, but failed to state that the house was “used or occupied” by him. This defect was held not to make the proceeding void, because the allegation that he had incurred the statutory penalty was an inferential charge that he used or occupied the house.<sup>3</sup>

§ 306. **Breach of the peace, attempt to provoke.**—A California statute made it a crime to “address to another or utter in the presence of another any words, language or expressions having a tendency to create a breach of the peace.” The charge was that the defendant “did willfully and unlawfully utter and address to others certain words, which words had a tendency to create a breach of the peace,” giving the words used. There was no allegation that the words were “addressed to or uttered in the presence of” the person of whom they were spoken. It was held that a conviction was void, and the prisoner was released on *habeas corpus*.<sup>4</sup> A Wisconsin statute made it a crime to use in reference to another “and in the presence of any member of his family, abusive or obscene language, intending or naturally tending to provoke an assault or any breach of the peace.” An affidavit charged that the defendant “in the presence of John A. Kitzerow” did use abusive language in reference to complainant by calling him a “swindler,” etc. It was held that a trial on this was void.<sup>5</sup> I think these cases unsound.

§ 307. **Burglary.**—The omission of the words “in the night time” from an indictment for burglary, does not make the proceeding void and excuse the bail from producing the accused in court.<sup>6</sup>

1. Heard v. Harris, 68 Ala. 43, 48.

2. State v. Hawes, 65 N. C. 301.

3. Pardee v. Smith, 27 Mich. 33, 43.

4. *Ex parte* Kearney, 55 Cal. 212—two judges dissenting.

5. Gelzenleuchter v. Niemeyer, 64 Wis. 316 (25 N. W. R. 442).

6. Reeve v. State, 34 Ark. 610, 612, denying State v. Lockhard, 24 Ga. 420.

**CHEAT AND DEFRAUD.**—A statute of New York made it a crime to conspire to cheat or defraud any person by means that are criminal, or by any means which, if executed, would amount to a cheat. An affidavit filed before a justice charged that two persons procured a surrogate to make a decree directing the payment of a judgment by them as administrators, by means of a fraudulent conspiracy, and upon this they were arrested. The proceedings were held not void because the affidavit charged no offense, as that was a question for the justice.<sup>1</sup>

§ 308. **Disorderly persons.**—A New York statute provided that “all keepers of houses for the resort of . . . drunkards, tipplers or gamesters . . . shall be deemed disorderly persons.” An affidavit charged that the defendant, keeper of a saloon, in, etc., is a disorderly person by allowing drunkenness and gambling in his saloon by men and boys,” etc. This was held sufficient to call upon the justice to say judicially whether or not he kept his house for the resort of drunkards, and that his action in issuing a warrant of arrest was not void, although erroneous.<sup>2</sup>

**DISTURBING PUBLIC MEETING.**—An Indiana statute made it a criminal offense “to interrupt, disturb or molest any collection of the people convened for any lawful purpose.” An affidavit before a justice of the peace alleged that the defendant did interrupt and disturb by contention and various other ways, a lawful assembly of the people convened at, etc., for a lawful purpose.” This was held not so informal as to be void.<sup>3</sup>

§ 309. **“Facts and circumstances.”**—A statute of Michigan provided that any one suspecting the commission of certain crimes might file a sworn complaint before a justice setting forth the facts and circumstances supposed by him to be true, but which he was not able to state of his own knowledge, upon which the justice could issue a subpoena for witnesses to come in and give evidence touching the complaint. It was held that a complaint which stated no facts or circumstances, but merely alleged that the deponent believed the crime to have been committed, did not give the justice jurisdiction to issue the subpoena, and that a fine imposed upon the witness for refusing to answer a question was void.<sup>4</sup> A New York statute required an affidavit in a criminal case to state “the facts tending to establish the commission

1. *Lewis v. Rose*, 6 Lans. 206, 208.

2. *Gardner v. Bain*, 5 Lans. 256.

3. *Henry v. Hamilton*, 7 Blackf. 506.

4. *Matter of Morton*, 10 Mich. 208;  
*Matter of Hall*, id. 210.

of the crime and guilt of the defendant." An affidavit made a charge of larceny, and alleged that the affiant "has probable cause to suspect and does suspect" that defendant is the guilty person. The proceeding was held to be void, and the justice a trespasser.<sup>1</sup> As the charges were colorable, I think these cases wrong.

§ 310. **False pretenses.**—A failure to state what the pretences were, does not make the proceeding void;<sup>2</sup> and the same was ruled in Alabama, where the affidavit before a justice alleged that the defendant "under false pretenses obtained lint cotton of affiant to the amount of nineteen dollars, and that said defendant is now in possession of said cotton."<sup>3</sup> But in an early case in Indiana, where an affidavit before a justice alleged that the affiant "had been swindled out of eight hundred and sixty dollars" by defendant, the proceeding was held void, and the justice a trespasser.<sup>4</sup> I think this case is inconsistent with later ones in the same state, and wrong.

**FORNICATION.**—An omission to state that the woman was unmarried, does not make a prosecution for fornication void.<sup>5</sup>

**INTOXICATION.**—A Rhode Island statute made it a crime to be "intoxicated under such circumstances as amount to a violation of decency." A person was charged with "being indecently drunk." This was held not void, and a protection to the justice.<sup>6</sup>

§ 311. **Larceny, estoppel against the state.**—A person was convicted of larceny before a magistrate in Massachusetts, and suffered the punishment adjudged. He was then prosecuted again on the ground that the first proceedings were void. The exact point is not shown by the report, but the court said: "It is reasonable to believe that the complainant intended to prosecute for a larceny. The defendant understood it so, and so did the magistrate." And the first judgment was held a bar.<sup>7</sup>

"**FELONIOUSLY,**" OMITTED.—An affidavit before a justice in Alabama charged that "Henry Sam did take his cow Cherry without his knowledge or consent." The conviction was held not void.

1. *Blodgett v. Race*, 25 N. Y. Supr. (18 Hun) 132.

2. *State v. Gachenheimer*, 30 Ind. 63.

3. *Rhodes v. King*, 52 Ala. 272.

4. *Hall v. Rogers*, 2 Blackf. 429.

5. *Heckman v. Swartz*, 64 Wis. 48 (24 N. W. R. 473, 475).

6. *Alexander v. Card*, 3 R. I. 145.

7. *Com. v. Loud*, 3 Metc. 328 (37 Am. D. 139).

on *habeas corpus*.<sup>1</sup> An affidavit before a justice of the peace in Illinois for larceny alleged that affiant "had a saddle and sheepskin stolen from his barn, and that he verily believes they are now in possession of a man, name unknown, a large sized man, riding a sorrel mare with a light mane and tail, and young colt running after, when last seen; who staid last night at Edmund Russel's in Persifer township, this county," giving time, county and state. This was held void, and that the officer having him in custody was guilty of no offense in allowing him to escape.<sup>2</sup> The opinion is not based on want of identity, but on the fact that the affidavit was not inconsistent with the idea that he might have borrowed the property from the real thief. I think the case unsound. An affidavit before a justice in Ohio alleged that defendant "did unlawfully take and convey away, without right or permission, a quantity of milk, the same being the property of affiant." The affiant and the justice both supposed this to be a charge of larceny, and a warrant was issued and the defendant was arrested and convicted. The evidence did not even tend to show larceny. It was held that the justice was liable for damages.<sup>3</sup> The opinion of the court is put simply upon the ground that no offense was charged, and I think it is erroneous.

§ 312. **Larceny or loan?**—An affidavit before a magistrate in Ireland charged that affiant had lent a gun to one Leonard, to whom frequent applications for its return had been made, but that he neglected to do so; and that affiant had reason to believe that the gun was in the possession of the defendant. On this a warrant for larceny was issued and the defendant arrested. The proceeding was held void and the magistrate a trespasser.<sup>4</sup>

LOST PROPERTY, FINDER OF.—A New York statute provided, in substance, that a person finding lost property under such circumstances as to give him knowledge, or means of discovery, of the true owner, and appropriating it to its own use without making reasonable efforts to restore it, should be guilty of larceny. A person deposed before a justice, in substance, that she had "missed a pin," and saw it in possession of a Mrs. William Tracy, who would not give it up. On this, the justice issued a warrant and Mrs. Tracy was arrested, and sued the justice for false imprisonment. The proceeding was held void, and that she could

1. *Ex parte Sam*, 51 Ala. 34.

2. *Housh v. People*, 75 Ill. 487.

3. *Truesdell v. Combs*, 33 O. St. 186.

4. *M'Donald v. Bulwer*, 13 Irish C.

L. 549, 554.

recover, as the affidavit alleged no loss of the pin, nor that Mrs. Tracy had found it under such circumstances as the statute indicated, nor anything tending to show those facts.<sup>1</sup>

§ 313. **Larceny, etc.—Possession.**—Where an affidavit before a justice in Alabama charged that certain specified goods had been stolen, and that affiant suspected they were in a trunk belonging to the defendant and another person, this was held sufficient to protect the affiant for the arrest of defendant for having stolen goods secreted in his trunk. The court said that, in common parlance, it would be understood from the affidavit that that was the charge made.<sup>2</sup>

**PROPERTY OR NOT?**—An affidavit before a justice in Alabama charged that “the said Sanford has feloniously taken, stolen and carried away from the possession of Carmelick, where she was placed by affiant, a negro woman named Eliza, valued at four hundred and fifty dollars, and that she is now in the possession of said Sanford.” This was held not void, although it failed to state that Eliza was a slave, or the property of any one, or that defendant intended to convert her to his own use; that it imputed a felony in an informal manner.<sup>3</sup>

§ 314. **Limitation, crime barred by.**—Is a conviction void because the charge shows that the offense is barred by the statute of limitations? On principle, I think not. The *claim* is that he is guilty. Matters are alleged which show its commission, and whether or not a prosecution is barred by lapse of time, is a question of law for the court to decide. The circuit courts of the United States have held that a conviction for a crime which the indictment showed was thus barred,<sup>4</sup> or the detention of a deserter by order of a military court under the same circumstances,<sup>5</sup> was not void. See section 209, *supra*, for a Vermont case which holds such a prosecution void.

§ 315. **Malicious mischief.**—A statute of New York made it a crime to *maliciously* wound or *needlessly* mutilate any animal. An affidavit filed before a justice charged that affiant “saw a man on a peddler’s cart, in said town, shoot at a dog of, and belonging to, said ‘Squire Perry, in said town; that the said dog was hit in

1. Tracy v. Seaman’s, 7 N. Y. St. Rep’r 144, 146.

2. Field v. Ireland, 21 Ala. 240.

3. Ewing v. Sanford, 19 Ala. 605, 611.

4. Johnson v. United States, 3 McLean 89.

5. *In re* Davison, 21 Fed. R. 618, reversing 4 Fed. R. 507; accord, *In re* White, 17 Fed. R. 723.

the neck, and he believes the said dog will die." On this, the defendant was arrested and convicted, and then sued the justice for false imprisonment. It was held that the affidavit had no tendency to show that the shooting was done either *maliciously* or *needlessly*, and that the justice was liable.<sup>1</sup>

A New Brunswick statute made it a crime to unlawfully and *maliciously* kill a heifer. A criminal charge tried before a justice for *unlawfully* killing a heifer is void, as being only a civil case, and slander will not lie against a person for accusing a witness therein of perjury.<sup>2</sup> These cases seem to me to be wrong.

§ 316. **Name of owner or person injured.**—The omission of the name of the owner of the property from an affidavit for larceny does not make the proceeding void,<sup>3</sup> although it is evident that larceny could not be predicated of property that had no owner.

NON-REPAIR.—A conviction of a township in England for non-repair of a highway is not void, because the presentment failed to show how the township was liable.<sup>4</sup>

OBSTRUCTING HIGHWAY.—An Indiana statute made it a misdemeanor for any person to obstruct a highway "in any manner." An affidavit charged that defendant obstructed a highway "by manufacturing a rail fence across" it, and this was held not void.<sup>5</sup>

§ 317. **Place or venue.**—The failure to allege the county or state where an assault and battery occurred,<sup>6</sup> or the place, otherwise than at complainant's "place of business,"<sup>7</sup> does not make the proceeding void. But, on the contrary, a recognizance taken by a justice, which failed to show in what *county* the crime was committed, was held void.<sup>8</sup> And where an affidavit for a search warrant stated that the goods "were somewhere concealed," without specifying any particular *place*, it was held void and the justice a trespasser;<sup>9</sup> so, where an affidavit before a justice alleged that "John Price murdered John Graham somewhere between this place and the state of Texas," it was held void.<sup>10</sup>

1. Warner v. Perry, 14 Hun 337.

2. Ganong v. Fawcett, 15 New Bruns. (2 Pugs.) 129.

3. Ewing v. Sanford, 19 Ala. 605, 611; Williams v. State, 88 Ala. 80 (7 S. R. 101).

4. Regina v. Haughton, 1 El. & Bl. 501 (72 E. C. L. 501) (17 Jur. 455; 22 L. I. M. C. 89).

5. Jeffries v. McNamara, 49 Ind. 142.

6. Miller v. Wood, 23 Neb. 200 (36 N. W. R. 483).

7. Bocock v. Cochran, 39 N. Y. Supr. (32 Hun) 521, 523.

8. State v. Magrath, 31 Me. 469.

9. Grumon v. Raymond, 1 Conn., 40 (6 Am. D. 200).

10. Price v. Graham, 3 Jones' Law 545.

Where the affidavit before a justice for an affray failed to show that it occurred in the justice's township, the proceedings were held void.<sup>1</sup> So, where an affidavit for a crime committed in county A was filed before a justice in county B, it was decided that he had no jurisdiction, and that the proceedings were void.<sup>2</sup>

§ 318. **Profane swearing.**—A justice convicted a person for profane swearing for using the words "Damn you to hell," "You are a damned old rascal to hell." This was held erroneous, but not void, and that the justice was not liable.<sup>3</sup>

**RUNAWAY SLAVE.**—It was a crime to "knowingly aid any negro or other slave to run away or depart from his master's service." An affidavit before a justice charged that affiant had good reason to believe, and did believe, that one Dennis Crosby was about to persuade, and was trying to persuade, two of his hired negroes to leave his premises." On this, Crosby was arrested, and sued the affiant for false imprisonment. The proceeding was held not void and a protection to the affiant.<sup>4</sup>

§ 319. **Sunday labor.**—A statute of New York made it a crime to do "any servile laboring or working" on Sunday. A person was charged with "circulating a memorial to the legislature" on that day, for which a justice fined him, and he sued the justice. The court said: "The complaint being made, the magistrate was bound to entertain it and exercise his judgment; and whether the facts disclosed showed, *prima facie*, a violation of the act for the observance of the Sabbath, was certainly a question of law. The section of the statute is not very explicit in respect to the clause already referred to, and might well embarrass more skillful administrators of the law than many of our justices of the peace." It was held that the justice erred, but that the facts stated were not so barren as not to give jurisdiction.<sup>5</sup>

§ 320. **Time.**—The omission to state the month or year in an affidavit for assault and battery, does not make the proceeding void.<sup>6</sup> An affidavit alleged that affiant "had bought liquor of defendant at his saloon on one Sunday in the month of May, 1888. A conviction thereon was reversed because of defects in the affidavit,<sup>7</sup> but in an action against the justice for trespass, it

1. State v. Davis, 65 N. C. 298.

2. *In re* Eldred, 46 Wis. 530.

3. Holcomb v. Cornish, 8 Conn. 375, 380.

4. Crosby v. Hawthorn, 25 Ala. 221.

5. Stewart v. Hawley, 21 Wend. 552, 555.

6. Miller v. Wood, 23 Neb. 200 (36 N. W. R. 483).

7. People v. Nowak, 5 N. Y. Supp. 239.



was held not void, and a protection.<sup>1</sup> The Indiana statute made it unlawful to sell intoxicating liquor on Sunday. An indictment charged a sale "on the 11th day of July, 1886," which was on Sunday, but it did not expressly so allege. A trial on the merits and an acquittal were held to be no bar to a new prosecution charging the same sale "on the 11th day of July, 1886, being Sunday."<sup>2</sup> This case seems to be unsound. The common-law mode of charging crimes is in use in that state, and while a definite time must be alleged, any time within the statute of limitations may be proved. But that does not prevent the prosecuting attorney from charging the correct time, as he did in that case; and as the court judicially knew that the time charged was Sunday, the defect was purely technical, and certainly did not touch the jurisdiction of the court—at least, I am unable to see where it did. If it did not, the judgment was not void; and if not void, parol evidence was admissible to show the actual matters tried. In other words, the state could not take advantage, collaterally, of the omission of a single allegation in the indictment, as has been many times decided in that state.

**TIME, IMPOSSIBLE.**—Where a criminal charge lays a future and, of course, impossible time, does that make all the proceedings void? I think not, because the statement of the correct time is never essential. As the allegation always is that defendant *did* do or omit something, the laying it at a time which is future is an obvious oversight. Four cases are all I can find on the point. Three hold the proceedings void,<sup>3</sup> and one holds to the contrary.<sup>4</sup> This Indiana case holds that a judgment forfeiting a recognizance is not void in such a case, which it would be if there was no jurisdiction, because it is a step in the principal case.

§ 321. **Trespass.**—An affidavit before a justice in Kansas for a criminal trespass, was defective in failing to allege on whose land the timber was cut. It was said that the affidavit was sufficient to challenge judicial examination, and was not void.<sup>5</sup>

"UNLAWFULLY," omitted from an affidavit for an assault and battery does not make the proceeding void.<sup>6</sup>

1. *Nowak v. Waller*, 63 N. Y. Supr. (8 Pac. R. 517); *State v. Ray*, Rice's Law 1 (33 Am. D. 90).  
(56 Hun) 647 (10 N. Y. Supp. 199).

2. *Shepler v. State*, 114 Ind. 194 (16 N. E. R. 521).

3. *People v. Clark*, 67 Cal. 99 (7 Pac. R. 178); *People v. Larson*, 68 Cal. 18

4. *Rubush v. State*, 112 Ind. 107, 112 (13 N. E. R. 877).

5. *Wagstaff v. Schippel*, 27 Kan. 450.

6. *Miller v. Wood*, 23 Neb. 200 (36 N. W. R. 483).

VALUE OMITTED.—Where the Wisconsin statute authorized different degrees of punishment for stealing property of different values, it was held that the failure to allege the value of a note in an affidavit for its larceny, made the proceeding void.<sup>1</sup> I think this case is wrong.

PART IV.

PROCEDURE, WRONG.

Title A.—Kind or nature of, wrong, . . . . .	§ 322-326	Title B.—Oral instead of written pleadings, . . . .	§ 327-328
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TITLE A.

KIND OR NATURE OF, WRONG.

§ 322. Attachment proceedings instead of personal.	§ 325. Legal instead of equitable procedure—Misjoinder of proceedings.
323. Civil instead of criminal procedure.	326. Motion instead of suit or action—Motion, title adjudicated on.
324. Equitable instead of legal procedure.	

§ 322. Attachment proceedings instead of personal.—The federal statutes did not authorize attachment proceedings where no personal service was made in the district, and such a proceeding was held void and set aside on motion of a garnishee.<sup>2</sup> A statute of Alabama provided that, for certain described debts, “the separate estate of the wife is liable, to be enforced by action at law against the husband alone, or against the husband and wife jointly.” A creditor, in such a case, proceeded by attachment, recovered a judgment by default “after due and legal notice,” sold the land, and got a sheriff’s deed. In ejectment for the land, the court said: “There is simply a charge on her statutory estate created by law; and there is no authority for the levy or seizure of the estate until the charge has been declared in amount and extent, and the estate subject to it ascertained by the judgment of a court of competent jurisdiction, in a proceeding of which the wife must have notice. The levy of the attachment on her estate, and its issue against her personally, are not warranted by law, and are absolutely void.”<sup>3</sup> A Nebraska statute made the *property* of married women liable for necessities for the family. An attachment was issued against a non-resident husband and wife “for money paid, laid out and expended for their benefit,”

1. Frazier v. Turner, 76 Wis. 562 (45 N. W. R. 411).

2. Noyes v. Canada, 30 Fed. R. 665.

3. Cauly v. Blue, 62 Ala. 77, 79.

and the published notice stated the same cause of action. The verdict showed that the debt was for "rent of the dwelling-house for the use of said defendant during coverture," and the judgment recited that the debt was for "necessary support of the family of said defendant during coverture," and ordered the property attached, the separate property of the wife, to be sold, which was done. This was held void in ejectment, because the claim made was a personal one against her, and not one to hold her property under the statute.<sup>1</sup> I cannot agree with any of the cases in this section. When the court has jurisdiction over the person, and power to grant the relief sought and given, it does not seem to me that a mistake in procedure touches the jurisdiction. It is simply doing, in an irregular manner, that which the court has power to do. The defendant being in court ought to object and appeal.

§ 323. **Civil instead of criminal procedure.**—It was held by the supreme court of Wisconsin, that a mistake of law in carrying on a proceeding for contempt in violating an order in a divorce case, as a civil one in the name of the parties, instead of as a criminal one on behalf of the state, was void.<sup>2</sup> This case is considered at length in section 89, *supra*.

§ 324. **Equitable instead of legal procedure.**—A suit in equity, wrongful because there is an adequate remedy at law, is not void for that reason.<sup>3</sup> Land was sold in Virginia by order of a court of chancery, on a credit, the title retained as security, and a bond, with surety, taken from the purchaser for the price. The purchaser failing to pay, the land was resold at a lesser price and he and his surety were duly notified to appear and show cause why a decree for the difference should not be rendered against them, and such a decree was rendered on default. This was held void as to the surety.<sup>4</sup> The court said: "A holds the bond of B for one thousand dollars due and unpaid. He goes into the circuit court with the bond in his hand, and, without writ issued, or any pleadings, asks the court to award a rule against B to show cause why judgment should not be rendered against him for the debt and interest. The rule is accordingly awarded, executed and

1. *Vorce v. Page*, 28 Neb. 294 (44 N. W. R. 452).

2. *In re Pierce*, 44 Wis. 411, 426, 450.

3. *Mellen v. Moline Iron Works*, 131 U. S. 352, 367 (9 S. C. R. 781); *Thomson v. Morris*, 57 Ill. 333, 336.

4. *Anthony v. Kasey*, 83 Va. 338 (5 S. E. R. 176).

returned, and judgment thereupon rendered for the debt, interest and costs. Such a judgment would be void, notwithstanding the court has jurisdiction of the subject and of the parties." Conceding that such a judgment would be void, that was not the case before the court. The chancellor had jurisdiction to render a decree against the purchaser for the deficiency, and the rule to show cause was his lawful process; and if he erred in awarding process against the surety of the purchaser—which is doubtful—he ought to have made his defense.

§ 325. **Legal instead of equitable procedure.**—A foreclosure of an instrument as a mortgage in a statutory proceeding in Missouri, when it was a deed of trust and ought to have been foreclosed in equity, is not void in ejectment.<sup>1</sup> It was decided in North Carolina that *scire facias* against heirs, to enforce a decree against an administrator, upon a deficiency of assets, was erroneous,<sup>2</sup> but not void collaterally.<sup>3</sup>

**MISJOINDER OF PROCEEDINGS.**—In an administrator's proceeding to sell land in Illinois, the widow filed a cross-bill and procured her dower to be set off. It was held that the misjoinder of the proceedings did not make the administrator's license to sell void.<sup>4</sup> So a misjoinder of causes of action in partition in Indiana, does not make the proceeding void.<sup>5</sup>

§ 326. **Motion instead of suit or action.**—An order made in New York for the issuing of an execution, on a *motion* made by an executor, when the statute required it to be done by an *action*, was held to be merely erroneous, and not void.<sup>6</sup>

**MOTION, TITLE ADJUDICATED ON.**—A person was notified to appear and show cause why he should not be punished for contempt for withholding property from a receiver. He appeared and answered that the property was his. The court heard the matter and imprisoned him for contempt. On *habeas corpus*, this was held void, because he had a right to have a regular trial, and was not before the court as an adverse party.<sup>7</sup> The same ruling was made where, on a motion, a person was imprisoned for contempt for failing to turn over to an executor the alleged

1. *Miles v. Davis*, 19 Mo. 408, 413.

4. *Swearngen v. Gulick*, 67 Ill. 208,

2. *Jeffreys v. Yarborough*, 1 Dev. 210.  
Eq. 506.

5. *Jones v. Levi*, 72 Ind. 586, 591.

3. *Den ex dem. White v. Albertson*,  
3 Dev. Law 241 (22 Am. D. 719).

6. *Nims v. Sabine*, 44 How. Pr. 252.

7. *Ex parte Hollis*, 59 Cal. 405, 413.

assets of the estate, which he claimed to own himself.<sup>1</sup> If the court had power in a proper case to determine the question of title, I think both these California cases unsound. A Virginia court had power to appoint trustees, upon summary process, to act for a certain congregation. On such an application, it not only appointed trustees, but gave them directions concerning their duties. These directions were held to be void, because they could only be given in a case brought before the court by a bill.<sup>2</sup> But where the want of jurisdiction was, I am unable to determine. The court had power to grant the relief sought, the defendant was before it, and had the same opportunity to introduce all its evidence as though the proceeding had been by a bill.

#### TITLE B.

##### ORAL INSTEAD OF WRITTEN PLEADINGS.

327. Principle involved in Title B—  
Proceedings not void—Crim-  
inal procedure.

328. Oral pleadings—Void—Crimi-  
nal procedure.

**§ 327. Principle involved in Title B—Proceedings not void.**—Is a judgment void, and all concerned trespassers, because the trial was had upon oral instead of written pleadings? No case has ever yet advanced any very cogent reason why it should be. Very frequently the whole trial is had in the actual absence of the pleadings, and a correct conclusion reached without difficulty. They are merely for the convenience of the parties, and what is for their convenience they may waive. The most difficult and complicated trials concern the title to land; and they are tried on a complaint simply alleging ownership in the plaintiff and a denial by the defendant. Under an oral plea of not guilty, a defendant in a criminal case may prove anything that tends to show his innocence. In many states, all the pleadings in inferior courts are oral. No statute has ever declared that the want of written pleadings shall render the proceedings void collaterally. It is only because the statutes so provide, that the pleadings have to be in writing, and simply *because* the statute is disregarded, is no reason for holding the proceedings void. The disregard must be in some material jurisdictional point before such serious consequences can ensue. The Indiana statute authorized partition to be made "on application" to the circuit court, after notice to the adverse party. A

1. *Ex parte Casey*, 71 Cal. 269 (12 Pac. R. 118).

2. *Wade v. Hancock*, 76 Va. 620, 625.

decree in such a case was collaterally assailed in the Supreme Court of the United States, because no complaint or petition appeared in the record. The court said: "The statute does not in terms require the application of the proprietor seeking a partition to be presented in writing, or, if one be presented, to be filed among the records of the court. . . . When an application is made, the court must consider whether it is by a proper party, whether it is sufficient in form and substance, and whether the requisite notice has been given as prescribed. Its order made thereon is an adjudication upon those matters."<sup>1</sup> The statutes of Florida did not expressly require an administrator's petition to sell land to be in writing, and the supreme court of that state held that such a sale was not void because the order was made on an oral request.<sup>2</sup> When the heirs came in and examined the reports, they could plainly see that a sale of land was necessary, and they were injured in no manner by the absence of a written petition. Still, they were willing to recover the land from the person who furnished the money to pay their ancestor's debts, but the supreme court of Florida was astute enough to head off such rascality. A decree of a competent court ordering the sale of a decedent's lands in Texas, will protect an innocent purchaser at such sale, on the ground that he need not look beyond the order, even though there be no petition.<sup>3</sup> A railroad company acknowledged service, and the plaintiff took judgment without filing any complaint. The supreme court of North Carolina held that this judgment was not void, and that the error could be cured at any time by filing a complaint, and that it was erroneous even to vacate the judgment on motion of the defendant.<sup>4</sup> The same ruling was made in Virginia, where the statute authorized process to issue before declaration filed.<sup>5</sup> It was ruled in New Jersey, that a confession of judgment in a superior court was not void because the affidavit required by statute was not filed.<sup>6</sup> In proceedings to revive a judgment by *scire facias* in Pennsylvania, the clerk certified that the declaration in the original action could not be found. The court treated

1. Hall v. Law, 102 U. S. 461, 463.

2. Emerson v. Ross, 17 Fla. 122, 129.

3. *Dictum* in Robertson v. Johnson, 57 Tex. 62, 64; *dictum* in Alexander v. Maverick, 18 Tex. 179 (67 Am. D. 693).

3. Leach v. Western N. C. R. R. Co., 65 N. C. 486.

5. Terry v. Dickinson, 75 Va. 475.

6. Den ex dem. Vanderveere v. Gaston, 24 N. J. L. (4 Yabr.) 818, 820.

the case as if none had ever been filed, and said it made the judgment erroneous, but not void.<sup>1</sup> The record of a superior court is not void because it is entirely silent concerning the filing of a petition or complaint. In a collateral attack on a judgment of naturalization, the supreme court of Illinois said: "It seems clear, both on principle and authority, that a record of naturalization made by a court of competent jurisdiction cannot be impeached in a collateral proceeding by showing that the preliminary steps required by law have not, in fact, been taken."<sup>2</sup>

**CRIMINAL PROCEDURE.**—In a late English case, a warrant was issued by a magistrate for a statutory crime, and the defendant was arrested, tried and convicted without any written accusation whatever. A witness therein was prosecuted for perjury, and his defense was, that the whole proceeding was void, for want of a written accusation; but it was held that the proceeding was not void, and that the defense was not good. Seven of the nine judges composing the court wrote opinions, and they seem to hold that, as the statute did not expressly require a written charge, the common-law error committed by the magistrate in proceeding on an oral one, did not touch his jurisdiction.<sup>3</sup> This case was approved in a later one, in which the same court, in speaking of the absence of a written charge, said that "if one who may insist on it waives it, submits to the judge and takes his trial, it is afterwards too late for him to question the jurisdiction, which he might have questioned at the time."<sup>4</sup>

**§ 328. Oral pleadings—Void.**—An order to an administrator to sell land, in the absence of the written petition required by the statute, was held void in Missouri, New York and Texas.<sup>5</sup> The Texas statute required persons holding title bonds from decedents, who desired to perfect them, to file a complaint in writing in the probate court, and to obtain an order for the administrator to make title according to the bond. A general order to the administrator to execute title to all lands for which the estate of the deceased stood bound, was held void.<sup>6</sup> The absence of an

1. *Hersch v. Groff*, 2 Watts & S. 449.

2. *People ex rel. Brockett v. McGowan*, 77 Ill. 644 (20 Am. R. 254).

3. *Reg. v. Hughes*, 4 Q. B. Div. 614 (14 Cox Cr. Cases 284, 305; 40 L. T. 685; 48 L. J. M. C. 151).

4. *Dixon v Wells*, 25 Q. B. Div. 249, 255.

5. *Teverbaugh v. Hawkins*, 82 Mo. 180; *Corwin v. Merritt*, 3 Barb. 341, 344; *dictum* in *Schneider v. McFarland*, 4 Barb. 139, 144; *Finch v. Edmonson*, 9 Tex. 504, 512.

6. *Jones v. Taylor*, 7 Tex. 240 (56 Am. D. 48).



affidavit in attachment<sup>1</sup> or bastardy<sup>2</sup> proceedings; or in confession;<sup>3</sup> or of written pleadings in a court of equity;<sup>4</sup> or of a written petition to commissioners to locate a highway,<sup>5</sup> or to try the right of property before a justice;<sup>6</sup> or of an affidavit in replevin;<sup>7</sup> or of a written complaint,<sup>8</sup> or confession,<sup>9</sup> or signature of defendant to the confession,<sup>10</sup> before a justice of the peace, in disregard of the statute, was held to make the proceeding void.

CRIMINAL PROCEDURE.—The issuing of a criminal warrant,<sup>11</sup> or an arrest without a warrant and trial without a charge in writing,<sup>12</sup> even by confession and oral consent of the defendant,<sup>13</sup> has been held to make the whole proceeding void. In the last Indiana case cited, an offense was committed in the presence of the justice, in which case the statute authorized him to cause the arrest of the offender by verbal order, and authorized his detention for one hour, in order that he might be taken “by virtue of a warrant issued on complaint on oath,” upon which complaint he was to be tried. It was held that a trial and conviction in such a case, by consent of defendant, without any written complaint, was void. The difference between this Indiana case and the English cases cited in the last section is, that in the former a statute and in the latter the common law was disregarded. But for the reasons given in section 67, *supra*, I think that makes no difference, on principle. See sections 212, 271 and 327, *supra*.

1. *Borland v. Kingsbury*, 65 Mich. 59 (*Kingsbury v. Borland*, 31 N. W. R. 620)—on *certiorari*; *Voshburgh v. Welch*, 11 Johns. 175; *Adkins v. Brewer*, 3 Cow. 206; *dictum* in *Endel v. Leibrock*, 33 O. St. 254, 267; *Gray v. McCarty*, 22 Q. B. (U. C.) 568, 571.

2. *Poult v. Slocum*, 3 Blackf. 421, 425.

3. *Wilson v. Davis*, 1 Mich. 156; *Oyster v. Shumate*, 12 Mo. 580.

4. *Dictum* in *Windsor v. McVeigh*, 93 U. S. 274, 283.

5. *Small v. Pennell*, 31 Me. 267, 270; *Harrington v. People*, 6 Barb. 607, 611; *State v. Morse*, 50 N. H. 9, 14; *Eames v. Northumberland*, 44 N. H. 67; *Clement v. Burns*, 43 N. H. 609, 614;

*Haywood v. Charlestown*, 34 N. H. 23, 26.

6. *Walker v. Ivey*, 74 Ala. 475, 477.

7. *Evans v. Bouton*, 85 Ill. 579.

8. *Reeves v. Clark*, 5 Ark. 27.

9. *Wilson v. Davis*, 1 Mich. 156.

10. *Spear v. Carter*, 1 Mich. 19 (48 Am. D. 688).

11. *Caudle v. Seymour*, 1 Ad. & El. N. S. 889 (41 E. C. L. 825); *Appleton v. Lepper*, 20 C. P. (U. C.) 138.

12. *Tracy v. Williams*, 4 Conn. 107, 113 (10 Am. D. 102), *relying on Morgan v. Hughes*, 2 Term R. 225; *Wilcox v. Williamson*, 61 Miss. 310.

13. *Bargis v. State*, 4 Ind. 126; *Drake v. State*, 68 Ala. 510; *Bigham v. State*, 59 Miss. 529; *O'Brian v. State*, 12 Ind. 369.

## CHAPTER IX.

### JURISDICTION TAKEN OVER THE PERSON BY VIRTUE OF DEFECTIVE PROCESS, SERVICE OR PROOF OF SERVICE, OR IN THEIR ABSENCE; OR BY VIRTUE OF AN UNAUTHORIZED APPEARANCE.

#### SCOPE OF CHAPTER IX, AND PRINCIPLE INVOLVED IN PROCESS

AND SERVICE, . . . . .	§ 329
PART I.—PROCESS, . . . . .	330-383
PART II.—SERVICE, DEFECTIVE OR WANTING, . . . . .	384-500

§ 329. **Scope of Chapter IX, and principle involved in process and service.**—In this chapter is considered the validity of rights and titles derived through a judicial proceeding which is infirm and defective in obtaining jurisdiction over either the plaintiff or defendant by reason of an error of law or fact. The object of the complaint or petition is to give the defendant official information concerning the demand made against him, and the object of process and service is to give him official information that he has been sued in some particular court. We have just seen in Chapter VIII, that a variation from the formulæ prescribed by law for the complaint or petition does not render the proceedings void, unless so gross as to leave no colorable information, and the same principles govern in regard to the process and service. If they are sufficient to inform the defendant that he has been sued in a specified court, and if the return is sufficient to inform the court that such service has been made, the proceedings are colorable, and will withstand a collateral assault. His actual rights are no more jeopardized by such defective notice than by a defective petition. Those defects, the plaintiff must remedy at his request; and if he makes no request he is held to waive them, at least collaterally. Why should any defect in the process or service, or proof of service, or in the preliminary matters relating to process or service, which could not mislead the defendant to his prejudice, make the judgment void? In such cases, a court of equity, which acts only in furtherance of justice, would afford no relief even against the plaintiff. Why should relief be given in a court of law, to the prejudice of a *bona*

*fide* purchaser, by holding the judgment void collaterally? Is the common law so destitute of just principles, that its judges must give active aid to iniquity in such cases? I am not willing so to admit. It is just as much the delight and duty of the common-law judge to do justice as it is of the chancellor. Suppose a person to be sued at law in reference to property, and process to be served on him, and judgment to go by default. Suppose now that two new suits arise between the parties concerning the same property, one at law and one in equity, and that the turning point in both is the notice afforded by the process and service in the first suit. If the process and service were sufficient to put him on inquiry in regard to the plaintiff's rights, the chancellor does not hesitate to hold him bound. Why should the common-law judge, on the same notice, hold all his proceedings void and all concerned trespassers? No court has ever yet given a very satisfactory reason why. The only reason that can be given is that the *law* requires the process to contain certain specified things, and to be served in a certain specified manner, and that when that is not done the legal rights of the defendant are infringed. That is true. And his remedy is to have the writ and service quashed at the cost of the plaintiff. But the writ and service gave him substantial information concerning the suit, and their defects caused him no actual damage; and it is a well-settled rule of the common law that a party must object at the first opportunity—and be active, too, in finding the opportunity—or his mere technical rights are waived. Hence, I conclude that the true rule concerning process and service, collaterally, both at law and in equity, is, that if information be given sufficient to warn defendant that a judicial proceeding is pending against him in a particular court, and the proof of service is sufficient for the court to infer that he has such information, the proceeding by default will not be void. This is the rule deduced by me from all the cases. Thus, it was held in Illinois, that an administrator's order to sell land was not void on account of defects in the notice to the heirs, if it was sufficient to apprise a reasonable person that the petition for that purpose was pending in the proper court;<sup>1</sup> and it was likewise ruled in Indiana, that if process, either actual or constructive, be sufficient to inform defendant of the nature of the proceedings, of the interest

1. *Finch v. Sink*, 46 Ill. 169, 170.

he has in them, and the court where it will be heard, it is not void.<sup>1</sup> And the Supreme Court of the United States said: "Where there has been personal service of irregular or erroneous process, the party has notice in part, and may, if he will, appear and object to or waive the irregularity."<sup>2</sup> Proceedings before the board of county commissioners in Indiana to annex territory to a city, are not void because of defects—case not showing what—in the statutory notice by publication, and the owner of the land annexed cannot defeat the right of the city to collect taxes.<sup>3</sup>

Where the Indiana statute required that, in a proceeding to establish a drain by the board of commissioners, a "notice of the pendency and prayer of the petition" should be given, but the notice given was "that the report of the viewers has been filed and will be heard," it was held not void collaterally. It was said that any one seeing it would understand that a petition to establish the drain was pending.<sup>4</sup>

Process was issued in due form in Georgia, but not served. This was not discovered until in term, when the court made an order for service returnable at the next term. The process was then served as it was, without any change of dates or terms, and judgment taken. This was held erroneous, but not void, because it could have been amended.<sup>5</sup> The court said: "If the defendant had notice of the suit and failed to object in time to those defects, and suffered judgment to go against him without insisting on them, then he waived them and they were cured by the judgment." A Vermont statute required a justice of the peace to indorse upon summonses the day, month and year when the writ was presented to and signed by him, and declared that the failure to do so should make the *writ* void. It was held that a failure to do so did not make the *judgment* void in trespass for goods seized. The court said: "The general principle certainly is, that a judgment can be considered void in no case except where it appears from the judgment itself that the court had no jurisdiction."<sup>6</sup> This old and sensible case ought to settle the

1. *Waltz v. Borroway*, 25 Ind. 380, 382.

2. *Hollingsworth v. Barbour*, 4 Peters 466.

3. *Huff v. City of Lafayette*, 108 Ind. 14 (8 N. E. R. 701).

4. *Montgomery v. Wasem*, 116 Ind. 343 (15 N. E. R. 795, and 19 N. E. R. 184).

5. *Baker v. Thompson*, 75 Ga. 164.

6. *Allen v. Huntington*, 2 Aiken (Vt.) 249 (16 Am. D. 702, 704).

law, that the omission of any matter of form, even in direct violation of the statute, does not make the writ void. So it was decided in Massachusetts, that the discharge of a poor debtor was not void because the notice of his desire to take the oath for such relief recited a repealed statute.<sup>1</sup> The decision was put upon the ground that the creditor *could not have been misled*, and it declares the true principle, in my opinion. It was likewise held by an early decision in a federal circuit court, that process in a special and summary proceeding, however defective, having been adjudged sufficient, would shield the judgment from collateral attack.<sup>2</sup> The New York statute required the notice attached to the summons published, to state when the summons was filed. The notice published showed the court and the county where it was triable, and that the summons was filed with the complaint, and also showed facts from which the law fixed the place of the filing of the complaint, and thus, by inference, the notice showed where the summons was filed. This was decided to be sufficient to protect the judgment from collateral attack.<sup>3</sup> An administrator's notice of the presentation of a petition to sell land in Illinois was not dated, and failed to name the state, but it did name the county and court and called for an appearance at the next term, and was published at the proper time for the next term, in the county named. These defects were held not to make the proceeding void. The court said: "Would any person reading it be advised of the time and place, when and where the petition would be presented, and its objects? The answer cannot be doubtful."<sup>4</sup>

As long ago as 1835, the supreme court of Maine, in speaking of process and service before a justice of the peace, said: "By chapter 76 of the revised statutes, section 8, it is provided, that all civil actions, wherein the debt or damage does not exceed twenty dollars, and wherein the title of real estate is not in question, and specially pleaded by the defendant, shall and may be heard, tried, adjudged and determined by any justice of the peace within his county. General jurisdiction to this extent

1. *Bussey v. Briggs*, 2 Metc. 132; *accord*, that service which cannot mislead is not void, is *Thompson v. Chicago S. F. & C. Ry. Co.*, — Mo. — (19 S. W. R. 77, 79).

2. *Doe ex dem. Sargeant v. State Bank*, 4 McLean 339, 347.

3. *Denman v. McGuire*, 101 N. Y. 161 (4 N. E. R. 278).

4. *Goudy v. Hall*, 36 Ill. 313, 317 (87 Am. D. 217).

having been thus given, the same section prescribes what process the justice shall issue, where it may be served, and how long before the time appointed for trial. The process is to be by summons, *capias* or attachment. The forms of these writs are prescribed in another statute. The service is to be made at least seven days before trial. Suppose the writ varies substantially from the form provided; or suppose it be served five days, instead of seven, before trial, yet if the justice renders judgment thereon, having jurisdiction, it will be a subsisting judgment, which may be enforced until reversed; which it may be by a writ of error. So if the writ is directed to an officer in another county, and is by him served, although not warranted by law, and the judgment rendered thereon may be reversible for error, yet it remains in force until so reversed."<sup>1</sup> A Vermont statute authorized notice of the desire of a poor debtor to take the oath of discharge to be served on the creditor by copy at his usual place of abode, but if he had no place of abode in the state, then by copy on his attorney. The creditor had been a resident of the county, but broke up housekeeping and went to living with a relative, and two days before service he "went out of the state to seek a residence for himself and family, leaving his wife and children" at his relative's house, in the county, where they still remained. Notice was served on his attorney. The attorney appeared and pleaded the foregoing matters in abatement of the service on himself, and the commissioners found the plea to be true, but held the service on the attorney good, and granted a discharge. In a collateral assault on the order of discharge, the court held that the questions presented were for the commissioners to decide, and that error in their decision did not make their judgment void.<sup>2</sup> In this case the record showed that the court held the service good on a mistake of law. The supreme court of Indiana has held in numerous cases that where the record of an inferior court showed "some" notice,<sup>3</sup> or "some,"<sup>4</sup> or "some kind"<sup>5</sup> of a notice in ditch proceedings, or "some" notice in proceedings to annex territory to a city,<sup>6</sup>

1. *Boynton v. Fly*, 12 Me. (3 Fairf.) 17, 18.

2. *Allen v. Hall*, 8 Vt. 34, 37.

3. *Oppenheim v. Pittsburgh C. and St. L. Ry. Co.*, 85 Ind. 471, 476.

4. *Kleyla v. Haskett*, 112 Ind. 515,

516 (14 N. E. R. 387); *Peters v. Griffie*, 108 Ind. 121 (8 N. E. R. 727); *Harris v. Ross*, 112 Ind. 314 (13 N. E. R. 873).

5. *Hackett v. State*, 113 Ind. 532, 536 (15 N. E. R. 799).

6. *City of Terre Haute v. Beach*, 96 Ind. 143, 145.

although the notice was constructive by posting and publishing, the proceedings were not void.

Concerning service made by a constable in Michigan, whether personal or by copy, the return was ambiguous. The justice construed it to be personal, and rendered a personal judgment by default. In a collateral suit, the defendant was allowed to prove that the service was by copy, and thus to show the judgment void.<sup>1</sup> But the construction put upon the return by the justice was conclusive collaterally, as it seems to me. Affidavits of service of summons, and of failure of defendants to answer, call upon the court to decide upon their sufficiency, and the determination of the court cannot be attacked collaterally.<sup>2</sup> Defective service of process gives the defendant actual notice, and, although the judgment is erroneous, it is not void.<sup>3</sup> Mere defects in service do not make a judgment against infants void.<sup>4</sup> The return to a writ of attachment was defective, for which reason the defendant appeared specially and moved to quash it, which motion the court overruled, but this error was held not to make the proceeding void.<sup>5</sup> The court of appeals of New York ruled that where service was defective, but adjudged to be good, the right of a defendant to defeat the judgment collaterally was just the same, whether he did not appear or whether he did appear specially and contest the point unsuccessfully.<sup>6</sup> This case seems to me to confuse jurisdiction over the person with jurisdiction over the subject-matter. Where the want of jurisdiction over the subject-matter is clear beyond all debate, the denial of a motion to dismiss cannot make the judgment valid. It is not so, however, with a want of jurisdiction over the person. It is possible for the court to obtain that. And when the defendant appears specially and moves to dismiss for want of service, the court *has power to decide that motion*. In respect to the motion, it has jurisdiction over both person and subject-matter, and its judgment that the motion is not well taken, however erroneous, is not void, and cannot be attacked collaterally, and necessarily shields the judgment in the main case, even though

1. Smalley v. Lighthall, 37 Mich. 348.

2. Hotchkiss v. Cutting, 14 Minn. 537, 542.

3. Webster v. Daniel, 47 Ark. 131 (14 S. W. R. 550); *quoting from* Harrington v. Wofford, 46 Miss. 41.

4. Hawkins v. McDougal, 126 Ind. 539 (25 N. E. R. 820).

5. Axman v. Dueker, 45 Kan. 179 (25 Pac. R. 582), and 45 Kan. 745 (26 Pac. R. 946).

6. Sheldon v. Wright, 5 N. Y. 497, 515.



it may show an entire absence of service. This is the same principle considered in section 236, *supra*, which holds a judgment not void, even though founded on a void judgment.

**WARRANT FOR ARREST.**—The only object of a warrant being to bring the defendant into court, so as to compel an appearance, the fact that the warrant is void, or wanting, does not affect the jurisdiction, when the defendant is within the actual power of the court. Thus, it was held in California, that the fact that the warrant for an arrest in a criminal case was void, so as to make the arresting officer liable for false imprisonment, did not avoid the judgment collaterally.<sup>1</sup> The principle is the same as a proceeding *in rem*. The court obtains a *de facto*—although wrongful—jurisdiction over the person of the defendant by having him in its actual custody. See section 383, *infra*, for cases of kidnaping and arresting without warrants.

## PART I.

### PROCESS.

Title A.—Preliminaries to issuing process, . . .	§ 330-346	Title B.—Process, defective or wanting, . . .	§ 347-383
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### TITLE A.

#### PRELIMINARIES TO ISSUING PROCESS.

##### § 330. Principle involved in title A.

Sub-title I.—Affidavit to au- thorize publication, defect- ive or wanting, . . .	§ 331-343	Sub-title II.—Order for pub- lication, defective or want- ing, . . .	§ 344-346
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**§ 330. Principle involved in title A.**—Before process for publication (and in certain cases before any process) can lawfully issue, the statutes required certain affidavits, motions and orders to be made by certain persons; and omissions and mistakes in these preliminary matters have been a fruitful source of collateral assaults on the judgments rendered in such proceedings. If the object of process and service is to notify the defendant that a suit is pending against him in a designated court, as advanced in section 329, then when the residence or whereabouts of the defendant is such, that the process actually issued and published is the

1. *Ex parte Ah Men*, 77 Cal. 198 (19 Pac. R. 380).

It is the fact of service and not its proof which gives jurisdiction, hence the proof can be amended in aid of the judgment collaterally. *In re Newman's Estate*, 75 Cal. 213 (16 Pac. R. 887, 889).

proper one, the entire absence of all preliminaries is a matter of no concern to him, and on principle, cannot make the judgment void. The publication made gives him the same information, no matter on what evidence or by whom ordered. Thus, a Mississippi statute authorized publication for non-resident distributees, and provided that the executor or administrator "shall make affidavit of the fact" of such non-residence. The court held this statute to be directory, and that if the court was satisfied concerning the non-residence by any competent evidence, the service by publication would not be void.<sup>1</sup> The supreme court of Iowa held that an affidavit was required to inform the judge ordering publication of the existence of such facts as authorized him to exercise the authority conferred on him by law; that it was in the nature of evidence; and that if it was sufficient in his judgment to authorize the particular order or judgment demanded, its sufficiency could not be questioned collaterally.<sup>2</sup> The supreme court of North Carolina recently held that all irregularities and errors in the order for publication were cured by the judgment of the court acting thereon.<sup>3</sup>

#### SUB-TITLE I.

##### AFFIDAVIT TO AUTHORIZE PUBLICATION, DEFECTIVE OR WANTING.

Division A.—Matters of form, § 331-334	Division B.—Matters of substance, . . . . . § 335-343
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#### DIVISION A.

##### MATTERS OF FORM.

§ 331. Entitling omitted.	§ 334. Person making affidavit or instituting proceedings, improper.
332. Filed or made too late—Made too long before being used.	
333. Information and belief.	

§ 331. **Entitling omitted.**—A judgment is not void because the affidavit to authorize publication omitted the usual heading "State of Iowa, Dickinson county, ss.," when it otherwise showed the state, county and court;<sup>4</sup> nor because it was not entitled in any court or cause, and failed to show who the plaintiff was, when it named the defendant's and was filed in the cause.<sup>5</sup>

§ 332. **Filed or made too late.**—A Minnesota statute authorized publication to be made "upon the filing" of an affidavit of non-

1. Cason v. Cason, 31 Miss. 578, 592.      4. Palmer v. McCormick, 30 Fed. R. 82.  
2. Banta v. Wood, 32 Iowa 469, 474.      5. Harris v. Lester, 80 Ill. 307, 311.  
3. Ward v. Lowndes, 96 N. C. 367 (2 S. E. R. 591, 597).

residence, etc. An affidavit was duly made and an order for publication issued thereon and published, but the affidavit was not "filed" until the day judgment was taken. This was held to make the judgment void;<sup>1</sup> and in a later case in the same state, where publication was first had and an affidavit of non-residence was made and filed the same day the petition was presented, the judgment was held void.<sup>2</sup> A Nebraska statute provided that, "before service can be made by publication an affidavit must be filed," and where it was filed two days after the first publication, the judgment was held void.<sup>3</sup> The Michigan statute in attachment proceedings, where there is no personal service and no appearance, provides that the plaintiff, "on filing an affidavit of publication of the notice hereinbefore required for six successive weeks, may file his declaration in the suit, and proceed therein as if a copy of such attachment had been served upon defendants." In a case where the declaration was filed on the 21st, but the affidavit of publication not until the 29th, the whole proceeding was held void.<sup>4</sup> A Wisconsin statute provided that, "in all cases where publication is made, the complaint shall be first filed." A judgment was held void because the complaint was not filed until eighteen days after the order for publication was made.<sup>5</sup> So a discharge granted to an insolvent, on a petition not verified before the court made the order for the creditors to appear and show cause, is void, and it is not cured by a subsequent verification before the discharge was granted.<sup>6</sup> Contrary to all these cases, and sounder in principle, in my opinion, is a late case from Indiana. The statute of that state concerning drainage proceedings required the petition to be filed before the posting of notices for a hearing; but where the notices were first posted, the proceedings were held not void.<sup>7</sup> No court has ever yet assigned any reason why the failure to comply with the letter of the statute on a preliminary matter that cannot possibly affect the rights of the defendant, should make the whole proceeding void, and none occurs to me.

1. Barber v. Morris, 37 Minn. 194 (33 N. W. R. 559).

2. Brown v. St. Paul and N. P. Ry. Co., 38 Minn. 506 (38 N. W. R. 698).

3. Murphy v. Lyon, 19 Neb. 689 (28 N. W. R. 328).

4. Steere v. Vanderberg, 67 Mich. 530 (35 N. W. R. 110, 113).

5. Anderson v. Coburn, 27 Wis. 558, 562.

6. Ely v. Cook, 28 N. Y. 365, 374 (2 Abb. Ct. of App. 14).

7. Deegan v. State, 108 Ind. 155, 157 (9 N. E. R. 148).

MADE TOO LONG BEFORE BEING USED.—A decree against non-residents, on publication, was said to be void in Illinois where the affidavit of non-residence was not filed for twenty days after verification.<sup>1</sup> This was a direct attack by bill of review, and the court admitted that it need not be filed the same day it was made. The *dictum* seems clearly wrong. In Nebraska a judgment is not void because the affidavit was not filed until the next day after it was made.<sup>2</sup> But in Michigan, where the affidavit of non-residence in attachment was filed four days after being verified,<sup>3</sup> and in summary proceedings on an affidavit verified three years before to recover land from one holding over,<sup>4</sup> the proceedings were held void.

§ 333. **Information and belief.**—An affidavit to authorize service by publication in Kansas stated the grounds on “information and belief.” On a motion to set aside the judgment, the affidavit was held to be erroneous, but not void, and the plaintiff was permitted to amend and make it positive in order to defeat the motion;<sup>5</sup> and the court of appeals of New York held that an affidavit of the non-residence of the defendant made on “information and belief” did not make the judgment void, because the facts must be obtained on inquiry and information.<sup>6</sup>

KNOWLEDGE OF ALL THE PLAINTIFFS.—A Wisconsin statute authorized publication to be made in partition suits for “unknown” owners when that “fact shall be made to appear by affidavit.” In such a suit, one of the plaintiffs filed his affidavit that the owners of a specified interest were unknown, and publication was ordered and made, and the land was partitioned. This was held void as to the unknown owners because the affidavit was not made by all the plaintiffs.<sup>7</sup> But the construction of the statute was a question for the trial court.

§ 334. **Person making affidavit or instituting proceedings, improper.**—A statute of Connecticut empowered a justice of the peace to appoint a private person to serve a summons, upon an affidavit by the plaintiff or his agent indorsed upon it stating certain facts.

1. *Dictum* in Campbell v. McCahan, 41 Ill. 45, 49.

2. Armstrong v. Middlestadt, 22 Neb. 711 (36 N. W. R. 151).

3. Wilson v. Arnold, 5 Mich. 98.

4. Allen v. Carpenter, 15 Mich. 25, 32.

5. Harrison v. Beard, 30 Kan. 532.

6. Van Wyck v. Hardy, 39 How. Pr. 392 (11 Abb. Pr. 475)—N. Y. Ct. of App., *affirming* 20 How. Pr. 222.

7. Kane v. Rock River Canal Co., 15 Wis. 179, 188; Mecklem v. Blake, 19 Wis. 397.

A writ thus issued to a private person upon the affidavit of one not the plaintiff nor alleged to be his agent, makes the writ void and gives such person no power to serve it.<sup>1</sup> The pauper mother of a bastard child was supported by the town of M at the county poor house in the town of P. The statute, in such cases, authorized the overseers of the poor of the town "where such woman shall be, to apply to some justice of the peace of the same county to make inquiries into the facts and circumstances of the case." The overseers of the town of M—and not those of the town of P where she was—made application to a justice, who went and took her examination and issued a warrant, on which the putative father was arrested. He sued the overseers and the justice for false imprisonment, and it was held that the proceedings were void and the parties liable.<sup>2</sup> The statutes of Maine and of Massachusetts provided that a poor debtor, desiring to take the oath for relief, should apply in writing to the keeper of the prison, who, in turn, should apply to a justice of the peace of the county, by whom a citation to the creditor was to issue. The debtor made a direct application to the justice, who issued a citation and discharged him. This was held void.<sup>3</sup> The debtor being in jail could not go and see the magistrate, so the statute allowed him to send the notice by an agent; but because he did it himself, those learned courts held the proceeding void. If the jailer took the defendant to the magistrate's office, just what difference it would make because the debtor handed the notice to the magistrate instead of to the jailer to hand to him, the courts did not point out, and I cannot. So in the bastardy case, if the persons conducting the suit on behalf of the plaintiff had no authority in law or in fact to do so, that was a defense to be made before the justice. A probate court in Missouri, on its own motion, made an order requiring a curator to give an appeal bond, when the statute only authorized it to make such an order on motion of the adverse party, but it was held not to be void.<sup>4</sup> So, the omission of the clerk to attach the seal of the court to the affidavit showing the facts to authorize publication, does not make the judgment void.<sup>5</sup>

1. *Case v. Humphrey*, 6 Conn. 130, 138.      *Stevens v. Edwards*, 12 Cush. 79; *Bruce v. Keogh*, 7 Cush. 536.

2. *Sprague v. Eccleston*, 1 Lans. 74.

4. *Potter v. Todd*, 73 Mo. 101, 105.

3. *Knight v. Norton*, 15 Me. 337; *Neil v. Ford*, 21 Me. 440; *accord*, 554.

5. *Entreken v. Howard*, 16 Kan. 551.

## DIVISION B.

## MATTERS OF SUBSTANCE.

## § 335. Cause of action—Cause stated too generally.

Sub-division I.—Diligence or  
ability to find defendant or  
his agent in the state, not  
shown, . . . . . § 336-339

Sub-division II.—Other mat-  
ters of substance, defective  
or wanting, . . . . . § 340-343

§ 335. Cause of action.—A statute of Indiana provided that, “Where it appears by affidavit filed, that a cause of action exists against any defendant, or that he is a necessary party to an action in relation to real estate,” and that he is a non-resident, publication could be made for him. In such a case, in partition, the affidavit on which publication was made simply alleged non-residence. The decree was held not void.<sup>1</sup> It was said to be a mere error of law in holding the affidavit sufficient. In a later case in the same court, an affidavit to procure publication for non-residents in a foreclosure case, alleged that the plaintiffs “have a good cause of action against the defendants for a foreclosure of mortgage,” failing to allege that it was the mortgage sued upon. This was held not to make the decree void.<sup>2</sup> But contrary rulings were made in Kansas<sup>3</sup> and Wisconsin,<sup>4</sup> where the affidavit failed to show that the cause of action was one upon which the statute authorized service by publication. The Indiana cases seem to me to be more in accord with public policy and reason. The complaint shows what the cause of action is, and these defects in the affidavit cause no injury to the defendant.

CAUSE STATED TOO GENERALLY.—An affidavit in Kansas alleged “that the above cause is one of those mentioned in section 72 of the code.” This was said to be defective but not to make the judgment void;<sup>5</sup> but precisely the contrary was held in Nebraska.<sup>6</sup> And in California, an affidavit for publication of notice to a non-resident for the foreclosure of a mortgage, alleged that the deponent “has a good cause of action in this suit against the defendant.” The statute required the facts to appear by

1. Carrico v. Tarwater, 103 Ind. 86, Pac. R. 830, following Shields v. 88 (2 N. E. R. 227); accord, Dowell Miller, 9 Kan. 390.  
v. Lahr, 97 Ind. 146, 151.

2. Essig v. Lower, 120 Ind. 239, 241 (21 N. E. R. 1090).

3. Harris v. Clafin, 36 Kan. 543 (13

4. Nelson v. Rountree, 23 Wis. 367.

5. Dictum in Claypoole v. Houston, 12 Kan. 324, 327.

6. Atkins v. Atkins, 9 Neb. 191, 194, 198 (2 N. W. R. 466)

affidavit. It was held that this statement did not tend to show the fact that he had a good cause of action; that it was only his opinion; that the foreclosure and sale were void in ejectment.<sup>1</sup>

#### SUB-DIVISION I.

##### DILIGENCE OR ABILITY TO FIND DEFENDANT OR HIS AGENT IN THE STATE, NOT SHOWN.

§ 336. Ability to find defendant in the state.

337. General or inferential allegations concerning diligence.

§ 338. "Satisfaction" of judge as to diligence.

339. Sheriff's want of diligence.

§ 336. **Ability to find defendant in the state.**—Where the statutes require the affidavit to authorize service by publication to show not only that the defendant is a non-resident, but also that personal service cannot be made upon him within the state, the omission of the latter clause makes the proceeding void in Iowa, Kansas, Nebraska and New York.<sup>2</sup> So where an Iowa statute, authorizing service by publication for unknown defendants, required an affidavit that their residence was unknown, and also that it "could not with reasonable diligence be ascertained," a decree foreclosing a tax lien in such a case was held void, where no affidavit could be found in the record, and the recital was that it was proved to the court "that the residence of the owner of said lands is unknown to the plaintiff," because there was no recital as to proof of diligence to ascertain his residence.<sup>3</sup>

§ 337. **General or inferential allegations concerning diligence.**—The codes of several states authorize service by publication for non-residents, on a showing by affidavit to the satisfaction of the court or judge that the defendant, "after due diligence, cannot be found within the state." The courts hold, that in order to shield such judgments from collateral attack, it is not sufficient that the affidavit follows the words of the statute that "after due diligence the defendant cannot be found in this state," but that it must state the facts having a tendency to show due diligence. But the later cases authorize an excuse for the use of diligence, where it appears that the defendant is then actually living out-

1. Forbes v. Hyde, 31 Cal. 342, 352.

2. Chase v. Kaynor, 78 Iowa 449 (43 N. W. R. 269); Carnes v. Mitchell, — Iowa — (48 N. W. R. 941); Shields v. Miller, 9 Kan. 390; Mc-

Gavock v. Pollack, 13 Neb. 535 (14 N. W. R. 659); Bixby v. Smith, 10 N. Y. Supr. (3 Hun) 60; Cook v. Farren, 34 Barb. 95 (21 How. Pr. 286).

3. Abell v. Cross, 17 Iowa 171, 174-



side of the state. Thus, where the affidavit alleged that the defendants resided in certain-named distant states, and that summons had been issued and could not "be personally served on them, because of such non-residence;"<sup>1</sup> or that summons could not be served on the defendants because they "*now* reside" at a place named in another state;<sup>2</sup> or that "defendant is a non-resident of this state, nor can be found therein, but has a place of residence at" a place named in another state,<sup>3</sup> the judgment was held not void. Where the affidavit showed the issuing of an attachment, and the return of the sheriff showed that he had used due diligence to find the defendant, without avail, and that deponent had reason to believe that defendant had departed from the state with intent to defraud his creditors, and had gone to California, this was held collaterally to be a sufficient showing of due diligence.<sup>4</sup> The Iowa statute required an affidavit to authorize publication to state the *facts* showing what diligence had been used to ascertain the name and place of residence of the owner of land. It was held that an affidavit simply stating that *diligence* had been used did not make the judgment subject to collateral attack.<sup>5</sup> A Nebraska statute required such an affidavit to state "that service of summons cannot be made within this state on the defendant." The affidavit stated that "the said defendants are non-residents . . . and that service by summons cannot be made upon them." It was held that there was not "an entire omission to state a material fact" in the affidavit, and that the judgment was not void.<sup>6</sup>

The Oregon code authorized publication against a non-resident defendant when it appeared to the satisfaction of the court or judge, by affidavit, that "the defendant, after due diligence, cannot be found within the state." An affidavit alleged that the defendant was a non-resident, and that he "cannot be found within the state of Oregon, but resides in San José, California, and that is his post office address." This was held void, because

1. *Kennedy v. New York Ins. & Trust Co.*, 101 N. Y. 487 (5 N. E. R. 774); *distinguishing* *Carleton v. Carleton*, 85 N. Y. 313, and *reversing* 32 Hun 35. Supr. (52 Hun) 614 (5 N. Y. Supp. 338; 24 N. Y. St. Rep'r 439).

2. *Pike v. Kennedy*, 15 Or. 420 (15 Pac. R. 637).

3. *M'Cracken v. Flanagan*, 59 N. Y. N. W. R. 681).

4. *Howe Machine Co. v. Pettibone*, 74 N. Y. 68.

5. *Little v. Chambers*, 27 Iowa 522, 526.

6. *Britton v. Larson*, 23 Neb. 806 (37

it failed to show any diligence to find defendant in the state.<sup>1</sup> This case is not in accord with the cases just cited. The California statute required the affidavit to authorize publication, to show that the defendant could not with due diligence be found within the state. An affidavit alleged that the affiant had made frequent inquiries for the defendant of more than a dozen persons in the city, and by letters written to other persons at places named, and of not less than a dozen other persons whom he thought likely to know him, but that he was unable to find any one who had seen or heard positively of him for the past eight years. The judgment was held void, not because the affidavit did not tend to show that the defendant, after due diligence, could not be found, but because it did not, in fact, so show.<sup>2</sup> The question was treated as strictly as though on appeal, and no allowance for error of judgment in the trial court was made. The case seems clearly wrong. In an earlier case, the same court held a justice's judgment rendered on publication void, because the affidavit simply alleged that the defendant, after due diligence, could not be found, and that an inquiry had been made of one of his intimate friends who was unable to give his whereabouts.<sup>3</sup> A statute of Minnesota required it to be made to *appear* by affidavit that "after due diligence the defendant cannot be found within the" state. The affidavit stated that affiant had seen a letter from a certain-named place in Missouri, *purporting* to be written by defendant and having the postmark of that place thereon, and that he believed defendant wrote that letter and resided at that place. The judgment was held void.<sup>4</sup> In an earlier case in the same state, it was held that the affidavit should show *legal evidence* going to establish the fact, and not opinions, conclusions, or hearsay; that it should detail what the deponent had done; and that this ought to be sufficient to make out a *prima facie* case of the absence of the defendant from the state; and that if all this were not done, the proceedings would be void.<sup>5</sup> I strongly protest against the application of such rules to judicial proceedings collaterally. A statute of Montana authorized publication on an affidavit alleging that defendant could not be found in the territory "after due diligence." An affidavit was made in

1. McDonald v. Cooper, 32 Fed. R. 745.

2. Braly v. Seaman, 30 Cal. 610.

3. Swain v. Chase, 12 Cal. 283, 285.

4. Harrington v. Loomis, 70 Minn. 366.

5. Mackubin v. Smith, 5 Minn. 367.

the language of the statute, on which publication was made. The judgment, was held void for failure to set out the facts constituting the diligence.<sup>1</sup> But a late case in Oregon,<sup>2</sup> is contrary to this, on principle, and seems to me to be founded on better reason. In an early case in California, it was held that an affidavit of non-residence and inability to find defendant in the state, which tended to show all necessary matters, but failed to do so with accuracy, did not give the court jurisdiction to appoint an attorney for an absent defendant.<sup>3</sup> But the weight of authority is, that if the affidavit tends to show each material fact, it will shield the proceeding collaterally.<sup>4</sup> Such an affidavit made and used in New York, alleged that defendant could not be found *in this state*. This was decided to be sufficient to shield the proceeding from collateral attack, because it tended to show that he could not be found *anywhere*.<sup>5</sup> So, where the affidavit stated "that service of summons cannot be made within the state of Kansas on the defendants," instead of stating that they were non-residents, it was held to state their non-residence inferentially, and that the judgment was not subject to collateral attack;<sup>6</sup> and in a later case in the same state, it was held that an affidavit which stated "that the said defendant has removed from the said county of Shawnee, and now resides in that region of country known as Pike's Peak, and that service of summons cannot be made on said defendant within this territory," was sufficient to show non-residence and absence from the territory when attacked collaterally.<sup>7</sup> So in Michigan, the plaintiff made an affidavit in a divorce case that the defendant, his wife, was not a resident of that state, as he was informed and believed; but that her residence was in the city of Toledo, in the state of Ohio. Publication made on this affidavit, and a divorce granted upon default, were held not void.<sup>8</sup> It was even held in California that *slight* irregularities in the substance of an affidavit for publication of summons by a justice, did not make his judgment void.<sup>9</sup>

1. Alderson v. Marshall, 7 Mont. 288 (16 Pac. R. 576).

2. Barton v. Sanders, 16 Or. 51 (16 Pac. R. 921).

3. Jordan v. Giblin, 12 Cal. 100, 102.

4. Welles v. Thornton, 45 Barb. 390; Harris v. Clafin, 36 Kan. 543 (13 Pac. R. 830, 835); Forbes v. Hyde, 31 Cal. 342, 352.

5. Simpson v. Burch, 11 N. Y. Supr. (4 Hun) 315, 316.

6. Ogden v. Walters, 12 Kan. 282, 293.

7. Carey v. Reeves, 32 Kan. 718, 722 (5 Pac. R. 22). See page 325, *infra*.

8. Pettiford v. Zoellner, 45 Mich. 358 (8 N. W. R. 57).

9. Seaver v. Fitzgerald, 23 Cal. 86.

§ 338. "Satisfaction" of judge as to diligence.—A New York statute authorized the judge to make an order for substituted service by copy left at the last place of residence when he was "satisfied" that the defendant resided in the state, but could not be served. That the judge was so "satisfied" on too feeble evidence, or without proof of sufficient diligence to find him, was held not to make the order or judgment void;<sup>1</sup> but where another statute of the same state provided that, "where the person on whom the service of the summons is to be made cannot, after due diligence, be found within the state, and that fact appears to the satisfaction of the court," etc., . . . "such court or judge may grant an order that the service be made by publication," etc., and the affidavit alleged that "defendant is a non-resident of this state, nor can he be found therein, but has a place of residence at Matewan in the state of New Jersey," a decree upon service by publication was held void because the affidavit did not tend to show that due diligence had been used to find the defendant in the state.<sup>2</sup> But where an affidavit made under the same statute alleged that the defendants were non-residents, and that a summons had been issued to the sheriff who used due diligence to find them without success, this was held sufficient to shield the proceeding collaterally.<sup>3</sup> The Dakota statute upon the question now under consideration was like that of New York, and where an affidavit followed the language of the statute, and alleged that the affiant did not know the residence or whereabouts of the defendant, and that he could not by reasonable diligence discover the same, the decree, by default, on service by publication, was held void.<sup>4</sup>

§ 339. Sheriff's want of diligence.—The Colorado statute, in cases where service was being made by publication, required that the "usual exertion on the part of the sheriff to serve the summons" should continue to be made. In such a case, where the summons was issued and returned "not found" on the same day, the decree was held void;<sup>5</sup> and the same point was decided the same way by the Supreme Court of the United States, holding a divorce

1. *Collins v. Ryan*, 32 Barb. 647, 649.

2. *McCracken v. Flanagan*, 127 N. Y. 493 (28 N. E. R. 385), reversing 5 N. Y. Supp. 338.

3. *Belmont v. Cornen*, 82 N. Y. 256.

4. *Beach v. Beach*, 6 Dak. 371 (43 N. W. R. 701).

5. *Israel v. Arthur*, 7 Colo. 5 (1 Pac. R. 438); *Clayton v. Clayton*, 4 Colo. 410.

granted to the husband void after his death, and that his first wife was his widow and entitled to recover the real estate of which he died seised from his second wife.<sup>1</sup>

A statute of Michigan provided for an order for publication "when the defendant is a resident of this state, upon proof by affidavit, that the process for his appearance has been duly issued, and that the same could not be served by reason of his absence from or concealment within this state, or by reason of his continued absence from his place of residence." In a foreclosure suit, a subpoena was issued June 16, returnable on the 29th; but on the 25th the sheriff made return under oath that he was unable to find the defendants, and was informed and believed they did not reside in the state. On June 30, the complainant made an affidavit that defendants "are residents of this state; that subpoena for their appearance has been issued in the above-entitled cause, returnable on the 29th day of June instant, and that the same could not be served on the said defendants by reason of their absence from the state of Michigan." On this showing, an order for service by publication was made and published, and a decree of foreclosure rendered by default. This decree was held to be void twenty years afterwards, because the sheriff by returning the writ four days before the return day failed to exercise due diligence to find the defendants; and it was also held to be impossible for the plaintiff to swear that the officer had used due diligence.<sup>2</sup> Mr. Justice Cooley dissented, and pointed out that the statute said nothing about diligence, and required nothing except that there should be proof by affidavit that the process issued could not be served by reason of the absence of the defendant from the state. The court does not notice the point that the trial court had to pass upon the sufficiency of the return and affidavit, and that it was just as competent to do so as the supreme court itself. The trial court was also competent to construe the statute, and to determine what diligence it required of the sheriff. Another Michigan statute enacted that a writ of attachment from a justice of the peace should be executed "at least six days before the return thereof" by seizing sufficient goods to satisfy the demand, and by "serving a copy of such attachment and inventory upon the defendant, if he can be found

1. *Cheely v. Clayton*, 110 U. S. 701      2. *Soule v. Hough*, 45 Mich. 418 (84 S. C. R. 328), *following Clayton v. N. W. R.* 50 and 159).  
Clayton, *supra*.

within the county ;” but that, if he could not be found, then a copy should be left at his last place of residence, if he had any in the county, and if not, then by leaving such copy with the person in possession of the goods attached. Under this statute, the court has uniformly held that if the substituted service was made even one day before the return day,<sup>1</sup> the whole proceeding was void. So where a justice’s summons was returnable on the 18th, and the last day for service was on the 15th, the judgment was held void where the service was made by copy left at the defendant’s residence on the 14th, because the officer did not wait until the 15th to see if he could find him and make personal service.<sup>2</sup> Another statute of the same state required service to be made on “the last presiding officer, president, cashier, secretary or treasurer” of a defunct corporation, and further provided that “if there be no such officer, or none can be found, such service may be made on such other officer, or member of such corporation, or in such other manner as the court in which the suit is brought may direct.” The affidavit alleged that “there is no officer of said corporation residing in this county,” except two persons shown to have been directors. On this affidavit, the court made an order for service on some other officer—the report not showing who it was. The judgment was held to be void because the affidavit failed to show that the officers named in the statute could not be found in the state.<sup>3</sup> It must be admitted that the various inferior courts of the state do not know the law as well as the supreme court, but when the proofs of the preliminary matters necessary to warrant an order for a particular kind of service are presented to them, they are compelled by law to adjudicate upon their sufficiency ; and if the proofs presented are sufficient “to set the judicial mind in motion,” the conclusion, however erroneous, is never void.

1. *Town v. Tabor*, 34 Mich. 262.

N. W. R. 121); *Rolfe v. Dudley*, 58

2. *Isabelle v. Iron Cliffs Co.*, 57

Mich. 208 (24 N. W. R. 657).

Mich. 120 (23 N. W. R. 613, 615); *Iron Cliffs Co. v. Lahais*, 52 Mich. 394 (18

3. *Merrill v. Montgomery*, 25 Mich. 73.

## SUB-DIVISION II.

## OTHER MATTERS OF SUBSTANCE, DEFECTIVE OR WANTING.

§ 340. Material allegation omitted from affidavit to authorize publication—Curative statute of Wisconsin.

341. Non-residence or absence, affidavit of, false in fact or wanting.

§ 342. Preliminary writ, wanting—  
Stayer, notice to give new.

343. Unknown heirs or owners—  
Affidavit that names are unknown, wanting.

§ 340. **Material allegation omitted from affidavit to authorize publication.**—The omission of any material allegation from the affidavit to authorize publication in Kansas<sup>1</sup> or New York;<sup>2</sup> or the failure in Wisconsin to show that the defendant has property within the state,<sup>3</sup> makes the proceeding void; but a mere “defect” in such an affidavit in Kansas, does not have that effect.<sup>4</sup> A Texas statute authorized publication to be made in two cases: “*first*, upon affidavit that the defendant was absent from the state; *second*, upon affidavit that the defendant was a transient person, so that the ordinary process of law cannot be served upon him.” An affidavit was filed that the residence of defendant was unknown to affiant. On this, publication was made and judgment rendered. This was held void because of the defects in the affidavit.<sup>5</sup> The Kentucky statute required an affidavit for publication to state, among other things “the name of the place wherein a post office is kept nearest to the place the defendant resides or may be found,” if known to affiant. But the omission of this clause from the affidavit was held not to make a decree of divorce void.<sup>6</sup> The same point was decided to the contrary in Mississippi concerning the same omission in an affidavit before a justice of the peace.<sup>7</sup>

**CURATIVE STATUTE OF WISCONSIN.**—A Wisconsin statute made the order for publication of notice “conclusive in all collateral actions and proceedings” of the existence of all facts required to exist to authorize the same to be made. Where an affidavit to authorize service by publication was made by an

1. Harris v. Claflin, 36 Kan. 543 (13 Pac. R. 830, 835).

2. Towsley v. McDonald, 32 Barb. 604, 608.

3. Manning v. Heady, 64 Wis. 630 (25 N. W. R. 1).

4. Shippen v. Kimball, — Kan. — 27 Pac. R. 813).

5. Stegall v. Huff, 54 Tex. 193, 196.

6. Carr's Adm'r v. Carr, — Ky. — (18 S. W. R. 453).

7. Drysdale v. Biloxi Canning Co., 67 Miss. 534 (7 S. R. 541).



attorney and failed to show his authority, or the grounds of his belief, the invalidity of the order for publication was held to be cured collaterally, by the statute.<sup>1</sup>

§ 341. **Non-residence or absence, affidavit of, false in fact or wanting.**—An Iowa statute provided that “service may be made by publication, when an affidavit is filed that personal service cannot be made on the defendant within this state, in either of the following cases: . . . (6) In actions which relate to . . . real property . . . and such defendant is a non-resident of this state.” The court said: “Under this provision two conditions must exist in order to give the court jurisdiction to enter a judgment against a defendant who has been served by publication. (1) The action must relate to some of the interests enumerated in the provision; and (2) the defendant must be a non-resident of the state.” The court said that, under this statute, the *fact* of non-residence gives the court jurisdiction to make service by publication, and not the *proof* of that fact; and, hence, the want of an affidavit of non-residence did not make the service by publication and the decree void.<sup>2</sup> The court distinguished several prior cases upon the ground that they were decided upon a prior statute, which provided that an order for publication might be made upon a *showing* that the defendant could not be found in the state. The court was right in its conclusions, but wrong, it seems to me, in its reasons. Jurisdiction always depends upon the allegations, never upon the facts; but the fact that correct service was made, ought to be a bar, collaterally. No court will grant a new trial when there is no probability of changing the result, even though the judgment be unsupported by any legal evidence. Why should it disturb titles because jurisdiction was correctly taken on illegal evidence or in the absence of evidence? The principle is precisely the same in both cases—namely, an error of law was committed which caused no harm. In a prior case, the court had construed the statute to mean that the affidavit need only state that personal service could not be made in the state.<sup>3</sup> In a still prior case, the court ordered publication for a non-resident on a return of “not found,” without the affidavit required by statute. The publication was duly made and a copy

1. Storm v. Adams, 56 Wis. 137 (14 N. W. R. 69).

2. Sweeley v. Van Steenburg, 69 Iowa 696 (26 N. W. R. 78).

3. Taylor v. Ormsby, 66 Iowa 109 (23 N. W. R. 288).

of the notice and petition mailed to the defendant, but the decree by default was held void.<sup>1</sup>

A publication in Georgia for a non-resident on a return of not found in the county, makes the decree void collaterally where it was not made to appear affirmatively to the court, "that the defendant was out of the limits of the state" before the order to publish was granted.<sup>2</sup> In this case it was held that the widow of a second husband had no rights in his estate, because not properly divorced from her first husband. A Missouri statute authorized publication for the defendant simply on an allegation in the petition, unverified, of his non-residence. It was held that publication made on such unverified petition was not void;<sup>3</sup> but in a case where the statute required the allegation to be verified, and it was not, an opposite ruling was made.<sup>4</sup> But it was held in Nebraska that the omission of an affidavit of non-residence did not make the judgment void, where there was an acknowledgment of service by defendant, showing his residence to be out of the state.<sup>5</sup> An affidavit to authorize publication, filed in a court of Kansas territory, showed that the defendant resided "in that region of country known as Pike's Peak, and that service of summons cannot be made on him in this territory." As the court judicially knew that the "region of country known as Pike's Peak" was within the territory, the decree was held void.<sup>6</sup>

**FALSE IN FACT**—In proceedings by a village to condemn the land of a railway company in Ohio, upon an affidavit that it had no officer or agent upon whom process could be served, publication was ordered and made. It was decided to be incompetent for it to prove collaterally that it had officers and agents in the state upon whom service could have been made.<sup>7</sup> A discharge in bankruptcy is not void because the petition stated the residence of a creditor to be in New York City, when it was in Glasgow, Scotland, although, on account of that false statement, he received no actual notice.<sup>8</sup> The court placed its opinion on the

1. *Bradley v. Jamison*, 46 Iowa 68, 71.

2. *Parish v. Parish*, 32 Ga. 653, 655.

3. *Elting v. Gould*, 96 Mo. 535 (9 S. W. R. 922).

4. *Charles v. Morrow*, 99 Mo. 638 (12 S. W. R. 903); *accord* *Gray v. Larrimore*, 2 Abb. (U. S.) 542, 551.

5. *Cheney v. Harding*, 21 Neb. 68 (32 N. W. R. 64).

6. *Carey v. Reeves*, 46 Kan. 571 (26 Pac. R. 951). See page 319<sup>7</sup>, *supra*.

7. *Cincinnati S. and C. Ry. Co. v. Village of Belle Center*, — O. St. — (27 N. E. R. 464, 468); *accord*, *Hammond v. Davenport*, 16 O. St. 177.

8. *Pattison v. Wilbur*, 10 R. I. 448, 453.

ground that the notice of the petition for the discharge had been duly given. On an affidavit that the residence of the defendant was unknown (not that he was a non-resident) the Texas statute authorized service by publication, and a personal judgment, it seems, when he was a resident. It was held that, in such a case, the defendant could not show that he was a non-resident in order to defeat a personal judgment collaterally.<sup>1</sup>

§ 342. **Preliminary writ, wanting.**—A Florida statute required a return of “no property” before the issuing of a notice against a garnishee; but the failure to have such a return was held not to make the proceedings against him void.<sup>2</sup> A statute of Pennsylvania authorized the courts to appoint a sequestrator for the property of a corporation after the return of an execution unsatisfied. The record of a Pennsylvania court showed that, after due notice to a corporation, but without the issuing or return of an execution, a sequestrator for its property was appointed, and this was held void in New York.<sup>3</sup> An Illinois statute required the issuing and return of process “not found” before publication for non-residents; and a judgment rendered on publication without the issuing or return of such process, was held void.<sup>4</sup> Another Illinois statute authorized the plaintiff, after recovering a judgment against one joint debtor, to issue a *scire facias* to the other to appear and show cause why he should not be bound by the judgment. After the *scire facias* was “sent out,” it authorized an attachment *in aid of the scire facias*. In such a case, the plaintiff, without issuing a *scire facias*, caused a writ of attachment to issue on the judgment, upon which property was seized and publication made, and judgment rendered making the other debtor a party to the judgment theretofore rendered, and ordering the attached property sold to pay the same. This was held void on the ground that the statute only authorized the attachment to issue after a *scire facias* was issued, and not in its absence.<sup>5</sup> It was a mere error in practice not to issue the *scire facias*. If issued, it could not have been served, and would have been of no use to the defendant, as the only notice he would have received would have been by the publication in attachment.

1. *Martin v. Burns*, 80 Tex. 676 (16 S. W. R. 1072).

2. *Sessions v. Stevens*, 1 Fla. 233 (46 Am. D. 339).

3. *Loop v. Gould*, 32 N. Y. Supr. (25 Hun) 387.

4. *Chickering v. Failes*, 26 Ill. 507, 518; *McDaniel v. Correll*, 19 Ill. 226.

5. *Firebaugh v. Hall*, 63 Ill. 81.

**STAYOR, NOTICE TO GIVE NEW.**—When a plaintiff, in Tennessee, having a judgment before a justice of the peace, became dissatisfied with the stayor, the statute required him to make an affidavit showing certain things, upon which the justice was to issue notice to the defendant to appear and give a new stayor. This was done on motion of the plaintiff without affidavit, and the defendant procured a new stayor. This operated as a judgment confessed by the stayor. It was held that the want of an affidavit did not make the judgment against the stayor void.<sup>1</sup>

**§ 343. Unknown heirs or owners—Affidavit that names are unknown, wanting.**—A Kentucky statute provided for proceedings against unknown heirs, upon service by publication, and required the plaintiff to file an affidavit that their names were unknown. In such a proceeding, it was held that the court obtained jurisdiction over them by the publication, and that the failure to file an affidavit that their names were unknown did not make the decree void.<sup>2</sup> But a proceeding by publication against unknown defendants in Iowa, where the petition was not verified, and where neither the notice nor the paper in which it was published was either ordered or approved by the court, all of which the statute required, was held void.<sup>3</sup> So in Tennessee, where the statute authorized publication “when the name of the defendant is unknown, and cannot be ascertained upon diligent inquiry,” a decree by default upon service by publication was held to be void, where the defendants were named as “the heirs of L. Bleidorn,” which was in the caption of the complaint only, and with no averment that their names were unknown.<sup>4</sup>

## SUB-TITLE II.

### ORDER FOR PUBLICATION, DEFECTIVE OR WANTING.

**§ 344. Clerk instead of judge makes the order, and *vice versa*—**  
Filed with clerk—Order recorded by clerk.

**§ 345. Mailing copy to defendant—**  
Names omitted from order.  
**346. Newspaper, designation of, defective—**Option of plaintiff.

**§ 344. Clerk instead of judge makes the order, and *vice versa*.**—Service by publication, no matter by whom ordered, carries

1. *Gaw v. Rawley*, 40 Tenn. (3 Head) 716.

2. *Hynes v. Oldham*, 3 T. B. Mon. 266; *Tevis's Representatives v. Richardson's Heirs*, 7 id. 654, 658; *Benningfield v. Reed*, 8 B. Mon. 102.

3. *Guise v. Early*, 72 Iowa 283 (33 N. W. R. 683).

4. *Bleidorn v. Pilot Mountain Coal and Mining Co.*, 89 Tenn. 166 and 204 (15 S. W. R. 737).

notice of the suit to the defendant, and is necessarily approved and confirmed by the court before the rendition of judgment. If the defendant does not wish to waive any irregularity, he ought to have it quashed. But the supreme court of Iowa held a judgment void because the order for publication was issued by the clerk without an order from the judge.<sup>1</sup> But in Indiana, where the statute required the clerk to fix, and to indorse upon an administrator's final report, the time for its hearing, of which time the administrator was to give notice, the judgment approving the report and discharging the administrator, was held not to be void because the time for the hearing was fixed by the court.<sup>2</sup>

**FILED WITH CLERK.**—A statute of Minnesota required the board of county commissioners to designate by resolution the newspaper in which the delinquent tax list should be published, and also required a certified copy of such resolution to be filed in the office of the clerk of the court. A judgment foreclosing a tax lien was held to be void because of the failure to file such copy in the clerk's office.<sup>3</sup> I think the Indiana case right, and the Iowa and Minnesota cases wrong.

**ORDER RECORDED BY CLERK.**—An Arkansas statute provided for the enforcement of the payment of overdue taxes by foreclosure in equity upon a complaint filed for that purpose. It also provided that, when the complaint was filed, the clerk should enter an order on the record, in a prescribed form, giving the substance of the complaint, including the description of the land, and a warning to all persons interested to appear and show cause within forty days why a lien should not be declared and the land sold. It also directed the clerk to publish a copy of this order in some newspaper. In a case where the copy of the order was duly published, but where the order was not entered on the record, the decree of foreclosure was held void.<sup>4</sup> I also think this case is unsound. The omission of these matters of form neither harms the defendant nor touches the jurisdiction.

**§ 345. Mailing copy to defendant.**—A statute of Oregon directed that all orders for service by publication should require a copy to

1. *Bardsley v. Hines*, 33 Iowa 157;  
*Royer v. Foster*, 62 Iowa 321, 324 (17  
N. W. R. 516); *Miller v. Corbin*, 46  
Iowa 150.

2. *Williams v. Williams*, 125 Ind.  
156 (25 N. E. R. 176).

3. *Merriman v. Knight*, 43 Minn.  
493 (45 N. W. R. 1098).

4. *Gregory v. Bartlett*, 55 Ark. 30  
(17 S. W. R. 344).

be mailed to the defendant if his address were known, and a decree was decided to be void because the order for publication failed to comply with the statute in this respect.<sup>1</sup> But where the California statute directed that such orders should require a copy of the complaint and summons to be mailed to defendant "forthwith," the omission of the word "forthwith" from the order, does not affect the judgment collaterally.<sup>2</sup>

NAMES OMITTED FROM ORDER.—A judgment was held not to be void in Mississippi because the names of the defendants were omitted from the order for publication, when they were given in the published notice.<sup>3</sup>

§ 346. **Newspaper, designation of, defective.**—A Minnesota statute required the board of commissioners to designate the paper in which the delinquent tax-lists should be published. This publication was to give jurisdiction to the district court to render judgment. Where the board instructed the auditor "to give the printing of the delinquent list to F. Daggett, editor of the Litchfield Ledger," a decree rendered by default, after due notice published in that paper, was held void because the editor instead of the paper was designated.<sup>4</sup> And in a later case in the same state, the board designated the "Minneapolis Tribune" as the paper in which to publish such list. There were two papers, owned by the same company, called the "Minneapolis Daily Tribune" and the "Minneapolis Weekly Tribune," in the latter of which the list was published, and the judgment was held void;<sup>5</sup> and in a still later case, where the board omitted to designate the paper, the same ruling was made.<sup>6</sup> These cases seem to me to be unsound. Actual service was made, and if the defendant was dissatisfied, he ought to have brought the defect to the attention of the district court and had the service quashed. A Missouri statute required the clerk, when he issued an order for service by publication, to designate the paper in which it should be published, but his failure to do so was held not to make the judgment subject to collateral assault;<sup>7</sup> but in a later case in the same state, where the statute required the judge to designate the

1. Odell v. Campbell, 9 Or. 298.

2. Anderson v. Goff, 72 Cal. 65 (13 Pac. R. 73, 76).

3. Cason v. Cason, 31 Miss. 578, 594.

4. Eastman v. Linn, 26 Minn. 215, 218 (2 N. W. R. 693).

5. Russell v. Gilson, 36 Minn. 366 (31 N. W. R. 692).

6. Brown v. Corbin, 40 Minn. 508 (42 N. W. R. 481).

7. Kane v. McCown, 55 Mo. 181, 196.

paper in which service by publication should be made, and his order was to publish "in some newspaper according to law," and the clerk, when he issued the order, designated a paper in which it was published, a contrary ruling was made.<sup>1</sup> But where a Kentucky statute required service by publication to be made for two months, which was actually made, although upon an order for eight weeks, the decree was held not void because of this defect in the order.<sup>2</sup> On the same principle, a publication actually perfect would not be void even though there were no order, because it would still be right.

OPTION OF PLAINTIFF.—The New York statute provided that an order for the service of a summons by publication should direct that it be published, or at plaintiff's option, that personal service be made out of the state. In such a case, an order was made simply for personal service out of the state, omitting the alternative order for publication, and service was made as ordered. It was decided by the court of appeals that this defect in the order did not make the judgment void.<sup>3</sup>

## TITLE B.

### PROCESS, DEFECTIVE OR WANTING.

#### § 347. Scope of, and principle involved in, title B.

Sub-title I.—Matters of form,  
defective or wanting, . . . § 348–354  
Sub-title II.—Matters of substance,  
defective or wanting 355–382

Sub-title III and section 383—  
Process in *capias* and criminal proceedings, wanting  
—Kidnaping.

§ 347. Scope of, and principle involved in, title B.—The word "process" is used to designate the written or printed instrument issued in order to warn a person that a judicial proceeding has been instituted against him. It includes the summons at law, the subpoena in chancery, the monition in admiralty, the warrant in criminal and *capias* proceedings, and all notices posted or published for that purpose. It being impossible to avoid errors, and the law having prescribed a method of correction by motion to quash or set aside the process, it would seem, on principle, that, where the process is sufficient to inform the person that a proceeding has been instituted against him in a

1. Otis v. Epperson, 88 Mo. 131, 134.

2. Blight's Heirs v. Banks, 6 T. B. Mon. 192, 200 (17 Am. D. 136).

3. *In re Field*, — N. Y. — (30 N. E. R. 48), *overruling* Ritten v. Griffith, 23 N. Y. Supr. (16 Hun) 454.



specified judicial tribunal, that method ought to be exclusive. That is the rule I believe to be established by the authorities considered in section 329, *supra*.

## SUB-TITLE I.

## MATTERS OF FORM, DEFECTIVE OR WANTING.

§ 348. Address to defendant.

349. Blanks filled by improper person—Deputation in blank.

350. Date of writ, irregular—Directed to wrong officer—Filing of complaint, not stated.

351. Kind of process, wrong—Unverified.

§ 352. Language of process—Newspaper with "patent inside."

353. Seal, omitted or wrong.

354. Warning to appear and show cause, omitted—Amount of demand, omitted.

§ 348. Address to defendant.—The published notice in foreclosure proceedings in Nebraska wherein A, B and C were named as defendants, was addressed to A and B only, and for this defect the decree was held to be void as to C.<sup>1</sup> But it does not seem possible that C could have been misled by so obvious an error. A citation in Louisiana was directed thus: "Jules G. Olivier, attorney in fact of Gabriel L. Fuselier. *You* are hereby summoned to appear . . . and file *your* answer," etc. After service on Olivier, judgment was rendered against Fuselier. Olivier had a power of attorney to represent Fuselier. The judgment was held void—the only defect being that it did not command him to appear for Fuselier.<sup>2</sup> In Iowa, where process was addressed to the guardian instead of the ward, but duly served on the ward, the decree was held not void;<sup>3</sup> but a contrary ruling was made in Mississippi where a published notice for a non-resident minor was erroneously addressed to him, instead of to his guardian.<sup>4</sup> Process in North Carolina issued against "John B. Blount, guardian to the heirs of William T. Muse," and duly served, is sufficient to shield the judgment against collateral attack, even though the law required it to issue against the wards themselves. The court said: "The *sci. fa.* in this case is not against the proper person. It should have been against the heirs themselves. But when the service was admitted by John B. Blount, the guardian of J. B. and W. T. Muse, we must then consider J. B. and W. T. Muse as in court. For that court was the proper

1. Frazier v. Miles, 10 Neb. 109, 112 (4 N. W. R. 930).

2. Jacobs v. Frere, 28 La. Ann. 625.

3. Dahms v. Alston, 72 Iowa 411 (34 N. W. R. 182).

4. Cason v. Cason, 31 Miss. 578, 595.

judge. It is so decided; and it cannot be contradicted in this collateral way whether they were properly in court, . . . for it is evident that these points were either expressly or impliedly so adjudicated by the court.”<sup>1</sup> Process from a justice’s court in Iowa was in favor of “R. McManus, president of board of sub-directors,” and was addressed to “Daniel Dougherty, treasurer.” A judgment by default was rendered against “Daniel Dougherty, treasurer.” The court said that this defective summons presented a question for the justice to decide, and that the judgment was not void, but was good against Daniel Dougherty, personally.<sup>2</sup> When process was issued in Indiana addressed to “Valentine Strange, trustee of Brown Civil Township,” a judgment against “Brown Township” was held void.<sup>3</sup> As Strange was the proper person to serve to bring in the township, it seems to me that this case is wrong. A justice of the peace in Texas issued process commanding the officer to summon “J. W. Sayre, agent of the Gulf, Colorado and Santa Fé Railway Company to answer . . . for a calf killed by said” railway company, etc. Service was made on Sayre, and judgment taken by default against the company, which was held void.<sup>4</sup> Process in Louisiana was addressed to a partnership and was served on one partner only, and it failed to show that the partnership was a commercial one. For these defects the judgment was held to be void as to the partner not served.<sup>5</sup> I think the last two cases are wrong for the reason given in the North Carolina case.

§ 349. **Blanks filled by improper person.**—Considerable litigation has arisen, collaterally, from the fact that process has been signed in blank by justices and clerks, and afterwards filled up by improper persons. As this involves a question of fact, and and as the record appears fair on its face, the judgment, for the reasons given in Chapter XII, *infra*, is never void. Thus, a notice to a creditor of the desire of a debtor to take the oath for relief, was filled up by a deputy sheriff, in violation of the Maine statute, and served, and a discharge on default granted. It was held that the justices must have determined that the notice was legal, and that

1. *Den v. Albertson*, 3 Dev. L. 241 (22 Am. D. 719).

2. *Dougherty v. McManus*, 36 Iowa 657.

3. *Vogel v. Brown School Township*, 112 Ind. 317 (14 N. E. R. 78).

4. *Gulf, Colorado and Santa Fé Ry. Co. v. Rawlings*, 80 Tex. 579 (16 S. W. R. 430).

5. *Stevenson v. Riser*, 23 La. Ann. 421.

it could not be inquired into collaterally.<sup>1</sup> So, a like discharge in Massachusetts, where the notice was signed in blank by the justice, and wrongfully filled up by another person, was decided not to be void, upon the ground that the signing and issuing of the notice was a ministerial act.<sup>2</sup> It does not seem to me proper to call the issuing of this notice a ministerial act. It is a necessary part of a judicial record, and is approved and confirmed by the court just as effectually as the final judgment itself. A judgment is not void because the summons was signed in blank and afterwards filled up by the constable,<sup>3</sup> or the plaintiff's attorney;<sup>4</sup> but where a warrant was signed in blank in Vermont, and improperly filled up by another justice, this was held void.<sup>5</sup>

DEPUTATION IN BLANK.—A justice signed his name upon process in attachment in the same state for the purpose of having a deputation to a special constable written above it, which was done; and upon this process, property was attached, and a judgment rendered by default and the attached property sold. In a suit against the special constable, who had no notice of the irregularity, it was held that the whole proceeding was void, and that it was not mere matter in abatement.<sup>6</sup> The subsequent *ratification* of the justice made the appointment good. Besides, it contradicted the record, which appeared regular, by parol evidence. But where the defendant in such a case pleaded in abatement to the wrongful deputation, which plea the justice overruled, this ruling was said to be *res judicata*, and to bar the defendant from contending, collaterally, that the judgment was void.<sup>7</sup> From this last decision, it is evident that the court confused the doctrines of *res judicata* and collateral attack in the other cases.<sup>8</sup> He had the same opportunity to contest the validity of the process in all the cases. It is the *opportunity* to make a defense which concludes.

§ 350. Date of writ, irregular.—Where process in Illinois was dated May 21, and the return April 21, and the judgment

1. Baker v. Holmes, 27 Me. 153, *accord*, Carey v. Osgood, 18 Me. 152; where the creditor was refused leave to show the service to be one day too short. *Accord*, *dictum* in Smith v. Saxton, 6 Pick. 483.

2. Haskell v. Haven, 3 Pick. 404.

3. Hafner v. Irwin, 4 Ired. L. 529.

533-

4. Miller v. Hall, 1 Spears 1—a motion to quash, which was overruled.

5. Adm'r of Whitcomb v. Cook, 39 Vt. 585.

6. Ross v. Fuller, 12 Vt. 265, 270; *accord*, Kelly v. Paris, 10 Vt. 261.

7. *Ex parte* Kellogg, 6 Vt. 509.

8. See section 17, *supra*.

was rendered May 4, it was presumed, collaterally, that May 21 was a mistake of April 21, and the judgment was held not void;<sup>1</sup> and the same ruling was made in Maine where the process bore date two days before the action was commenced.<sup>2</sup>

**DIRECTED TO WRONG OFFICER.**—Where process to arrest a pauper in New York was wrongfully delivered to a constable of a township in which the pauper did not reside, upon which he was arrested and an order of removal made, this order was decided to be void, and the justice a trespasser;<sup>3</sup> but a contrary ruling was made in Georgia, where the process was erroneously directed to the defendant instead of to a constable.<sup>4</sup>

**FILING OF COMPLAINT, NOT STATED.**—The failure of a published summons in Minnesota to state that a complaint had been filed, does not make the judgment void.<sup>5</sup> So where the Indiana statute required the notice to landowners of the pendency of a ditch proceeding to show that the petition *was* filed, the judgment establishing the ditch was held not void because the notice given stated that it *would* be filed at a time specified.<sup>6</sup>

§ 351. **Kind of process, wrong.**—Where the same court in Indiana had both law and equity jurisdiction, a judgment at law, by default, was held void because the process was a chancery subpoena.<sup>7</sup> This case seems to me to be unsound. The statutes of New York and Michigan provide for “long” summonses before justices against residents of the county, and for “short” ones against non-residents. The New York cases hold that a mistake in issuing the wrong kind of process makes the proceeding void,<sup>8</sup> while the supreme court of Michigan said that the judgment “would probably not be void.”<sup>9</sup> I think the Michigan *dictum* sound. It is merely matter in abatement. But the Michigan statute did not require the justice’s record to show the residence of the defendant, and where a suit was begun by a short summons it was presumed, collaterally, that the residence of the defendant was such as to require that kind of process.<sup>10</sup> In an action

1. Chicago Dock and Canal Co. v. Kinzie, 93 Ill. 415, 431.

2. Woodman v. Smith, 37 Me. 21.

3. Reynolds v. Orvis, 7 Cow. 269.

4. Telford v. Coggins, 76 Ga. 683.

5. Lane v. Innes, 43 Minn. 137 (45 N. W. R. 4, 6).

6. McMullen v. State, 105 Ind. 334, 339 (4 N. E. R. 903).

7. Falls v. Hawthorn, 30 Ind. 444.

8. Harriott v. Van Cott, 5 Hill 285; *dictum* in Rue v. Perry, 63 Barb. 40, 43.

9. *Dictum* in Moore v. Vrooman, 32 Mich. 526.

10. Allen v. Mills, 26 Mich. 123.

by a town in New York to recover a penalty, where the statute authorized a summons against a resident, but required a warrant for the arrest of a non-resident, the justice is not liable civilly for damages because he issues a summons for a non-resident, and after personal service, renders a judgment by default, and thereupon issues a *mittimus* upon which the defendant is imprisoned.<sup>1</sup>

UNVERIFIED.—The Massachusetts statute authorized causes to be brought to the supreme court, provided an affidavit should be indorsed on the writ showing that a certain amount was involved; but the want of this affidavit was held not to affect the jurisdiction.<sup>2</sup>

§ 352. *Language of process.*—A statute of Louisiana required the citation in attachment cases to be served by posting copies in both French and English; but the omission to post in French does not affect the judgment, collaterally.<sup>3</sup>

NEWSPAPER WITH “PATENT INSIDE.”—A judgment is not void because the notice was published in a home paper having a “patent inside” published abroad.<sup>4</sup>

§ 353. *Seal, omitted or wrong.*—The omission of a seal from the process, on principle, ought not to make the proceeding void; and so it was held that, where it was omitted from a summons,<sup>5</sup> or writ of attachment,<sup>6</sup> or citation to a creditor of an insolvent debtor,<sup>7</sup> or *scire facias*,<sup>8</sup> or where it had dropped off the citation before service,<sup>9</sup> the judgment was not void. To the contrary, is an old case in North Carolina which held that a warrant issued by a justice without a seal was void, and that the defendant could lawfully resist an arrest.<sup>10</sup> But where a *ca. sa.* issued from the court of common pleas in New York with the supreme court seal attached, it was held to be amendable, and not void, and a protection to the officer and the plaintiff;<sup>11</sup> and the same ruling

1. Hoose v. Sherrill, 16 Wend. 33.

2. McLaughlin v. Cowley, 127 Mass. 316, 321.

3. Gibson v. Foster, 2 La. Ann. 503. 506.

4. Palmer v. McCormick, 30 Fed. R. 82.

5. Strong v. Catlin, 3 Pinney 121 (3 Chandler 130); King v. Davis, 85 Ind. 309, 311; State v. Davis, 73 Ind. 359, 361; Crane v. Blum, 56 Tex. 325.

6. Talcott v. Rozenberg, 3 Daly 203, 207.

7. Lewis v. Brewer, 51 Me. 108; Gray v. Douglas, 81 Me. 427 (17 Atl. R. 320); Partridge v. Hannum, 2 Metc. 569, 571.

8. Heighway v. Pendleton, 15 O. 735, 753.

9. Baldwin v. Merrill, 44 Me. 55.

10. State v. Worley, 11 Ired. L. 242.

11. Dominick v. Eacker, 3 Barb. 17.

was made in Iowa, where process of garnishment was issued from the circuit court with the seal of the district court attached.<sup>1</sup>

§ 354. **Warning to appear and show cause, omitted.**—A statute of Illinois required delinquent taxpayers to be notified that, at a certain time and place, the collector would “apply to the county court for judgment against said lands for said taxes . . . and for an order to sell said lands for the satisfaction thereof.” The notice given omitted to state that the collector would apply for an order to sell, and for this defect the judgment was held void;<sup>2</sup> but the same court made a contrary ruling, where an administrator’s notice warned “all persons interested” that, at a specified time and place, he would present a petition for an order to sell the real estate of the decedent to pay debts, but failed to warn them “to appear and show cause why said land shall not be sold.”<sup>3</sup> So, where the ecclesiastical court in England, which had power to grant letters of administration, to excommunicate, and to cite the next of kin to come in, and either take out letters or renounce the right to do so, cited the next of kin to come in and take out letters absolutely, saying nothing about renouncing, and excommunicated him for his failure to come in, this judgment of excommunication was decided not to be void, and to be a protection for the judges in an action for damages.<sup>4</sup>

**AMOUNT OF DEMAND, OMITTED.**—A judgment by default for money, where the process failed to show that it was demanded, is contrary to the express terms of the Iowa statute, but is not void.<sup>5</sup> A North Carolina statute required the summons from a justice of the peace to “contain the amount of the sum demanded by the plaintiff;” and where a summons in replevin commanded the defendant “to answer the complaint of W. H. Morris for the wrongful detention of one dark bay mule,” giving no amount or sum demanded, the judgment was held to be void.<sup>6</sup> But in California, where the statute in certain cases required a justice’s summons to notify the defendant that, upon his failure to answer, the plaintiff would “apply to the court for the relief demanded,” and in certain other cases, that he would “take judgment for”

1. *Rose v. D. V. R. Co.*, 47 Iowa 420; accord, as to amendability in such cases, *Murdough v. McPherrin*, 49 Iowa 479; *Jump v. Batton*, 35 Mo. 193 (86 Am. D. 146).

2. *Charles v. Waugh*, 35 Ill. 315.

3. *Hobson v. Ewan*, 62 Ill. 146, 152.

4. *Ackerly v. Parkinson*, 3 M. & S. 411, 424, 428 (A. D. 1815).

5. *Blair v. Wolf*, 72 Iowa 246 (33 N. W. R. 669).

6. *Leathers v. Morris*, 101 N. C. 184 (7 S. E. R. 783).

a specified sum, a mistake in the summons in these respects does not make the judgment void;<sup>1</sup> and the same ruling was made in Missouri, where the published notice omitted to state the amount of the claim.<sup>2</sup> The Minnesota statute, in proceedings to obtain judgment for delinquent taxes, required notice to be published containing, among other things, the amount of the tax. In the published notice in the column marked "Am't," were the figures "26," without any mark or line or anything to indicate what they meant, and the judgment was held void.<sup>3</sup> But a tax judgment in Missouri, for a sum in excess of the amount recited in the order of publication, was decided to be merely erroneous and not void.<sup>4</sup>

SUB-TITLE II.

MATTERS OF SUBSTANCE, DEFECTIVE OR WANTING.

Division A and section 355— Cause of action, or purpose of proceeding, misde- scribed.	Division D.—Signature to process—Style of process —Subsequent alterations and amendments, . . . § 371-375
Division B.—Name of defend- ant, wrong or wanting, § 356-364	Division E.—Time for ap- pearance, uncertain or wrong, . . . . . 376-382
Division C.—Name of plain- tiff—Order for publication —Place of appearance— Property misdescribed, . 365-370	

DIVISION A AND SECTION 355.

CAUSE OF ACTION, OR PURPOSE OF PROCEEDING, MISDESCRIBED.

§ 355. Cause of action, or purpose of proceeding, misdescribed.—The statutes of Iowa and Texas required the published notice to non-residents to state what the cause of action was. Such a notice in Iowa stated that the amount claimed was "money justly due on account for one hundred and fifty tierces of ham sold to you at your request." The cause of action stated in the petition was for damages, because the defendant failed to accept and take one hundred and fifty tierces of hams according to contract. In a collateral assault on the judgment (which was by default) on account of the defective notice, it was held that it raised a question for the trial court to decide, and

1. Keybers v. McComber, 67 Cal. 395 (7 Pac. R. 838).

2. Holland v. Adair, 55 Mo. 40, 49.

3. Bonham v. Weymouth, 39 Minn. 92 (38 N. W. R. 805, 807).

4. Schmidt v. Neimeyer, 100 Mo. 207 (13 S. W. R. 405).



that its decision was not void.<sup>1</sup> But in such a case in Texas, where a new cause of action was added to the petition after publication was made, and a judgment rendered on both causes, the whole proceeding was decided to be void.<sup>2</sup> Upon a motion to revive a judgment in Kansas, the statute required a notice to be served upon the defendant, stating, among other things, "the nature and the terms of the order" to be applied for. Instead of this notice, an ordinary summons was issued warning the defendants that they had been sued, and that unless they answered on the return day, the petition would be taken as true. The judgment of revivor on this notice, was held void.<sup>3</sup> The same ruling was made in Wisconsin concerning the collateral validity of an order by road supervisors establishing a road, upon a notice that they would meet "to make an examination and survey of the proposed road,"<sup>4</sup> or that they would meet "to take into consideration" the application,<sup>5</sup> when the statute required the notice to state that they would meet "to decide upon" the application. So in Massachusetts, where a poor debtor's notice of his desire to take an oath in order to obtain a discharge, misdescribed the court from which the execution issued, a discharge by default was decided to be void.<sup>6</sup> All these cases, except the first, give the defendant greater rights when he remains absent than when he appears and contests, which is a confusion of the doctrines of *res judicata* and collateral attack. Undoubtedly, the object of such statutes is to give the defendant exact information as to what will be done, so that he may govern himself accordingly, and to deviate therefrom is error. But if the process is sufficient to give him official information that a suit is pending against him, he is necessarily charged with knowledge of the contents of the complete record in that case. See section 263, *supra*.

1. Woodbury v. Maguire, 42 Iowa 339, 341.

2. Stewart v. Anderson, 70 Tex. 588 (8 S. W. R. 295).

3. Gruble v. Wood, 27 Kan. 535.

4. Austin v. Allen, 6 Wis. 134.

5. Babb v. Carver, 7 Wis. 124.

6. Shed v. Tileston, 8 Gray 244.

## DIVISION B.

## NAME OF DEFENDANT, WRONG OR WANTING.

§ 356. Christian name, wrong or wanting.

357. Corporate name.

358. "Estate"—Fictitious.

359. "Heirs."

§ 360. "Initials."

361. Omitted, but described.

362. "Persons interested."

363. Surname.

364. Unknown children.

§ 356. **Christian name, wrong or wanting.**—Where the first name of defendant was "Barney," a judgment against him as "Barent," is not void;<sup>1</sup> and the same was held where his first name was "Beulah" and the published notice gave it as "Berlah;"<sup>2</sup> or as "——— Waldron."<sup>3</sup> The last case was a notice of the filing of a petition for a proposed highway. On the contrary, where the first name of a creditor was "Edward," and a poor debtor's notice called him "Ebenezer,"<sup>4</sup> the discharge was held void. The name of defendant was Gustavus Weil. The summons, as served, gave it as Augustus Weil. The justice amended it so as to read Gustavus, and then rendered judgment by default. The statute provided that the justice might amend process "by correcting a mistake in the name of a party," but it was decided that the judgment was void.<sup>5</sup> Where the first and middle name of a non-resident defendant in partition was "Mary Hannah," and she was proceeded against as "Hannah," the proceeding was held void.<sup>6</sup> But where an infant was personally served as "Collin Moffitt," when her true name was "Juliather Eoline Moffitt;"<sup>7</sup> or proceedings to appoint a guardian for an insane person called her "Sarah" instead of "Susan;"<sup>8</sup> or proceedings to assess a tax called the owner of property "Henry," by which name he was known, although his true name was "William,"<sup>9</sup> the judgments were held not void. On the contrary, where a judgment, after personal service, was taken against "Freeman" Hildreth whose true name was "Truman" Hildreth, and when he was never known by any other name, it was held void.<sup>10</sup> This

<sup>1</sup> Guinard v. Heysinger, 15 Ill. 288.

<sup>2</sup> Lane v. Innes, 43 Minn. 137 (45 N. W. R. 4, 6)—Gilfillan, C. J., dissenting.

<sup>3</sup> Miller v. Porter, 71 Ind. 521.

<sup>4</sup> Slasson v. Brown, 20 Pick. 436.

<sup>5</sup> McGill v. Weil, 10 N. Y. Supp. 246.

<sup>6</sup> Castle v. Mathews, Hill & D. 438.

<sup>7</sup> Pond v. Ennis, 69 Ill. 341, 344.

<sup>8</sup> *Dictum* in Conkey v. Kingman, 24 Pick. 115.

<sup>9</sup> Van Voorhis v. Budd, 39 Barb. 479.

<sup>10</sup> Farnham v. Hildreth, 32 Barb. 277.

last case relies on an old English case which was this: "Aquilla" Cole was sued by the name of "Richard" Cole, and after personal service, judgment was taken by default against "Richard," and an execution was issued and the goods of "Aquilla" were seized. In trespass by Aquilla, the whole proceeding was held void.<sup>1</sup> So in Texas, a decree quieting title, on service by publication, against Mary E. Robison, her maiden name, was held void because she had married a man by the name of Freeman;<sup>2</sup> and the same ruling was made in Indiana in respect to a foreclosure against Cora B. Hilton, on a publication addressed to "—— Hilton," although Cora B. was the person intended.<sup>3</sup> The omission of the Christian name of the defendant from the entire proceedings, designating him as "——Day,"<sup>4</sup> or "——Pomerooy,"<sup>5</sup> does not make them void. The name of a person was "Luckenbough," and he was the assignee of "Unangst." A judgment against him as "Luckenbach, assignee of Unangst" was held valid collaterally.<sup>6</sup> But where the complaint was against "——Doyle, John Doe and Richard Roe," not alleging the names to be fictitious, upon which there was no service, and an answer by *John* Doyle, a judgment against *James* Doyle was held void as to *James* Doyle, senior, *James* Doyle, junior, and Catherine Doyle.<sup>7</sup> A judgment rendered, on personal service, against "William B," is good, collaterally, against "Wales B;"<sup>8</sup> against "James Read" is good against "Joseph Read;"<sup>9</sup> and against "Van Nortrick" is good against "Van Nortwick;"<sup>10</sup> but a judgment against "Mr. Kraft" was held void in New York where the complaint failed to allege that his true name was unknown.<sup>11</sup>

§ 357. **Corporate name.**—A judgment rendered against a railroad company is not void because it was a railway company.<sup>12</sup> The petition in a tax-foreclosure suit correctly named a bank as the owner of the property, but the summons named T. H. Larkin as

1. Cole v. Hindson, 6 T. R. 234.

2. Freeman v. Hawkins, 77 Tex. 498 (14 S. W. R. 364).

3. Schissel v. Dickson, 129 Ind. 139 (28 N. E. R. 540, 543).

4. Root v. Fellows, 6 Cush. 29.

5. Newcomb v. Peck, 17 Vt. 302 (44 Am. D. 340)—name being "—Pomerooy."

6. Schee v. La Grange, 78 Iowa 101 (42 N. W. R. 616).

7. Ford v. Doyle, 37 Cal. 346.

8. First National Bank v. Jagers, 31 Md. 38, 46.

9. Stevelie v. Read, 1 Wash. C. Ct. 274.

10. Mallory v. Riggs, 76 Iowa 748 (39 N. W. R. 886).

11. Gardner v. Kraft, 52 How. Pr. 499.

12. Mobile and M. Ry. Co. v. Yeates, 67 Ala. 164.

defendant. He was the president of the bank, and the proper person to receive service for it. A copy of the summons and petition was delivered to Larkin by the sheriff and return of that fact duly made, and judgment was taken by default against the bank, which was held void.<sup>1</sup> The petition and summons together certainly informed Larkin that the suit was against the bank, and I think the case not sound. Where the name of the defendant was "Lafayette Insurance Company," a judgment rendered against it by the name of "The President, Directors and Company of the Lafayette Insurance Company," is not void, and will support an action against it.<sup>2</sup> A California statute provides that where two or more persons are associated in any business, and transact such business under a common name, whether it comprises the names of such persons or not, they may be sued by such common name, the summons in such case being served on one or more of the associates, but that the judgment shall bind only their joint property. In the caption of a complaint the defendants were named "M. Walsh *et al.*, composing the Red Star Mining Company." In the body of the complaint it was alleged that "said Red Star Company" (omitting the word "Mining") "is a mining association, composed of a great number of persons," etc. The return of service showed that a copy of the complaint and summons was delivered to "M. Walsh, personally, one of the members of the Red Star Mining Company." A judgment by default was taken against the "Red Star Mining Company," and an execution was issued and delivered to the sheriff, who refused to serve it on the ground that the judgment was void. The court below sustained this claim, holding that the action was against M. Walsh personally, and not against the company. But the supreme court reversed the judgment, holding that there was not such an absence of proper allegations as to render the judgment void.<sup>3</sup> In a later case in the same state, the name of the defendant was the "Independent Tunnel Company." A complaint before a justice of the peace called it the "Independent Company." The summons was addressed to the "Independent Tunnel Company," and a return was made of service on an agent of the "Independent Company," and judgment was ren-

1. Blodgett v. Schaffer, 94 Mo. 652 (7 S. W. R. 436, 442).

2. The Lafayette Ins. Co. v. French, 18 How. 404, 409.

3. Welsh v. Kirkpatrick, 30 Cal. 202 (89 Am. D. 85).

dered against the "Independent Tunnel Company." This was held void.<sup>1</sup> The name of a corporation was "The Bloomfield Railroad Company." It was sued as the "St. Louis, Bloomfield and Louisville Railroad Company," but the judgment by default was held invulnerable when assailed collaterally.<sup>2</sup> A complaint against Brown township, describing it as Brown *civil* township, does not make the judgment void.<sup>3</sup>

§ 358. "**Estate.**"—Where the notice in drainage proceedings in Indiana, which was constructive by posting and publishing, gave the names of the landowners as "Gugle's estate" and "——— Armstrong," and upon which assessments were made and paid, it was held that those irregularities did not make the assessments against the lands of other persons, who were properly named, void.<sup>4</sup>

FICTITIOUS.—A warrant for "John Doe or Richard Roe, whose true name is unknown," without describing the person or his residence, was held void.<sup>5</sup> But in California, if a person is sued by the fictitious name of "John Doe," and permits judgment to go by default after personal service,<sup>6</sup> or appears and answers by his true name,<sup>7</sup> the judgment is not void, although the complaint is not amended.

FIRM NAME.—Proceedings before a justice of the peace against persons in their firm name, either ordinary,<sup>8</sup> or special, by attachment,<sup>9</sup> are not void; and the same rule holds good in respect to a confession by them.<sup>10</sup>

§ 359. "**Heirs.**"—Designating the defendants simply as the "heirs" of the decedent in an administrator's petition and notice to sell land,<sup>11</sup> or in a petition and notice to establish a highway,<sup>12</sup>

1. King v. Randlett, 33 Cal. 318, 321.

2. Bloomfield R. R. Co. v. Burress, 111 S. E. R. 207).  
82 Ind. 83, 84.

3. Vogel v. Brown Township, 112 Ind. 299 (14 N. E. R. 77).  
619, 624.

4. Prezinger v. Harness, 114 Ind. 491 (16 N. E. R. 495).  
567.

5. Com. v. Crotty, 10 Allen 403 (87 Am. D. 669).

6. Baldwin v. Morgan, 50 Cal. 585, 588.

7. Campbell v. Adams, 50 Cal. 203; Johnston v. San Francisco Savings Bank, 75 Cal. 134 (16 Pac. R. 753).

8. Goodgion v. Gilreath, 32 S. C. 388

(11 S. E. R. 207).

9. McDonald v. Simcox, 98 Pa. St. 619, 624.

10. McIndoe v. Hazelton, 19 Wis. 567.

11. Shawhan v. Loffer, 24 Iowa 217, 227—said to be a question for the probate court. Gibson v. Roll, 27 Ill. 88 (81 Am. D. 219); Morris v. Hogle, 37 Ill. 150 (87 Am. D. 243); Hobson v. Ewan, 62 Ill. 152; Swearengen v. Gulick, 67 Ill. 211; Bostwick v. Skinner, 80 Ill. 158.

12. Miller v. Porter, 71 Ind. 521.

does not make the proceeding void ; and the same ruling was made in Ohio, where notice published for Sarah Ray, called her Sarah Roy, but further correctly described her as the heir of a person named, and correctly gave the names of other relatives.<sup>1</sup> So also, where Pillsbury was notified by publication as "Pillsby, heir of John Cutter, deceased," giving his first name correctly, the judgment was held not void.<sup>2</sup> A guardian was appointed in Iowa on June 7 for all the infant heirs, except one. On June 17 he filed a petition to sell the land of the wards, describing them as "the minor children of Hugh Pursley, deceased," and an order for notice was made. On June 23 he was appointed guardian for the omitted child, and asked to have its name included in the petition to sell and in the order for notice, all of which was done, and the notice was served on all the wards. These irregularities were held to have no effect collaterally.<sup>3</sup>

§ 360. "Initials."—Process against persons garnished in Alabama, described them as "John J. Lazo and John Guizon," and the answer was by "John B. Guizon for J. J. Lazo & Co.," of which one Peres was a member. The judgment was decided not to be void on account of these defects.<sup>4</sup> But a contrary ruling was made in Iowa, where the published notice was addressed to "John C. Hopkins, P. T. B. Hopkins, his wife, W. R. I. Hopkins, trustee, and George M. Staples," while the true initials of the wife were "T. P. B.," instead of "P. T. B.," as published.<sup>5</sup> This ruling was made on a demurrer to a petition, which did not allege that she was, in fact, the wife of John C. Hopkins ; after a reversal, the petition was amended so as to allege that she was his wife, and on a second appeal it was decided that that fact was sufficient to shield the judgment from collateral attack.<sup>6</sup> The court said that the test was, that, if the defendant and others knowing her, or knowing of her, would not probably be misled, the notice would be sufficient, collaterally. Judicial proceedings are not void because they only give the initials of the first and middle names of the defendant.<sup>7</sup> But

1. *Buchanan v. Roy's Lessee*, 2 O. St. 252.

2. *Lessee of Pillsbury v. Dugan*, 9 O. 117, 120 (34 Am. D. 427).

3. *Pursley v. Hays*, 22 Iowa, 11 (92 Am. D. 350).

4. *Betancourt v. Eberlin*, 71 Ala. 461, 466.

5. *Fanning v. Krapfl*, 61 Iowa 417, 419 (14 N. W. R. 727, and 16 id. 293).

6. *Fanning v. Krapfl*, 68 Iowa 244 (26 N. W. R. 133). See section 367.

7. *Porter v. Stout*, 73 Ind. 3, 5 ; *Oakley v. Pegler*, 30 Neb. 628 (46 N. W. R. 920).

the opposite was ruled in Missouri, where the name of the defendant in the published notice was given as "Q. R." instead of "Quinces R.;"<sup>1</sup> while in Alabama, a divorce was decided to be valid collaterally where the publication gave the letter "Y" as the initial of defendant's middle name when she had none;<sup>2</sup> and where the declaration and judgment in Missouri were against "John E. Barron," but process ran against and the return showed service on "J. E. Barron," the same ruling was made.<sup>3</sup>

§ 361. **Omitted, but described.**—That the omission of the name of a defendant from the process makes the judgment void in respect to him, is plain;<sup>4</sup> but where he is so described that he would not be misled, it is not void. Thus, a published notice in partition in Indiana, read: "Notice is hereby given that Henry Weaver and Sarah Ann Weaver, heirs of David Waltz, deceased, late of said county, have filed their petition for partition of the real estate of said decedent, in said county, and that said petition will be heard at the next term of the court of common pleas of said county." This notice was properly dated and signed, and showed the county and state where the suit was pending, but it named no person as a defendant. The decree was held to be valid collaterally, because the heirs of David Waltz, upon seeing the notice, would know that they were intended.<sup>5</sup> So an administrator's sale of land is not void because the petition did not give the names of the heirs;<sup>6</sup> and where it described them as "The Unknown Heirs of said Estate," it was held that it could not be shown collaterally that he did know them; and it was said: "The court determined the petition to be sufficient, and this determination cannot be attacked in this collateral proceeding."<sup>7</sup> So, where the bill described the defendant as the only infant son of Simon T. Preston, name unknown, the same ruling was made.<sup>8</sup> A judgment establishing a gravel road is not void in Indiana, because the landowners were described as "Waldron's

1. Skelton v. Sackett, 91 Mo. 377 (3 S. W. R. 874).

2. Harrison v. Harrison, 19 Ala. 449.

3. Martin v. Barron, 37 Mo. 301, 305.

4. Blanton v. Carroll, 86 Va. 539 (10 S. E. R. 329).

5. Waltz v. Borroway, 25 Ind. 380. See section 367.

6. Stow v. Kimball, 28 Ill. 93; Morris v. Hogle, 37 Ill. 150 (87 Am. D. 243, 245); Hobson v. Ewan, 62 Ill. 152.

7. Stanley v. Noble, 59 Iowa 666 (13 N. W. R. 839); *accord*, as to "Unknown Owner" in proceedings to charge a lot with an assessment, is Emrick v. Dicken, 92 Pa. St. 78.

8. Preston v. Dunn, 25 Ala. 507, 513.



Heirs." <sup>1</sup> But, in North Carolina, where the defendants in *scire facias* proceedings were designated as the "heirs and devisees of Andrew Christie," the judgment was held void.<sup>2</sup> A person was sued as "widow Caroline I. Journey," and service was duly made by copy left at her usual place of residence, of which she did not learn. The judgment was held void, although the court admitted that such service was not constructive, and that if the copy had been delivered to her, personally, the judgment would have been valid.<sup>3</sup> This case seems clearly wrong.

OMITTED FROM PLEADINGS.—It sometimes happens that a defendant's name is omitted from the complaint but is contained in the process and judgment. In such a case, it was held in Virginia that the judgment was invalid as to him, collaterally,<sup>4</sup> while in Illinois such an irregularity in respect to one of the plaintiffs was held to be an error too small to reverse the case in the absence of a motion to correct below.<sup>5</sup> And in California, where a person was named neither in the petition nor process, but appeared and filed an answer, the judgment was said to be erroneous, but not void.<sup>6</sup>

§ 362. "Persons interested."—A notice in Kansas to "all persons interested" in the estate of a decedent named, in an administrator's proceeding to sell land, does not make it void;<sup>7</sup> and the same was decided in Minnesota, where the statute, in making partition and distribution in the probate court, required notice to be given "to all persons interested," and the notice published was addressed to "all persons interested," in the language of the statute.<sup>8</sup>

§ 363. Surname.—Where the name of a defendant, served outside of the state, is given as Bagswell, instead of Bagwell, that does not make the judgment void;<sup>9</sup> but the contrary was held where the defendant was named Brimford in the *published* notice, instead of Binford;<sup>10</sup> or Blackman E. Browning, instead of Blackmar E. Brownell;<sup>11</sup> or Tragar, instead of Troyer;<sup>12</sup> or

1. Porter v. Stout, 73 Ind. 3, 5; Miller v. Porter, 71 Ind. 521.

2. Bonner v. Tier, 3 Dev. L. 533.

3. Journey v. Dickerson, 21 Iowa 308, 318—Cole, J., *dissenting*.

4. Mosely v. Cocke, 7 Leigh 224.

5. Fonville v. Monroe, 74 Ill. 126.

6. Tyrrell v. Baldwin, 67 Cal. 1 (6 Pac. R. 867).

7. Taylor v. Hosick, 13 Kan. 518, 527.

8. Greenwood v. Murray, 28 Minn. 120, 122 (9 N. W. R. 629).

9. Case v. Bartholow, 21 Kan. 300.

10. Entrekin v. Chambers, 11 Kan. 368, 377.

11. Weaver v. Carpenter, 42 Iowa 343, 349.

12. Troyer v. Wood, 96 Mo. 478 (10 S. W. R. 42).

Miller, instead of Millen;<sup>1</sup> or Wheeler, instead of Whelen;<sup>2</sup> but when the *published* notice was for Johnson, instead of Johnsen;<sup>3</sup> or Seavers, instead of Seaver;<sup>4</sup> or Shaffer, instead of Shafer,<sup>5</sup> the judgments were held not void. So, where a person received and recorded a deed in which he was named Cheeseman, a decree against him in respect to that land, on service by publication for him by that name, is not void, although his true name was Chesseman.<sup>6</sup> In an administrator's petition to sell land, an infant heir was named "Mary Ann McIntruff," but in the summons her true name, "Mary Ann Herrin," was given. The summons was served and a guardian *ad litem* appointed for her. It was held that, if she was incorrectly named in the petition, the objection should have been taken before the trial.<sup>7</sup> Where a person was sued as "Sinclair," his true name, and the summons was issued for, and returned as served upon, "St. Clair," the judgment was held void.<sup>8</sup>

§ 364. **Unknown children.**—A statute of Kentucky authorized a writ of attachment to issue at or after, but not before, the commencement of an action, which was done by filing a petition and causing a summons to issue. A petition was filed and a summons issued commanding the sheriff "to summon the unknown children" of persons named, instead of "the defendants" named in the writ; then a writ of attachment was issued and property was seized. It was held that this summons was void, and that issuing it did not commence the action, and that for that reason the attachment was void.<sup>9</sup> But as, after the levy of the attachment, due service by publication was made on the defendants, the owners of the land attached, and judgment duly rendered ordering its sale, I think this case unsound. Jurisdiction was acquired by the publication, and if the preliminary proceedings were not correct, the defendants ought to have had them quashed.

**UNKNOWN WARDS.**—The statute authorized the court to appoint guardians for minors resident in the county. The court

1. Chamberlain v. Blodgett, 96 Mo. 482 (10 S. W. R. 44).

2. Whelen v. Weaver, 93 Mo. 430 (6 S. W. R. 220).

3. Paul v. Johnson, 9 Phila. 32.

4. Seaver v. Fitzgerald, 23 Cal. 86, 93.

5. Rowe v. Palmer, 29 Kan. 337.

6. Blum v. Chesseman, — Minn. — (51 N. W. R. 666).

7. McCormack v. Kimmel, 4 Ill. App. 121, 124.

8. Rivard v. Gardner, 39 Ill. 125, 126.

9. Kellar v. Stanley, 86 Ky. 240 (5 S. W. R. 477 and 4 id. 807).

appointed a guardian for the "unknown heirs" of a person, and this was held void.<sup>1</sup> But it seems to me that this order ought to have been construed, collaterally, to mean the "unknown *minor* heirs," and that it was not void as to them.

## DIVISION C.

## NAME OF PLAINTIFF—ORDER FOR PUBLICATION—PLACE OF APPEARANCE—PROPERTY MISDESCRIBED.

§ 365. Christian name, wrong or wanting—Firm name—"Heirs."  
366. Surname.  
367. Comments on sections 356 to 366.

§ 368. Order for publication, misdescribed in published notice.  
369. Place of appearance.  
370. Property misdescribed or not described.

§ 365. **Christian name, wrong or wanting.**—Giving the Christian name of the plaintiff in the first three of six published notices in Michigan as "Grant" instead of "Garnett," makes the proceeding void.<sup>2</sup> But where the first name was given as "John" instead of "James;"<sup>3</sup> or as "Mary" instead of "Ann,"<sup>4</sup> the contrary was held. This last case was an attachment, and the changing of the name of the plaintiff from "Mary Cain" to "Ann Cane," after the levy of a subsequent writ, was held not to give it the preference. The designation of the *middle* name of the plaintiff in the published notice by the letter "M" instead of "H" does not make the proceeding void. The court said: "Where publication has been made, it is as effective as actual service, and is sufficient if it inform the defendant of the nature of the proceeding, the interest he has in it, and the court where it will be heard."<sup>5</sup>

**FIRM NAME.**—Attachment proceedings in the firm name of the plaintiffs are not void,<sup>6</sup> and the officer can introduce them in evidence against a stranger to show his right to levy on goods as being fraudulently conveyed;<sup>7</sup> and, generally, proceedings are not void because conducted in the firm name of the plaintiffs.<sup>8</sup> But it was held in Michigan that a judgment in favor of *James*

1. *Dictum* in State *ex rel.* Ross v. McLaughlin, 77 Ind. 335.

2. Colton v. Rupert, 60 Mich. 318 (27 N. W. R. 520).

3. McGaughey v. Woods, 106 Ind. 380 (7 N. E. R. 7).

4. Cain v. Rockwell, 132 Mass. 193.

5. Morgan v. Woods, 33 Ind. 23, 28.

6. Cady v. Smith, 12 Neb. 628 (12 N. W. R. 95).

7. Barber v. Smith, 41 Mich. 138, 140 (1 N. W. R. 992).

8. Nutzenholster v. State *ex rel.* Sumner, 37 Ind. 457; Bennett v. Child, 19 Wis. 362 (88 Am. D. 692)—a judgment in favor of "Child, Gould & Co."

ally against both the real defendant and the person served. The real defendant cannot contradict the sheriff's return, and the person actually served cannot show that he was not the real defendant. But when notice is published or posted for George Jones, the judgment is only valid in so far as it deals with the property of the *person whom I intended to sue*. The Iowa case,<sup>1</sup> cited in section 360, *supra*, and the Indiana case,<sup>2</sup> cited in section 361, *supra*, which hold that a judgment rendered on published notice is not void if the defendant is so designated or described that, after reading it, he could not be misled, are correct as far as they go. All persons have an opportunity to read published or posted notices, and no person can be heard in court to say that he did not. Nor can any person be heard to say that he did not read and understand the entire record referred to in such notice. The sole object of the notice is to afford him that opportunity. Hence, publication or posting gives the real defendant judicial knowledge that his property has been seized, when such is the case, and he cannot be misled, no matter what name he is called. In respect to the name of the plaintiff, it does not seem to me that any mistake in that, renders the judgment void. If the creditor's real name is John Smith, and he brings suit in the name of George Jones, the defendant has the opportunity to contest and correct that matter, if he cares to do so. And if the person who sues is a stranger to whom he owes nothing, he has the opportunity to show those facts.

§ 368. Order for publication, misdescribed in published notice.—An order for service on non-residents directed it to be made by publication, and by mailing a copy of the summons, complaint and order for publication to the defendant. The order in regard to the mailing was complied with, and the summons with notice attached, was published in the paper designated. But the published notice instead of stating that the summons was served by publication pursuant to an order of the judge, as the fact was, stated that the summons was served without the state of New York pursuant to an order of the judge. In a collateral assault on this judgment, it was held that, as the service made was correct, the mistake in the published order in respect to the kind of service ordered, did not make it void.<sup>3</sup> The same ruling was

1. Fanning v. Krapfl, 68 Iowa 244 (26 N. W. R. 133).

2. Waltz v. Borroway, 25 Ind. 380.

3. Loring v. Binney, 45 N. Y. Supr. (38 Hun) 152. *Affirmed*, 101 N. Y.

623.

made in Missouri, where the order for publication was correctly made by the court, but where the publication stated that it was made by the clerk.<sup>1</sup>

§ 369. **Place of appearance.**—If the process gave no information concerning the place or court where the defendant might appear and contest with the plaintiff, the judgment by default would be void; but errors and omissions on this point, which could not or did not mislead the defendant, would have no such effect. Thus, an administrator's notice that he would file a petition to sell land at "the Shelby circuit court to be holden in the courthouse in Shelbyville," was published in a newspaper in Shelby county, Illinois. The notice failed to state the county or state where the petition would be filed, but the court said that no one who read the notice could doubt that it meant Shelby county, state of Illinois, and that the order to sell was not void.<sup>2</sup> On the contrary, where process was personally served out of the state, notifying the defendant that a foreclosure petition was on file in the district court of Union county, Iowa, but failing to state *when* and *where* he must appear, as required by statute, the decree was held void.<sup>3</sup> Precisely the contrary was decided in Indiana, where the process failed to indicate the place for appearance, when the statute required it to be at the courthouse.<sup>4</sup> No one could be misled by such omissions. A New York statute required the publication of summons for non-residents. The summons designated the office of the plaintiff's attorney, on whom a copy of the answer could be served, as "number 13, Chambers street, in the city of New York." The copy, as published, omitted the words "in the city of New York." The decree was held to be proof against a collateral attack, as no one could have been misled.<sup>5</sup> But where an insolvency proceeding was pending before a county judge, and the notice of an application for a discharge erroneously fixed the place of appearance before a judge of the supreme court, the discharge was held void.<sup>6</sup> I doubt the correctness of this decision. The creditors necessarily knew that the proceeding was pending before the county judge, and they must have known that the place fixed in the notice was a clerical error.

1. Johnson v. Gage, 57 Mo. 160, 164.

2. Moore v. Neil, 39 Ill. 256 (89 Am. D. 303).

3. Kitsmiller v. Kitchen, 24 Iowa 163.

4. Hollingsworth v. State, 111 Ind. 289 (12 N. E. R. 490).

5. Van Wyck v. Hardy (39 How. Pr. 392; 11 Abb. Pr. 475), N. Y. Ct. of Appeals, *affirming* 20 How. Pr. 222.

6. People v. Gray, 19 How. Pr. 238.

§ 370. **Property misdescribed or not described.**—Where the published notice, in attachment proceedings in Nebraska, failed to describe the land seized, the proceeding was held void;<sup>1</sup> and the same ruling was made in Minnesota concerning a tax judgment.<sup>2</sup> So, tax judgments were held void where the notice described the land as “lots” instead of “sections;”<sup>3</sup> and as “except 12.64 acres in the southeast corner of sub-lot 1, lot 1, in Robinson’s reserve,” instead of “Sub-lot 1, of lot 1, in Robinson’s reserve, except 12.64 acres in the southeast corner thereof.”<sup>4</sup> So, a guardian’s sale of land in Iowa, was held void for a misdescription in the notice in respect to the township, although the law required no description to be given.<sup>5</sup> If the court had ruled that surplusage never makes judicial proceedings void, no one would have accused it of ignorance of law. I cannot agree with the Nebraska case. The omission was obvious, and caused no harm to defendant.

#### DIVISION D.

##### SIGNATURE TO PROCESS—STYLE OF PROCESS—SUBSEQUENT ALTERATIONS AND AMENDMENTS.

§ 371. Defective signature.  
372. Person signing, wrong.  
373. Want of signature.

§ 374. Style of process.  
375. Subsequent alterations and amendments.

§ 371. **Defective signature.**—A Pennsylvania judgment by default was held not void in Iowa because the summons was signed “R. P. Macly, Prothonotary, per J. W. Haming.”<sup>6</sup> The New Hampshire statute required a summons issued by a justice to be signed by him, but the name of the justice was signed by the plaintiff’s attorney. The defendant, in ignorance of that fact, appeared and contested the case on the merits and was defeated. To an action on the judgment, he set up the irregularity in the signature to the summons, as a defense; but the court held that the irregularity was waived by the appearance, and that the defense was bad.<sup>7</sup> A Massachusetts statute required the notice to a creditor that his debtor desired to take the oath for the

1. Wescott v. Archer, 12 Neb. 345, 349 (11 N. W. R. 491 and 577).

2. Feller v. Clark, 36 Minn. 338 (31 N. W. R. 175).

3. Kipp v. Fernhold, 37 Minn. 132 (33 N. W. R. 697).

4. Pickering v. Lomax, 120 Ill. 289 (11 N. E. R. 175, 178).

5. Frazier v. Steenrod, 7 Iowa 339 (71 Am. D. 447).

6. Hart v. Cummins, 1 Iowa 564.

7. Nichols v. Smith, 26 N. H. (6 Foster) 298.

relief of poor debtors, to be signed by a magistrate with a designation of his official character. Where a notice was signed "Thorndike D. Hodges, Magistrate," the discharge was held void for want of proper designation of official character;<sup>1</sup> and in a later case, where the person signing the citation designated himself as "justice of the peace," a like ruling was made because only "trial justices" had jurisdiction over such matters, and all justices of the peace were not trial justices.<sup>2</sup> It seems to me that the supreme court ought to have known judicially the names and titles of all judicial officers in the state. A judgment was assailed collaterally in Minnesota because the signature of the plaintiff's attorney was printed on the summons instead of written, but the court said that this, even if erroneous, did not make the proceeding void.<sup>3</sup>

§ 372. **Person signing, wrong.**—The Minnesota statute required process in attachment to be allowed by the judge and signed by the clerk, and where the judge both allowed and signed it, the proceedings were held void;<sup>4</sup> and the same was held in Indiana, where the statute required the published notice for non-residents to be signed by the clerk, instead of which it was signed by the plaintiffs.<sup>5</sup> But if the omission to sign the process does not make it void, as the next section demonstrates, I do not see how a wrong signature can have that effect. It is, at most, surplusage, and can be stricken out without harm.

§ 373. **Want of signature.**—The New Hampshire statute required process issued by a justice of the peace to be signed by him. But a judgment by default for the possession of real estate, founded on process not signed by the justice, was held to be simply erroneous, and not void.<sup>6</sup> A West Virginia summons was tested thus: "Witness . . . the — day of — and in the — year of the state," with no signature, or seal of court, and the judgment was held valid collaterally.<sup>7</sup> An order of sale issued by the clerk without his signature, in violation of the statute, does not make the sale void in North Carolina, as the order of confirmation cures the defect.<sup>8</sup> In South Carolina a justice's

1. Carter v. Clohecy, 100 Mass. 299.

2. Nash v. Coffey, 105 Mass. 341.

3. Herrick v. Morrill, 37 Minn. 250 (33 N. W. R. 849).

4. Wheaton v. Thompson, 20 Minn. 196, 199.

5. Cox v. Matthews, 17 Ind. 367, 373.

6. Smith v. Smith, 15 N. H. 55, 66.

7. Ambler v. Leach, 15 W. Va. 677, 692.

8. Spencer v. Credle, 102 N. C. 68 (8 S. E. R. 901, 910).



summons was not signed by him, but the defendant indorsed it, over his own signature: "Due and legal service of a copy of the within accepted, February 11, 1882," and the judgment was held not void;<sup>1</sup> and in an earlier case in the same court, a printed form of *summary process*, with all the blanks unfilled, was indorsed: "A. M. Wicker v. Charles Pope, *sum. pro.* on sealed note, seventy-two dollars and forty-three cents. I accept the legal service of this process to spring term, 1850. February 28, 1850. C. P. Pope." Judgment was entered by default, without filling any of the blanks, and without the signature of the clerk or seal of the court, and an execution was issued and levied. The defendant, in 1853, moved to set aside the execution for those defects, but the plaintiff was given leave to fill the blanks, and to have the signature of the clerk and seal of court attached.<sup>2</sup> This could not have been done if the proceeding had been void. A late case in Massachusetts held that, where process had been issued without the signature of the clerk, and served, it could be amended after a special appearance and motion to dismiss.<sup>3</sup> This shows that the court thought the process not void. To the contrary, the supreme court of Alabama held a judgment void because the process was not signed by the clerk.<sup>4</sup> In Minnesota process in attachment, not signed by the clerk, was issued by a court commissioner, and levied on land. The defendant appeared specially and moved to quash for that reason, but the district court, conceiving the process to be regular, overruled the motion, and a judgment went by default and the land was sold. After the levy of the attachment, and before the motion to quash, the defendant sold the land. In a contest between the defendant's vendee and the attachment vendee, it was held that the process needed the clerk's signature, and that it, and all the proceedings, were void. It was especially contended that the action of the court in overruling the motion to quash was *res judicata*, but the court said that the purchaser from the defendant got his deed before the motion to quash was made, and at that time the attachment was an absolute nullity, and that he was not affected by the ruling of the court.<sup>5</sup> It seems to me that the court erred on both points.

1. *Benson v. Carrier*, 28 S. C. 119 (5 S. E. R. 272).

2. *Wicker v. Pope*, 6 Rich. 366.

3. *Austin v. Lamar Ins. Co.*, 108 Mass. 338.

4. *Sheppard v. Powers*, 50 Ala. 377.

5. *O'Farrell v. Heard*, 22 Minn. 189, 193.

§ 374. **Style of process.**—The constitutions of many of the states of the union provide that all process shall run in the name of “The State,” or “The People,” or “The Commonwealth.” It would not seem that a failure to observe this formal and purely technical requisition, which harms no one, ought to make the proceedings of the courts void; and it is so held in Arkansas,<sup>1</sup> California,<sup>2</sup> Missouri,<sup>3</sup> Nebraska<sup>4</sup> and Wisconsin.<sup>5</sup> In the Arkansas cases, the process had no style at all, and the first case held it amendable after plea in abatement, and the second case held the error too small to quash the writ on appeal; and the first Wisconsin case held that the failure of an order of arrest to run in the name of “The State of Wisconsin” was an amendable defect in form, and not sufficient even to vacate the arrest on motion. But in Illinois,<sup>6</sup> and Kentucky,<sup>7</sup> this defect was deemed to be of so grave a nature as to prevent the jurisdiction from attaching, and the whole proceedings were held void. But in a later case in Kentucky, it is held that a judgment by default in proceedings by attachment against non-residents, is not void because the order of attachment did not purport to issue on behalf of the commonwealth, when it was indorsed on the summons, which did thus purport to issue, as the summons and attachment will be read together.<sup>8</sup>

§ 375. **Subsequent alterations and amendments.**—A justice's summons in Ohio was made returnable December 31. Some one, without the consent of the justice or the plaintiff, altered it and made it returnable January 3, and then it was served. On the latter-named day, a judgment was rendered by default, and a transcript was filed so as to obtain a lien upon land. It was held that equity would not grant relief against this lien without any showing of a meritorious defense, and the *dicta* are to the effect that the judgment was simply erroneous, and not void.<sup>9</sup> In tres-

1. Mitchell v. Conley, 13 Ark. (8 Eng.) 414; Kahn v. Kuhn, 44 Ark. 404.

2. *Dictum* in Brewster v. Ludekins, 19 Cal. 162, 171.

3. Hansford v. Hansford, 34 Mo. App. 262, 272; Carson v. Sheldon, 51 Mo. 436; Davis v. Wood, 7 Mo. 162, 165, *overruling* Charless v. Marney, 1 Mo. 537, and Fowler v. Watson, 4 Mo. 27, and Little v. Little, 5 Mo. 227.

4. Livingston v. Coe, 4 Neb. 379.

5. Ilsley v. Harris, 10 Wis. 95, 100; Mabbett v. Vick, 53 Wis. 158, 164 (10 N. W. R. 84).

6. Wallahan v. Ingersoll, 117 Ill. 123 (7 N. E. R. 519, 522).

7. Yeager v. Groves, 78 Ky. 278.

8. Northern Bank of Ky. v. Hunt's Heirs, — Ky. — (19 S. W. R. 3).

9. Gifford v. Morrison, 37 O. St. 502 (41 Am. R. 537).

pass for false imprisonment in Vermont, where the defendant justified by virtue of an execution, the plaintiff offered to prove that the original writ in the action in which the execution issued, had been altered by the erasure of one justice's name and the insertion of the name of the one who rendered the judgment; but it was held that he could not do so.<sup>1</sup> But in Massachusetts, where the plaintiff sued for conversion, and the defendant justified under an order of sale in attachment proceedings, the plaintiff was allowed to recover upon showing that the writ of attachment, after service, was altered so as to direct the plaintiff to be summoned as trustee, upon which service the judgment was taken.<sup>2</sup>

AMENDMENTS.—In an early case in Arkansas, the court, in speaking of the amendability of process, said that, in regard to final process, process other than original, the almost uniform rule has been to allow all such amendments as attaching a seal; changing the seal where the wrong one was attached; attaching the signature of the clerk in cases of omission; changing the name of the justice in the *teste*, where the wrong one was used; prefixing the style, where that was omitted; and the like (citing cases to each point), yet, in regard to original process to bring the party into court, such amendments have not been allowed, because the issuing of such process is the ministerial act of the clerk, before the court has gained jurisdiction of the party or the case; while in regard to final process the court has acquired full jurisdiction of the parties who are supposed to be present and privy to what transpires.<sup>3</sup> The distinction made does not seem sound. If the original summons or process is issued by the clerk, without an order of the court, the first step the court takes is to examine and approve and ratify it, which then makes it judicial process under the maxim that a subsequent ratification is equivalent to a prior command. In most courts, where a case is filed in term time, the court orders the process to issue, and is responsible for its form from the first. In a California case, the summons was ordered to be published weekly for three months. After four publications a supplemental complaint was filed and a new summons issued on the complaint, original and supplemental, and it

1. Spaulding v. Chamberlin, 12 Vt. 538 (36 Am. D. 358).

2. Brown v. Neale, 3 Allen 74 (80 Am. D. 53).

3. Whiting v. Beebe, 12 Ark. (7 Eng.) 421, 535.

was ordered to be published for three months. Instead of publishing the new summons, the old one was amended and interlined so as to make it contain the substance of the new one, leaving its old date of issue untouched, and the publication was continued for three months longer. A judgment by default, and order of sale, and sale were held void, collaterally, in ejectment.<sup>1</sup> But this seems to me to have been a slight error in practice, which did no harm.

## DIVISION E.

## TIME FOR APPEARANCE, UNCERTAIN OR WRONG.

§ 376. Hour for appearance.

377. Month, omitted — Past time, fixed.

378. Sunday—Term changed by law —Term, commencement of, wrongly stated.

379. Time for appearance—Too distant.

§ 380. Time for appearance—Too soon — Administrator's notice — Personal service — Publication.

381. Time for appearance, wanting.

382. Time for appearance—Year omitted.

§ 376. Hour for appearance.—The statutory form for a justice's summons in Massachusetts fixed an hour for appearance; but such a summons commanded the defendants to appear "on Monday, October fifth, A. D., 1868," without specifying the hour. The court held the judgment not void, and that the appropriate remedy was an appeal.<sup>2</sup> The New Hampshire statute required notice to the creditor of the desire of the debtor to take the poor debtor's oath, to state the "time and place," where it would be taken. Where such a notice fixed the day, but not the hour, the discharge was held void, because it was the general practice to fix the hour.<sup>3</sup> The meaning of the word "time," as used in the statute, was a question for the justice to decide.

§ 377. Month, omitted.—A judgment by default in Missouri is not void because the published notice fixed the time for an appearance "at the next term of said court, to be holden on the first Monday, 1877"—omitting "of May," after "Monday;"<sup>4</sup> and the same was ruled in Iowa where the process called for an

1. McMinn v. Whelan, 27 Cal. 300, 312, 314.

2. Hendrick v. Whittemore, 105 Mass. 23.

3. Sanborn v. Piper, 64 N. H. 335 (10 Atl. R. 680).

4. Jasper County v. Wadlow, 82 Mo. 172, 179.

appearance at the "next term," while the statute required it to name the return term.<sup>1</sup>

PAST TIME, FIXED.—Process in Connecticut was issued in December, 1873, returnable at the February term, 1873, instead of 1874. On motion to amend, at February term, 1874, it was refused and the case was erased from the docket. On appeal, it was said that the court clearly had no jurisdiction, no power to hear and determine, and that "no court can pass an order creating jurisdiction for itself."<sup>2</sup> It seems to me that the court ought to have ordered the correction of so obvious an error on its own motion. The past time fixed being impossible and absurd, should have been struck out as surplusage, leaving the year blank, in which case 1874 would have been intended, as shown in section 382, *infra*.

§ 378. Sunday.—Process returnable on Sunday is not void, and it will be amended so as to be returnable on Monday, and a decree *pro confesso* entered thereon.<sup>3</sup>

TERM CHANGED BY LAW.—Notice by a guardian of an application to sell land was published for the April term. Afterwards, the law was changed, making the April term to begin March 24, on which day the court convened. Where the notice had been published the requisite time, an order to sell was not void.<sup>4</sup>

TERM, COMMENCEMENT OF, WRONGLY STATED.—The Arkansas statute required publication to state "the month and day of the month on which the term of court will commence," but where the notice commanded defendants "to appear in this court within thirty days," the judgment by default was not void;<sup>5</sup> and the same ruling was made in Iowa, where, the process and return being regular, the copy served stated that the term began on May 2, instead of the 24th.<sup>6</sup> So, where a notice to show cause why an administrator's petition to sell land should not be granted, fixed the day for hearing "on or before the January term to be held on January 1, 1861, when the term began on January 7, an order to sell granted on the 7th was not void."<sup>7</sup>

1. De Tar v. Boone County, 34 Iowa 488, 490.

2. Hoxie v. Payne, 41 Conn. 539.

3. McEvoy v. Trustees, 38 N. J. Eq. (12 Stew.) 420.

4. Nichols v. Mitchell, 70 Ill. 258, 262.

5. Cross v. Wilson, 52 Ark. 312 (12 S. W. R. 576).

6. Irions v. Keystone Mfg. Co., 61 Iowa 406 (16 N. W. R. 349).

7. Johnson v. Clark, 18 Kan. 158.

§ 379. **Time for appearance—Too distant.**—Justice's judgments by default were held void in Indiana and Pennsylvania where the return day was fixed, respectively, one<sup>1</sup> and two<sup>2</sup> days beyond the statutory limit. The Utah statute required a summons accompanied by an order of arrest to be returnable *immediately*. One was issued returnable in eleven days, and the party was arrested and brought before the justice and a judgment obtained. On this judgment an execution against the body was issued, and the defendant arrested. On *habeas corpus*, she was released, the court holding the *judgment* void.<sup>3</sup> This seems to be a clear misconception of the law. As the court had power to grant the relief demanded, there was no want of jurisdiction over the subject-matter, and as the defendant was brought before it, there could not possibly be any want of jurisdiction over the person. Where process from a superior court was tested in May, and made returnable on a certain day in May *next*, it was held void in New York,<sup>4</sup> and England;<sup>5</sup> but precisely the contrary was held in South Carolina.<sup>6</sup> The true intent being so obvious, it seems to me that good sense is with the South Carolina case. So, process in Virginia, returnable in one hundred and fifty days, was held void, because the statutory limit was ninety days.<sup>7</sup> The New York statute required an administrator's notice to show cause why he should not be authorized to sell land, to be published so that the return day should not be less than six nor more than ten weeks. But an order to sell was decided not to be void because the return day was fixed seventy-one days in the future.<sup>8</sup>

§. 380. **Time for appearance—Too soon.**—Where the return-day in a *justice's* summons was fixed at a shorter time than authorized by statute, the judgment was held void in Missouri,<sup>9</sup> but merely irregular and not void in New York;<sup>10</sup> and in Massachusetts a justice's judgment was held void because founded on trustee process returnable too soon.<sup>11</sup>

1. Fuller v. Indianapolis and Cincinnati R. R. Co., 18 Ind. 91.

2. Pantall v. Dickey, 123 Pa. St. 431 (16 Atl. R. 789).

3. *Ex parte* Dixon, 1 Utah 192.

4. Bunn v. Thomas, 2 Johns. 190.

5. Parsons v. Loyd, 3 Wils. 341.

6. Posey v. Branch, 2 McMull. 338, relying on Adams v. Scott, 12 Wend. 218.

7. Lavell v. McCurdy, 77 Va. 763, citing Warren v. Saunders, 27 Gratt.

259.

8. O'Connor v. Higgins, 16 N. Y. St. Rep'r 130, 132 (1 N. Y. Supp. 377).

9. Sanders v. Rains, 10 Mo. 770.

10. Hoose v. Sherrill, 16 Wend. 33.

11. Stimpson v. Malden, 109 Mass. 313.

**ADMINISTRATOR'S NOTICE.**—Where the time fixed in an administrator's notice that he would apply for leave to sell land, was too soon, being ten instead of twenty days,<sup>1</sup> or three weeks instead of forty days,<sup>2</sup> the order to sell was held not void in North Carolina and Alabama, respectively; but the contrary was held in California, where the notice was twenty-six days instead of four weeks;<sup>3</sup> and in Illinois, where the notice was forty-one instead of forty-two days;<sup>4</sup> and in Kansas where the notice was thirty-five instead of thirty-six days;<sup>5</sup> and also where the notice fixed the time at ten o'clock A. M., while the order fixed it at one o'clock P. M.;<sup>6</sup> and in New York, where the notice was thirty-six instead of forty-two days.<sup>7</sup>

**PERSONAL SERVICE.**—Where the summons in a civil action in New York required an answer within six days after service instead of ten,<sup>8</sup> or within ten days instead of twenty in Michigan,<sup>9</sup> the judgments were held not void. In the last case, the court said: "The party having been legally served within the jurisdiction is personally informed that proceedings will be urged against him. He has a right to expect that in due time the plaintiff will discover the error and take steps to rectify it. If this is not done, he has the right to the common-law remedies for the correction of errors."

**PUBLICATION.**—Where the return-day in the published notice in attachment proceedings in Indiana was fixed for the first instead of the second term, the judgment was held not void;<sup>10</sup> but the contrary was decided in Kentucky and Minnesota.<sup>11</sup> The Kentucky judgment was rendered on a published notice of eighteen instead of sixty days, and in the Minnesota case, the return-day was fixed less than six days after the completion of the publication, when the statute required at least six days to elapse.

**§ 381. Time for appearance, wanting.**—A statute of Kentucky required notice to non-residents to be both published and posted,

1. McGlawhorn v. Worthington, 98 N. C. 199 (3 S. E. R. 633).

2. Doe v. Jackson, 51 Ala. 514.

3. Townsend v. Tallant, 33 Cal. 45 (91 Am. D. 617).

4. Gibson v. Roll, 30 Ill. 172 (83 Am. D. 181).

5. Mickel v. Hicks, 19 Kan. 578 (27 Am. R. 161).

6. Fleming v. Bale, 23 Kan. 88, 93.

7. Stilwell v. Swarthout, 81 N. Y. 109.

8. Gribbon v. Freel, 93 N. Y. 93.

9. Granger v. Judge, etc., 44 Mich. 384 (6 N. W. R. 848).

10. Ziegenhager v. Doe, 1 Ind. 296, 300.

11. Brownfield v. Dyer, 7 Bush 505, 507; Bird v. Norquist, 46 Minn. 318 (48 N. W. R. 1132).



and required the court to fix the day for appearance. The court made the necessary order, but on the return day no posting had been done, and the court again ordered the notices posted, but fixed no new appearance day. The notices were then posted. The proof of publication was made before a justice of the peace—which was improper according to a prior decision of the court, but not forbidden by statute. The decree rendered was decided to be void because the process and proof of service varied from the law;<sup>1</sup> but a contrary ruling was made in Indiana, where the return day was omitted but the time for the commencement of the term given.<sup>2</sup>

§ 382. **Time for appearance—Year omitted.**—A Kentucky judgment was held void in Missouri, where the record showed that the summons was issued on the 24th day of December, 1816, returnable “on the first day of our March term,” and was served on one defendant on the 27th day of December, 1816, and on the other on the 1st day of March, 1817, and judgment rendered by default on the 25th day of November, 1817.<sup>3</sup> The only defect in this record was the failure to name the year; and I do not doubt that the court which so decided knew that 1817 was intended. A contrary decision was made in Iowa, where a judgment was held not void because publication was made in December, 1860, designating the “April term” for the return, and naming no year.<sup>4</sup> So, where an administrator’s notice in Illinois that he would apply for license to sell land, was dated “September 6, 1852,” and was published that month, and gave notice that “at the December term” the application would be heard, naming no year, the order to sell was decided not to be void.<sup>5</sup>

### SUB-TITLE III AND SECTION 383.

#### PROCESS IN CAPIAS AND CRIMINAL PROCEEDINGS, WANTING— KIDNAPING.

§ 383. **Process in capias and criminal proceedings, wanting—Kidnaping.**—A judgment of a court of inferior and limited jurisdiction in a civil cause in favor of a city, is not void because the defendant was arrested and brought before it without process.<sup>6</sup>

1. *Green’s Heirs v. Breckenbridge’s Heirs*, 4 T. B. Mon. 541.

2. *Stout v. Woods*, 79 Ind. 108.

3. *Bobb v. Graham*, 4 Mo. 222.

4. *Gregg v. Thompson* 17 Iowa 107

5. *Finch v. Sink*, 46 Ill. 169.

6. *State v. Taxing District*, 84 Tenn. (16 Lea) 240, 250. See section 435, *infra*.

So the fact that a person was kidnaped and brought within the jurisdiction of the court unlawfully, does not make its proceedings void, and is no ground for a discharge on *habeas corpus*,<sup>1</sup> and not even cause for a reversal in a higher court.<sup>2</sup> But the opposite view was taken in Nebraska. Thus, a person was arrested and forcibly and unlawfully carried into that state on a charge of larceny, had an examination before a justice and was bound over to the district court, where an information was filed against him to which he pleaded not guilty; and afterwards, on the same day, he moved for his discharge because he had been thus brought into the state, but his motion was overruled. He was tried, the jury disagreed, and he was remanded to jail to await another trial. He then applied to the supreme court for a release on *habeas corpus*, and was released on the ground that the district court had no jurisdiction.<sup>3</sup> This case seems to me to be wrong, on principle. The subject-matter—the right to punish such offenses—was within the jurisdiction of the court, and the person of the defendant was within its actual power. Its power was undoubted, but it ought not to have exercised it in that particular case. The case is wrong on another ground. By entering a plea of not guilty, he submitted to the jurisdiction of the court, and whether or not he should be allowed to withdraw that plea, and plead to the jurisdiction, was a question wholly within the discretion of the trial court. In accord with this Nebraska case, is a late case in Ohio, in which a conviction for one crime was held void, when the person had been brought from New York as a fugitive from justice, on another charge.<sup>4</sup>

1. *Ex parte* Scott, 9 B. & C. 446 (17 121 (9 S. W. R. 735), *citing* Dow's E. C. L. 204; *In re* Ellis, 79 Mich. 322 Case, 18 Pa. St. 37, and Ker v. Illinois, (44 N. W. R. 616); State v. Smith, 1 119 U. S. 436 (7 S. C. R. 225).  
Bailey 283; Kingen v. Kelley, — 3. *In re* Robinson, 29 Neb. 135 (45 Wyo. — (28 Pac. R. 36). N. W. R. 267).

2. State v. Ross, 21 Iowa 467, 470; 4. *Ex parte* McKnight, — O. St. State v. Day, 58 Iowa 678 (12 N. W. — (28 N. E. R. 1034).  
R. 733); Brookin v. State, 26 Tex. App.

## PART II.

## SERVICE, DEFECTIVE OR WANTING.

## § 384. Principle involved in part II.

Title A.—Appearance—Due process of law, . . .	§ 385-387	Title I.—Person served or not served, or person accepting service—Errors, concerning, . . .	§ 451-461
Title B.—Constructive service, force and effect of, .	388-398	Title J.—Place of service or accepting of service—Errors concerning, . . .	462-467
Title C.— <i>In rem</i> , or <i>quasi in rem</i> , . . . . .	399-416	Title K.—Proof of service in domestic court, false in fact, . . . . .	468-482
Title D.—Substituted service, effect of, . . . . .	417-419	Title L.—Proof of service in foreign, and other state, court—False in fact, . .	483
Title E.—Unauthorized proceedings, . . . . .	420-435	Title M.—Proof of service, insufficient in law, . . .	484-487
Title F.—Mode of service, wrong, . . . . .	436-445	Title N.—Time of making service, improper, . . .	488-493
Title G and section 446.—Paper in which publication is made, unlawful—German—Order for publication, varied from—Sunday.		Title O.—Service wanting in proceedings not <i>in rem</i> , .	494-498
Title H.—Person making service, improper, . . .	447-450	Title P.—Service wanting in proceedings where it is dispensed with by statute, .	499-500

§ 384. Principle involved in part II.—The principles which seem to me to govern this part of Chapter IX, are considered in section 329, *supra*, and the cases there cited are in point here.

## TITLE A.

## APPEARANCE—DUE PROCESS OF LAW.

§ 385. Appearance, effect of—Attachment—Process, wrong in kind.	§ 386. Appearance, right of, denied—Alien enemy— <i>In rem</i> .
	387. "Due process of law."

§ 385. Appearance, effect of.—As the only object of process and service in proceedings purely civil, is to afford the defendant an opportunity to appear, and to compel his appearance in proceedings which are criminal or *quasi* criminal, a voluntary appearance by him renders them useless, and eliminates them from the record. Thus, a sentence in admiralty is not void for want of a citation, where the owner of the property appeared personally.<sup>1</sup>

1. *Dennison v. Hyde*, 6 Conn. 508.

**ATTACHMENT.**—The service of a writ of attachment from a federal court by an unauthorized person is waived by a consent order for the goods to be sold and the proceeds to be paid into court for the attaching creditors, according to their priorities.<sup>1</sup> The supreme court of California said: "Any irregularities in obtaining the attachment were waived by the defendant when he appeared and answered without taking advantage of them, by motion or otherwise, in the course of the proceedings. The process is merely auxiliary, and the judgment in the action cures all irregularities."<sup>2</sup>

**PROCESS, WRONG IN KIND.**—A statute of New York required a summons against a non-resident to be returnable not less than two nor more than four days from its date, and declared that "if such defendant be proceeded against otherwise, the justice shall have no jurisdiction of the cause." It was held that an appearance after service of a different process, cured the error.<sup>3</sup>

A REMONSTRANT against a proposed ditch cannot enjoin its construction for want of notice.<sup>4</sup> So a petitioner for a road is not entitled to notice of the proceedings, as he is, in fact, a plaintiff; and his subsequent grantee cannot enjoin the use of the road for want of notice to his grantor.<sup>5</sup>

§ 386. **Appearance, right of, denied—Alien enemy.**—During the late American civil war, many judgments were rendered against persons within the lines of the opposing forces who had neither power nor legal right to appear; and these judgments, generally, have been held void. The leading, although not the first case, was this: Real estate was seized under the confiscation acts of the congress of the United States, and notice was duly given, and the defendant appeared and answered. On motion, his answer was stricken out because it showed that he was "a resident within the city of Richmond, within the confederate lines, and a rebel," and judgment was taken against him as upon default. This was held to be void upon the ground that a proceeding wherein one is not allowed to be heard, is the same as one without notice at all.<sup>6</sup> This decision has been misunder-

1. *Walter v. Bickham*, 122 U. S. 320 (7 S. C. R. 1197).

2. *Porter v. Pico*, 55 Cal. 165, 173—*approved*, *Harvey v. Foster*, 64 Cal. 296, 298; *accord*, *Dunn v. Crocker*, 22 Ind. 324, 326, and *Carothers v. Click, Morris* (Iowa) 54.

3. *Clapp v. Graves*, 26 N. Y. 418.

4. *Sunier v. Miller*, 105 Ind. 393 (4 N. E. R. 867).

5. *Graham v. Flynn*, 21 Neb. 229 (31 N. W. R. 742).

6. *Windsor v. McVeigh*, 93 U. S. 274; *accord*, in respect to the same

stood by some courts. His answer was not struck out because not verified, but because it showed that he was residing within the "confederate lines." That was equivalent to denying any hearing. Proceedings were begun in the United States court in Indiana to confiscate property on the ground that the owner was engaged in rebellion against the United States. He appeared and filed an answer. This was stricken out *for want of an affidavit of loyalty*. The supreme court of Indiana held these proceedings void,<sup>1</sup> when, apparently, all he was required to do was to swear to his answer denying that he was engaged in the rebellion. Whether or not he should be required to do so, was a question purely in the discretion of the court; and this requirement no more affected the jurisdiction than the striking out of any plea for want of verification. If he could not swear to his answer, a trial would be a useless waste of time. This distinction is pointed out in a late case in Arkansas.<sup>2</sup> Where the defendant was expelled from the union lines and forbidden to return, judicial proceedings afterwards carried on against him were held void;<sup>3</sup> but where a person voluntarily left the union lines to engage in war against the United States, legal proceedings against him as an absentee were held valid.<sup>4</sup> Where a citizen of Virginia had brought an action in Indiana before the war, and his attorney, after the war began, carried on the action to an unsuccessful termination, it was held that the war suspended the power of the court to proceed;<sup>5</sup> and, conversely, where loyal citizens had suits pending in the insurgent states at the outbreak of the war, which were afterwards carried on to adverse terminations by their attorneys; or where such proceedings were begun after the war commenced,<sup>6</sup> they have been held void.

judgment, is *Underwood v. McVeigh*, 23 Gratt. 409, 411.

1. *Henry v. Carson*, 96 Ind. 412, 423.

2. *Carolan v. Carolan*, 47 Ark. 511 (2 S. W. R. 105).

3. *Dean v. Nelson*, 10 Wall. 158; *Lasere v. Rochereau*, 17 Wall. 437.

4. *Ludlow v. Ramsey*, 11 Wall. 581; *Foreman v. Carter*, 9 Kan. 674; *Deitrich v. Lang*, 11 Kan. 636; *Dorsey v. Thompson*, 37 Md. 25, 44; *University v. Finch*, 18 Wall. 106.

5. *Brooke v. Filer*, 35 Ind. 402; *Sturn v. Fleming*, 22 W. Va. 404, and

31 W. Va. 701 (8 S. E. R. 263); *Griman v. Edwards*, 21 W. Va. 247; *Haymond v. Camden*, 22 id. 180.

6. *Pennywit v. Kellogg*, 1 Cin. (O.) 17; *Pennywit v. Foote*, 27 O. St. 600, 624 (22 Am. R. 340); *Livingston v. Jordan*, Chase's Dec. 454; *Botts v. Crenshaw*, id. 224; *Blackwell v. Willard*, 65 N. C. 555; *Menefee v. Marge*, — Va. — (4 S. E. R. 726); *Cuyler v. Ferrill*, 1 Abb. (U. S.) 169; *Dorr's Adm'r v. Rohr*, 82 Va. 359, 363; *Van Epps v. Walsh*, 1 Woods 598; *Dorr v. Gibboney's Ex'r*, 3 Hughes 382.

IN REM.—A proceeding in the orphans' court in Delaware to assign dower was *in rem* to which all the world were parties. A person who claimed to have purchased some of the land, applied to be made a party, but the court excluded him. This was held to make the decree void in respect to his rights.<sup>1</sup>

§ 387. "Due process of law."—If it is the law that any constitutional infirmity in acquiring jurisdiction renders the proceeding void, as a majority of the cases seem to hold,<sup>2</sup> it is a very important question as to what constitutes "due process of law" as guaranteed by all the constitutions, both state and national. The placing of this guaranty in the constitution of the United States by the fourteenth amendment, added nothing to the law as it had always existed in all the state constitutions, or had been universally applied by the courts as a maxim of the common law; and the only object in placing it in the constitution of the nation, was to prohibit the states from repealing or abolishing it. The fact that this guaranty has been placed in the national constitution, and the Supreme Court of the United States thus made the final arbiter in all cases concerning it, has made it very prominent. If service could be dispensed with in certain proceedings, and errors and irregularities therein disregarded in others, without rendering the proceedings void, collaterally, before this guaranty was placed in the constitution of the nation, the same things can still be done with the same effect. In other words, in order to determine what this guaranty is, and the effect caused by disregarding it, the books must be examined. The court of appeals of New York said that due process of law "Requires an orderly proceeding, *adapted to the nature of the case*, in which the citizen has an opportunity to be heard, and to defend, enforce and protect his rights. A hearing or an opportunity to be heard is absolutely essential. We cannot conceive of due process of law without this."<sup>3</sup> An attachment was issued in Vermont against a non-resident, and a corporation indebted to him was garnished. Notice for the defendant was left with the corporation garnished, under a statute, and judgment was rendered against the garnishee, which it paid. The defendant in the suit sued the corporation in New York, and it was held that the notice in Vermont was not "due process of law," and that the

1. Lowber's Lessee v. Beauchamp, 2 Harr. (Del.) 139.

2. See sections 75 to 88, *supra*.

3. Stuart v. Palmer, 74 N. Y. 183; 191.

proceeding was void and no defense for the corporation.<sup>1</sup> It was held in Minnesota, that a statute authorizing foreclosures against resident defendants on service by publication,<sup>2</sup> and in Mississippi that a statute which authorized levee commissioners to quiet title on such service,<sup>3</sup> were void. These were both direct attacks. But it was also decided in Minnesota that personal notice was not a constitutional prerequisite to taking private property for public use,<sup>4</sup> and that a statute authorizing a decree quieting title on service by publication against unknown claimants was "due process of law," and that the decree was not void.<sup>5</sup>

Where the New York statute provided that, in partition proceedings against non-resident infants, a guardian *ad litem* might be first appointed for them, and that then a copy of the order appointing such guardian should be served on them and on their father, and that unless they appeared within a specified time and chose some other guardian, etc., the guardian so appointed should act, this was held to be "due process of law."<sup>6</sup> An Indiana statute created in each county a board for the equalization of the valuation of property for purposes of taxation, and provided that it "shall have the power to hear complaints of any owner of personal property, . . . to equalize the valuations of property and taxables, . . . and to correct any list or valuation as they may deem proper. It shall also have power to equalize the valuations made by the assessors, either by adding to or deducting from their valuations such sums as to said board, or a majority thereof, shall appear just and equitable, and, in the discharge of this duty, may send for persons and papers." The statute also provided that "two weeks' previous notice of the time, place and purpose of such meeting shall be given by the county auditor in some newspaper of general circulation, printed and published in the county, or, if no newspaper be published in the county then by posting up notices in three public places in each township in the county." This notice having been given,

1. *Martin v. Central Vermont R. R. Co.*, 58 N. Y. Sup'r (51 Hun) 642 (3 N. Y. Supp. 82; 20 N. Y. St. Rep'r 375, 377).

2. *Bardwell v. Collins*, 44 Minn. 97 (46 N. W. R. 315).

3. *Brown v. Board of Levee Commissioners*, 50 Miss. 468.

4. *Kuschke v. City of St. Paul*,

45 Minn. 225 (47 N. W. R. 786); *accord*, as to gravel road assessments, *Tucker v. Sellers*, — Ind. — (30 N. E. R. 531).

5. *Shepherd v. Ware*, 46 Minn. 174 (48 N. W. R. 773).

6. *Gotendorf v. Goldschmidt*, 83 N. Y. 110.



presumably by publication, the board met and passed an order in these words: "On motion, the board increased the assessment of Peter Kuntz on personal property twenty thousand dollars." This was held void, because of want of power to make such an order without personal notice to Kuntz, the same not being due process of law.<sup>1</sup> This case seems to deny the power of the state to authorize a personal judgment against a resident upon constructive service. But the service in this case stood upon a different footing from ordinary constructive service in a cause between private individuals. Here was a board with judicial powers, having its time and place of meeting fixed by a public law of which all persons were bound to take notice, and it was given jurisdiction over all the property in the county, and all the property owners in the county were made parties by law to advance a public purpose. It is more like substituted service by copy left at a person's residence, of which he may never learn, which authorizes a personal judgment.

The law, which Mr. Kuntz was bound to know, fixed the time and place to have certain rights between him and the state adjudicated, and it seems to me that nothing more was necessary. A late case in the supreme court of New York is contrary in principle. The statute provided that, for a certain time each year—namely, on or before August 1 to the third Tuesday of August—the tax rolls should be open for inspection at a certain place. It also provided for the posting of notices to that effect. It was held that such posting was not jurisdictional, and that its absence did not render the assessment void for want of "due process of law."<sup>2</sup> But the court of appeals held that an increase of valuation on a tax roll by assessors, without giving notice when the statute required it, was void, and that the assessors were trespassers.<sup>3</sup> A personal judgment rendered in California against a citizen of that state absent in Massachusetts, on service by publication, is a valid judgment.<sup>4</sup> So it was said by the supreme court of Texas, in speaking of the Mexican law in force in that state while it was an independent republic, that each state may prescribe the mode of making service on its own citizens, and that a judgment on

1. Kuntz v. Sumption, 117 Ind. 1, 9 (19 N. E. R. 474).

2. People v. Turner, 56 N. Y. Supr. (49 Hun) 466 (18 N. Y. St. Rep'r 26, 29; 2 N. Y. Supp. 253).

3. Jewell v. Van Steenburgh, 58 N. Y. 85, 89.

4. Henderson v. Staniford, 105 Mass. 504; *accord dictum* in Beard v. Beard, 21 Ind. 321.

such service would be valid in its courts;<sup>1</sup> and it was recently ruled in Iowa that a statute which provides for holding an inquest of insanity, in the absence of the defendant and without notice to him, where the court is satisfied that it would be of no advantage to him, was not void as depriving him of his liberty without "due process of law."<sup>2</sup> So, the foreclosure of a mortgage by the common-law proceeding of *scire facias* was regarded as *in rem*, and was held to bar the rights of all persons having inferior rights without making them parties.<sup>3</sup> The supreme court of Illinois said: "In all suits at law, the proceedings are confined alone to the parties to the transaction. In no proceeding in that form are subsequent purchasers or incumbrancers ever made parties, but are required to take notice of the proceeding, and failing to do so, their rights are not protected."<sup>4</sup> If that was "due process of law" then, I judge it to be so now. This section is not intended to be exhaustive. Indeed, it could not be so, because it takes the whole chapter in order to consider the question in its collateral bearing alone.

## TITLE B.

### CONSTRUCTIVE SERVICE, FORCE AND EFFECT OF.

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| <p>§ 388. Scope of, and principle involved in, title B—Errors in constructive service—Power of the court to adjudicate upon.</p> <p>389. Section 388 continued—Collateral validity of judgments on constructive service—Protection they afford plaintiff.</p> <p>390. Non-resident—Divorce against, on constructive service—Principle involved.</p> <p>391. Non-resident—Divorce against, on constructive service, effect of, on children and property.</p> <p>392. Non-resident—Insolvent's discharge against, on constructive service.</p> <p>393. Non-resident—Personal judgment against, on constructive</p> | <p>service, what is, or is not—Leading cases considered.</p> <p>§ 394. Non-resident—Personal judgment against, in particular proceedings—Attachment proceedings—Guardianship proceedings—Personal judgment, valid.</p> <p>395. Non-resident—Revivor against,</p> <p>396. Non-resident—Right, title or interest of, in property, adjudicated upon constructive service—Quieting title.</p> <p>397. Resident—Divorce against, on constructive service—Partition against.</p> <p>398. Resident—Proceeded against as a non-resident, upon constructive service.</p> |
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1. *Thouvenin v. Rodriguez*, 24 Tex. 468.

2. *Chavannes v. Priestly*, 80 Iowa 316 (45 N. W. R. 766).

C. A.—24

3. *State Bank v. Wilson*, 9 Ill. (4 Gilm.) 57.

4. *Chickering v. Failes*, 26 Ill. 507, 517.

§ 388. **Scope of, and principle involved in, title B.**—In all cases where original service is made by publishing or posting, or made in *any* manner at a place over which the power of the tribunal for such purpose cannot possibly extend, the service is constructive. In respect to those who owe no allegiance to the sovereignty where the tribunal sits and by whose power it acts, the judgment rendered on such service can sequester only the specific rights and titles within its jurisdiction actually seized and adjudicated upon. In respect to those who do owe allegiance, or are under obligations to obey, whether or not the judgment on such service may also impose personal obligations and duties, is a question upon which the cases differ, as is somewhat shown in section 387, *supra*, in considering “Due Process of Law.” A case in Nebraska is contrary to the definition just given. A non-resident subsequent mortgagee was made a defendant in foreclosure proceedings, and he indorsed an acceptance of service upon the summons at a place outside of the state. This was held to be personal and not constructive service.<sup>1</sup>

**ERRORS IN CONSTRUCTIVE SERVICE—POWER OF THE COURT TO ADJUDICATE UPON.**—The supreme court of Indiana, in a late case, said: “Where there is some notice, although defective, the judgment is not void; if there is notice, although irregular and defective, there is jurisdiction. . . . The rule with respect to *notice by publication* is the same as to notice by service of summons; there is, indeed, reason for being more liberal in cases of constructive notice than in cases where the service is by summons, for the defendant in the former class of cases is entitled, as of right, to open the judgment and try the cause. It is a mistake to suppose that notice by publication is purely of statutory origin, for it was well known in chancery and at common law. There is, therefore, no valid reason why the same presumptions should not obtain in cases where the notice is by publication as where it is by service of summons, and the weight of authority is to that effect.”<sup>2</sup> A judgment of the supreme court of Illinois was collaterally attacked in a lower court because the published notice to the defendant in error was insufficient. The court said: “Whether the defendants in the writ of error had the constructive notice required by the rules of practice of this court to bring them before it and give jurisdiction to proceed in the case, was one of

1. *Cheney v. Harding*, 21 Neb. 65 (31 N. W. R. 255).

2. *Quarl v. Abbett*, 102 Ind. 233, 240 (52 Am. R. 662; 1 N. E. R. 476).

the questions this court had to determine before rendering judgment. It heard evidence upon the question, and determined it by proceeding to render judgment. This determination is final and conclusive." <sup>1</sup>

In later cases, it was held in Indiana that, where the trial court had held defective notice of the settlement of a decedent's estate,<sup>2</sup> or a defective publication, based on a defective affidavit,<sup>3</sup> good, the judgments could not be questioned collaterally; and the supreme court of Ohio held that, where the publication for non-residents was informal, but adjudged by the court to be sufficient, it could not be assailed collaterally.<sup>4</sup> The supreme court of California said that "the court is just as competent to determine a question of constructive service as of actual service. The mode of determining one is no less solemn and deliberate than the other. It is just as much a matter of record. The action of the court is worthy of as much trust and confidence in the one as in the other." <sup>5</sup> The supreme court of Missouri decided that a proceeding in the circuit court to foreclose an alleged tax lien against a non-resident owner, on service by publication, was a proceeding according to the "course of the common law," and that the jurisdiction depended upon the allegations of the petition, and not on the fact that the land was legally assessed, or that the taxes were unpaid. It also said: "No distinction can be made between the force and effect of a judgment rendered upon actual and constructive service, in cases where constructive service is authorized by law, except such as is made by statute." <sup>6</sup> But the supreme court of Michigan, in a late case, took a different view concerning the power of the court. It said: "Where cases and proceedings are not according to the usual course, and are special in their character, they *are held void on slighter grounds* than regular suits, because the courts have not the same power over their records to correct them. So, where there has been no personal service within the jurisdiction, the doctrine prevails that proceedings not conforming to the statutes are void. But this is on the ground that there has been no service whatever, and the party, therefore, has not been notified, in any proper way, of anything.

1. Fahs v Darling, 82 Ill. 142, 145.

4. Lessee of Boswell v. Sharp, 15 O.

2. Jones v. Jones, 115 Ind. 504, 511 447, 467.  
(18 N. E. R. 20).

5. Hahn v. Kelly, 34 Cal. 391, 410

3. Goodell v. Starr, 127 Ind. 198 (94 Am. D. 742).

(26 N. E. R. 793).

6. Jones v. Driskill, 94 Mo. 190 (7 S. W. R. 111, 114).

The purpose of the statutory methods is to furnish means from which notice may possibly or probably be obtained. But as a court acting outside of its jurisdiction is not recognized as entitled to obedience, the special statutory methods stand entirely on their own regularity, and if not regular cannot be said to have been conducted under the statutes. The distinction is obvious, and is not imaginary." <sup>1</sup> This opinion was written by Mr. Justice Campbell, a very able jurist, and yet it seems to me to be contrary to both authority and principle. Why is not the court just as competent to construe one instrument as another? It is compelled to construe all that are presented. When the plaintiff presents an instrument showing an alleged service on the defendant and demands a default, the court must examine it. If it needs any construction, it must construe it. All courts admit that a large number of deviations from the prescribed form may exist without affecting the jurisdiction. When the court examines the instrument and notes its variations from the statute, it must decide whether or not they are fatal, no matter what the instrument may be.

**§ 389. § 388 continued—Collateral validity of judgments on constructive service—Protection they afford plaintiff.**—All the cases agree that, when the property of a non-resident is duly seized under attachment or garnishment, and duly sold by virtue of a judgment founded on constructive service, the innocent purchaser gets a good title; <sup>2</sup> but if the non-resident defendant afterwards sues the plaintiff to recover the value of his property, the cases differ in respect to his rights. The question seems very plain on principle. The judgment is either valid or void when assailed collaterally. There is no middle ground. If it is not void, as the case assumes, it will protect all persons when sued in another action for anything done under or by virtue of its authority. It solemnly adjudicates that the plaintiff is entitled to the relief granted, and if jurisdiction existed to make such a grant, the plaintiff cannot be sued for taking it. If such a judgment did not conclusively settle the rights of the parties between themselves, then a decree quieting title on constructive service would always be void, because nothing is sold; and the non-resi-

1. *Granger v. Judge of Superior Court*, 44 Mich. 384 (6 N. W. R. 497 (48 Am. D. 300); *Minot v. Tilton*, 64 N. H. 371 (10 Atl. R. 682, 684); 848). *Schenck v. Griffin*, 38 N. J. L. (9

2. *Dictum* in *Dearing v. Bank*, 5 Ga. Vroom) 462, 465.

dent claimant could always bring ejectment, which all the cases now agree he cannot do. The conflict in the cases arises from a confusion of the doctrines of *res judicata* and collateral attack, as pointed out in section 17, *supra*. The cases point out that, if any part of the claim sued upon remains unpaid after the property seized is exhausted, the defendant can contest its validity when sued in a new action, and from that they draw the conclusion that nothing was settled by the original action. But the plaintiff in the original action could only sue and obtain an adjudication *upon so much of his claim as the property seized would satisfy*. The law authorized him to split his cause of action at that point. The remainder constitutes another cause of action, against which the defendant is permitted to make any defense he may have, as is shown by the cases cited in section 17, *supra*. It was held in Iowa, that a judgment in Illinois, upon constructive service, ordering the sale of attached property, was a bar to an action by the original defendant against the plaintiff for conversion.<sup>1</sup> Bank stock in Maryland, owned by a non-resident, was seized and sold on a judgment in attachment founded on constructive service, for the non-payment of an alleged tax to the city of Baltimore. The owner sued the city to recover the money, on the ground that the stock was not subject to the tax. It was held that he could not raise the question; that the judgment was as conclusive as if rendered on personal service.<sup>2</sup> An early case in New York held that a judgment in attachment upon constructive service, was no bar to an action by the defendant in the original action against the plaintiff for malicious prosecution, and that he might show that the cause of action sued upon in the attachment had been paid.<sup>3</sup> This case was followed in Illinois.<sup>4</sup> It was also held in Indiana and Kansas, that a non-resident defendant might recover from the plaintiff the money collected on garnishment proceedings founded on constructive service, by showing that the claim sued upon was unjust,<sup>5</sup> while precisely the contrary was held in Pennsylvania, where an attachment defendant sued the plaintiff for the value of the goods seized and sold.<sup>6</sup>

1. Melhop v. Doane, 31 Iowa 397 (7 Am. R. 147)—Miller, J. *dissenting*.

2. Gordon's Ex'rs v. Mayor, etc., of Baltimore, 5 Gill 231, 241.

3. Bump v. Betts, 19 Wend. 421.

4. Bliss v. Heasty, 61 Ill. 338.

5. Hoshaw v. Hoshaw, 8 Blackf. 258; Powell v. Geisendorff, 23 Kan. 538.

6. McDonald v. Simcox, 98 Pa. St. 619, 624.

Suit was brought in Missouri to quiet title to land. The plaintiff's claim rested upon an alleged title-bond, after due service by publication, his title was quieted. The defendant had conveyed this land with warranty, and was sued in Illinois for its breach. He was permitted to show that he never agreed to convey to the plaintiff in the Missouri suit, and thus to defeat the action.<sup>1</sup> If the Missouri decree had any force as between the parties, as I think it did, this case is wrong. A person agreed to purchase a tract of land in Missouri, and executed a note to the owner, and received a title-bond for a deed on payment of the note. The owner brought suit in Missouri to compel a specific performance, and after service by publication on the non-resident maker of the note, obtained a decree and an order to sell the land, which was done, and the proceeds were credited on the note. The complaint alleged and the decree adjudged that the plaintiff had tendered a deed to the defendant before the suit was brought. The plaintiff then sued the defendant in Kansas for the balance due on the note, and sought to use the Missouri decree to prove that he had tendered a deed before bringing the Missouri suit, but it was held that he could not do so.<sup>2</sup> The distinction between this case and the last, is obvious. Assuming that the Missouri decree quieting title was valid in Missouri as against both the parties to the action in Illinois—a matter which the case does not negative—then the Missouri land, which the plaintiff in the Illinois case held by a warranty deed, had been taken from him by virtue of a claim, which a competent court had adjudged to be a right superior to the title of his warrantor. The defendant in Illinois was permitted to show that he still had the title to the Missouri land, which was a successful collateral attack on the Missouri decree because the court came to an erroneous conclusion on a question of fact. But the Kansas case is entirely different. There the plaintiff attempted to use the Missouri decree in a suit concerning another cause of action—for the balance due on the note was another cause of action upon which the Missouri decree did not profess to adjudicate—to show that the allegations of the complaint were true in fact, which is the doctrine of *res judicata*, and of course he could not do so because those allegations were not actually contested on the trial. A decree of divorce was rendered in Illinois, on constructive service, against the wife, a resident of New York. In a contest over the

1. Jones v. Warner, 81 Ill. 343.

2. Iles v. Elledge, 18 Kan. 296, 299.



validity of this decree in New York, she sought to show that it was void because he did not, in fact, reside in Illinois. The court said: "If the wife had appeared in the Illinois action, . . . and the question of residence had then been litigated, the decision of the court might have been conclusive; but since no process was served upon her in this state, and she had no notice of the action, she had no opportunity to be heard, and is not barred by the finding of the decree."<sup>1</sup>

As the Illinois statute required the plaintiff to be a resident of that state, and as the petition alleged such residence, the court necessarily had to pass upon and find that allegation to be true. If it could not adjudicate that question, it could adjudicate nothing, and it follows that all judgments against non-residents on constructive service are subject to contradiction on all jurisdictional questions of fact, which I do not believe to be law. A resident of Ohio died there, leaving an insurance policy of ten thousand dollars in a Pennsylvania company payable to his widow. Under the law of Ohio, his administrator was entitled to about three-fourths and the widow to about one-fourth of this policy. She took the policy to Pennsylvania and sued the company, and it paid the money into court, and suggested that the administrator in Ohio claimed to have some interest in it, and asked that he be compelled to interplead with her and settle their respective rights. The court granted this request, and ordered the administrator to show cause why he should not interplead, notice of which was duly served on him in Ohio. The administrator failing to appear, the court adjudged it all to the widow, and she received it. The administrator then sued her in Ohio to recover his share, and it was held that he could do so.<sup>2</sup> But the Pennsylvania court had the actual and lawful control of this fund, and the power to distribute it. It could do no more than give non-resident claimants an opportunity to be heard. An early case in South Carolina is to the contrary. A decree was rendered after due constructive service, excluding a non-resident from any distributive share in an estate, giving it all to the residents. The non-resident claimant sued the residents to recover his distributive share, but the court held that the decree was not void for any error of law or fact, and that it barred his right to

1. *Cross v. Cross*, 108 N. Y. 628 (15 N. E. R. 333; 1 Silvernail 572).

2. *Cross v. Armstrong*, 44 O. St. 613 (10 N. E. R. 160).

raise the question.<sup>1</sup> A late case in Iowa involves the same principle, and was wrongly decided, in my opinion. It was this: A resident of Iowa, one Kelly, had the actual custody of an insurance policy as a pretended assignee. Another pretended assignee brought a suit in New York against the insurance company and the Iowa assignee, and made personal service on him in Iowa, and obtained a decree by default enjoining the company from paying him. This decree was held void against Kelly in a suit by him against the company in Iowa.<sup>2</sup>

The principle involved in the three last cases is not the same as that considered in sections 392 and 396, *infra*, where a proceeding by the debtor against the creditor to cancel the debt is held to be personal, but more nearly resembles a suit in garnishment where a claim of the creditor is sequestered by a third person. In the Iowa case just cited, all the company could do was to notify the Iowa claimant. It could not compel him to show up his right, nor free itself from the New York court. I can see no difference in the principle between that case and a case where the claimant had been an alleged creditor of the Iowa claimant, and proceeded by garnishment. A defendant was successful in the court below, and then left the state. In due time the plaintiff took an appeal, and gave notice by publication according to law. The appellate court proceeded *ex parte* to reverse the decree below and rendered a decree for the plaintiff. Suit was brought on this decree in a federal court in another state, and it was held to be binding on defendant personally.<sup>3</sup> It was recently held in Indiana that a personal judgment in a bastardy case based solely on service by publication, when no statute provided for such service in those cases, was void.<sup>4</sup>

JURISDICTION OVER SUBJECT-MATTER, CONTRADICTION OF RECORD IN RESPECT TO, BY NON-RESIDENT DEFENDANT.—A statute of New Jersey made it a penal offense for a non-resident to gather clams within its waters, and punished the offender by a forfeiture of his boat or vessel, and gave jurisdiction to two justices of the peace of the county where the boat or vessel should be seized. The sheriff of Monmouth county seized the vessel of such an alleged offender, and filed a complaint before two

1. *Hurt v. Hurt*, 6 Rich. Eq. 114.

3. *Nations v. Johnson*, 24 How. 195.

2. *Kelly v. Norwich Union Fire*

4. *Moyer v. Bucks*, 130 Ind. — (28

Ins. Co., — Iowa — (47 N. W. R. N. E. R. 992).

986).

justices of that county, alleging that the owner was a non-resident and using the vessel seized in gathering clams in Monmouth county, contrary to the statute, etc. After a trial, the allegations of the complaint were found to be true, and it was specifically adjudicated that the vessel was being used to gather clams in Monmouth county, and the sheriff was ordered to sell it, which he did. The sheriff went to New York, and the owner of the vessel there sued him in the circuit court of the United States for a conversion. On that trial, the jury found that the plaintiff was using his vessel in gathering clams within the waters of New Jersey, but not in Monmouth county. The contention was, that the New Jersey record was conclusive that the offense was committed in that county. The circuit court, being of a contrary opinion, rendered a judgment for the plaintiff, and the sheriff carried the case to the Supreme Court of the United States. That court, after citing and commenting upon a number of authorities tending to show that, when a judgment of one state is sought to be used in another, the jurisdiction of the court rendering it can be inquired into, said: "But it must be admitted that no decision has ever been made on the precise point involved in the case before us, in which evidence was admitted to contradict the record as to jurisdictional facts asserted therein, and especially to the facts stated to have been passed upon by the court. But if it is once conceded that the validity of a judgment may be attacked collaterally by evidence showing that the court had no jurisdiction, it is not perceived how any allegation contained in the record itself, however strongly made, can affect the right so to question it. The very object of the evidence is to invalidate the paper as a record. If that can be successfully done, no statements contained therein have any force. If any such statements could be used to prevent inquiry, a slight form of words might always be adopted so as effectually to nullify the right of such inquiry. . . . On the whole, we think it clear that the jurisdiction of the court by which a judgment is rendered in any state may be questioned in a collateral proceeding in another state, notwithstanding the provision of the fourth article of the constitution and the law of 1790, and notwithstanding the averments contained in the record of the judgment itself."<sup>1</sup> The general principle established by

1. *Thompson v. Whitman*, 18 Wall. 457, 468 (A. D. 1873). See section 576, *infra*.

this case is, that a record from another state when offered in evidence may be contradicted on any jurisdictional question of fact, and the specific question decided was, that it might be contradicted in respect to the *place* where the property sequestered by it was seized. This case overturns the law as it then stood, and, in my opinion, is untenable on principle. That court, more than a half a century before, had decided the specific question the other way. Thus, where a vessel had been condemned by a French prize court at Guadaloupe, it was contended in a federal court that the condemnation was void because the vessel was taken on the high seas and not within the jurisdiction of France; but the Supreme Court of the United States said: "Although it be now stated, as a reason why we should examine whether a jurisdiction was rightfully exercised over *The Sea Flower*, that she was captured more than two leagues at sea, who can say that this very allegation, if it had been essential, may not have been urged before the French court, and the fact decided in the negative? And, if so, why should not its decision be as conclusive on this as on any other point? The judge must have had a right to dispose of every question which was made on behalf of the owner of the property, whether it related to his own jurisdiction, or arose out of the law of nations, or out of the French decrees, or in any other way."<sup>1</sup>

The general principle involved was decided the other way in 1681. The French and Dutch were at war, which gave French prize courts the power to condemn Dutch ships; and where a French prize court condemned and sold a ship as Dutch, and the purchaser took her to England, where the former owner sued him in trover on the ground that she was an English ship over which the French court had no jurisdiction, it was held to be incompetent for him to contradict the French record on that question of fact.<sup>2</sup> This case was followed in an early case in the Supreme Court of the United States, where it was decided that the record of a foreign prize court could not be contradicted by showing that the vessel did not, in fact, attempt a breach of blockade.<sup>3</sup> If it be said that these were decisions of prize courts, I answer, so was the *New Jersey* case; and I ask, why put the judgment of a prize court on a different foundation from that of any other

1. *Hudson v. Guestier*, 6 Cranch 281, 284.

3. *Croudson v. Leonard*, 4 Cranch 434.

2. *Hughes v. Cornelius*, 2 Shower 232 (3 Sm. Ldg. Cas. 2007).

court? The judge of that court is sworn to hear the evidence, and from that to find the facts, and then to apply the law, and that is precisely what all judges of all courts are sworn to do. The duty being the same, unless we are to disregard principle, the final judgments must be accorded the same force. But suppose the owner of the vessel in the New Jersey case had appeared and contested the question as to the place where it was seized being in Monmouth county, and had been defeated; and suppose he had then carried it to the court of common pleas and there been defeated again; and then to the supreme court, and then to the court of errors and appeals, and had been defeated on the merits in all the courts of New Jersey, would that have barred his right to retry the same question in New York? To hold that it would, would demonstrate that the supreme court confounded the doctrines of *res judicata* and collateral attack, as explained in section 17, *supra*, because he had the opportunity to make that contest in the New Jersey courts. The principle involved here is not the same as that involved in the contradiction of service, which is considered in sections 476 and 483, *infra*. If a case ever comes before the Supreme Court of the United States, for instance, where a person who has been convicted and imprisoned for crime sues the sheriff in another state for false imprisonment, and offers to show that he committed the crime in a county other than that in which he was tried, the court will have to hold his evidence competent, and thus give him two days in court on that question, or overrule *Thompson v. Whitman*, because in that case, the owner of the vessel first had his day in court in New Jersey, and then again in New York.

§ 390. **Non-resident—Divorce against, on constructive service—Principle involved—**(See sections 648 to 651, *infra*).—Each state necessarily has the power to fix and settle all rights and titles within its borders, because no other state can. A portion of these rights are matrimonial. The fact that one of the parties to the matrimonial contract or union is a non-resident, no more affects the power of the state to declare and settle the rights of the resident, in so far as those rights are within its limits, than if the joint right existed in lands or goods. One of the rights of the resident is to have the alleged marriage contract declared void *ab initio*, and thus to quiet his right to matrimonial freedom, and another is to have the actual contract dissolved, for cause, so that

he may again have his matrimonial freedom, with the right to remarry. Another right he has is to have his title to all property, and his right in and to the children, within the state, fixed and settled. A law authorizing the courts to settle these matters by adjudication, is necessarily valid. And as the adverse party is out of the state, the adjudication necessarily has to be made upon constructive service. Such a law existing, a decree in conformity thereto necessarily fixes and settles the right of the resident petitioner to his matrimonial freedom, and to his children and property within the state. His matrimonial freedom being granted by a court of competent jurisdiction, and the record being fair on its face, any other woman desiring to marry him has the same right to rely upon it as if it adjudicated the title to property. And such marriage, being valid and binding where made, ought to be valid and binding the world over. Where the parties reside in different states, a divorce granted to the resident petitioner upon constructive service, is held to be valid, and a bar to a petition for a divorce by the adverse party in the state of his or her residence, by the courts of Iowa, Massachusetts, Missouri, and Ohio, and by one case in the supreme court of New York.<sup>1</sup> But the courts of New Jersey, New York, North Carolina, Pennsylvania, and Wisconsin hold to the contrary.<sup>2</sup> Some of these cases need more particular notice. In *People v. Baker*, a divorce had been granted on constructive service to the wife in Ohio against the husband in New York, after which he remarried, and he was held guilty of bigamy. In *O'Dea v. O'Dea*, a divorce had been duly granted to the husband in Ohio against the wife in Canada. She afterwards went to New York and remarried, and this husband brought a suit to have the marriage annulled on the ground that she had another

1. *Van Orsdal v. Van Orsdal*, 67 Iowa 35 (24 N. W. R. 579); *Burlon v. Shannon*, 115 Mass. 438; *Gould v. Crow*, 57 Mo. 200, 204; *Cox v. Cox*, 19 O. St. 502; *Holmes v. Holmes*, 57 Barb. 305, 307.

2. *Doughty v. Doughty*, 27 N. J. Eq. 315, 321, and 28 N. J. Eq. 581, *on appeal*. *Flower v. Flower*, 42 N. J. Eq. 152 (7 Atl. R. 669); *McGiffert v. McGiffert*, 31 Barb. 69 (17 How. Pr. 18); *Vischer v. Vischer*, 12 Barb. 640; *Hoff-*

*man v. Hoffman*, 55 Barb. 269; *Holmes v. Holmes*, 4 Lans. 388, 391; *People v. Baker*, 76 N. Y. 78 (32 Am. R. 274); *O'Dea v. O'Dea*, 101 N. Y. 23; *DeMeli v. DeMeli*, 120 N. Y. 485 (24 N. E. R. 996); *Cross v. Cross*, 108 N. Y. 628 (15 N. E. R. 333, and 1 Silvernail's N. Y. Ct. of App. 572); *Irby v. Wilson*, 1 Dev. & Bat. Eq. 568, 572; *Zerfass' Appeal*, 135 Pa. St. 522 (19 Atl. R. 1056); *Cook v. Cook*, 56 Wis. 195 (43 Am. R. 706; 14 N. W. R. 33 and 442).



husband living, and it was held by five judges against three that he could maintain the suit.

In Zerfass' Appeal, the parties were married in Pennsylvania, and separated there, it seems, and the husband removed to Nebraska and there obtained a divorce on constructive service, and then came back to Pennsylvania and died. His divorced wife was held to be his widow, and entitled to administer upon his estate. In Cook v. Cook, the husband residing in Michigan, had procured a divorce against the wife, residing in Wisconsin, on constructive service, and it was held that she could procure a divorce and alimony in Wisconsin. So far as the granting of alimony out of Wisconsin property was concerned, I think this case was right. The wife had a *right*, either vested, inchoate or contingent, in the property of the husband in Wisconsin, which the court in Michigan could not possibly touch, as she was not personally within its power. In respect to that right, or alleged right, none but the courts of Wisconsin could adjudicate. The cause of action in respect to their property rights could be split—necessarily had to be under the circumstances—and adjudicated upon in the states where the property was situated, but not so with the personal bond of matrimony. That was either in force or it was not. I am now speaking of this as a common law or ecclesiastical question. Of course a state might, by statute, prohibit persons living within its dominion from remarrying because of a foreign divorce, until after a divorce should be granted by its courts, or place any other restriction upon such persons it might deem wise or expedient. But as no such statutes exist, I think the cases that hold that the matrimonial bond cannot be severed so as to free both parties by a decree made upon constructive service, are wrong on principle. In Doughty v. Doughty, the vice-chancellor held that a divorce granted in Illinois, upon constructive service, against the wife in New Jersey, of which she did not learn, when the husband knew where she resided and made no attempt to inform her, was void. On appeal, it was said, *arguendo*, that a divorce granted by a state to a domiciled citizen, on constructive notice to a non-resident, would change the *status* of the plaintiff but would not affect the *status* of the defendant, because one state could not force its policy in regard to divorces upon another state or its citizens; but the court finally held the decree void because the plaintiff alleged in his petition that he never, in fact, assented to the marriage, and that



he was declared to be married without such consent; that the only cause of action held by him, on his own showing, was one against her for boasting that they were married—a cause of jactitation under the ecclesiastical law—which did not create a matrimonial status for the laws of Illinois to dissolve, but a mere personal cause against her in which the state had no interest and which could only be determined after personal service on her. I cannot agree that the state of Illinois had no power to free its citizens from an alleged contract of marriage so that they might marry without danger from the criminal laws. An early case in Wisconsin is contrary to *People v. Baker*. It decided that the divorce of the wife in another state, upon constructive service, barred a suit by her former husband against her new husband for criminal intercourse.<sup>1</sup> So it was held in Ohio that a divorce granted to a wife in Indiana, where she resided, was a bar to her suit for a divorce in Ohio.<sup>2</sup> In an early case in New York, a divorce had been granted to the wife in Connecticut while the husband resided in New York. This record when offered in evidence in the latter state was silent concerning service, and was held void.<sup>3</sup>

Parties were citizens of New York and there intermarried. They then became citizens of Ohio, where they separated, he going to Pennsylvania and she to Wisconsin; afterwards he removed to Michigan, and there obtained a divorce, upon constructive service, for her alleged desertion in Ohio. After that, she removed to Michigan, and he removed to Pennsylvania, and married again and died there. The divorce was held void in Pennsylvania, and the first wife was decided to be his widow. The court said: "The cause of divorce did not arise in the state of Michigan, neither did the parties reside therein. Mrs. Platt was not served with process, neither did she appear to answer the libel."<sup>4</sup> In an action of ejectment, in Oregon, the title depended on the validity of an Indiana divorce. The divorce could not be pleaded. The court held that when it was introduced in evidence the opposite party might show it to be void for fraud, want of notice, and the like, and that she was not obliged to go to Indiana to set it aside, but could do so in Oregon when opportunity presented.<sup>5</sup> I think this case correct.

1. *Shafer v. Bushnell*, 24 Wis. 372,

2. *Cooper v. Cooper*, 7 O. (Part II)  
238.

3. *Bradshaw v. Heath*, 13 Wend 407.

4. *Platt's Appeal*, 80 Pa. St. 501.

5. *Murray v. Murray*, 6 Or. 17, 24.

§ 391. **Non-resident—Divorce against, on constructive service, effect of, on children and property.**—A decree by default, granting a divorce against a non-resident upon constructive service, is void in so far as it attempts to dispose of children who are then outside of the state;<sup>1</sup> and the same ruling was made in Indiana, New York and Vermont in respect to a decree for alimony granted in another state in such a case.<sup>2</sup> A husband was arrested in Pennsylvania for deserting his wife, and was ordered to pay her eight dollars per week. Afterwards, he went to Missouri, and there, upon constructive service and by default, obtained a divorce. He then returned to Pennsylvania, and moved to have the order for support discharged; but it was decided that the divorce did not affect the rights of the wife in respect to that order, and his motion was denied,<sup>3</sup> and correctly so, as it seems to me. Persons were citizens of Pennsylvania, and there intermarried, and the husband there owned real estate in which his wife had an inchoate right of dower. She abandoned him, and he removed to Iowa and became a citizen of that state, and there duly procured a divorce upon constructive service, and afterwards died there. It was held that the divorce did not affect her dower interest in his Pennsylvania lands. The court said: "By marriage, the wife has claims upon her husband's property here, and the law of Pennsylvania has claims to apply it to her support, as one of its married citizens. On what principle of right or of comity shall the decree of a distant tribunal, never having acquired jurisdiction from domicile, or otherwise, over her, cut loose those claims, and disable Pennsylvania from taking the property of the husband within her borders, to lift the burden of support from the public shoulders; or from rendering to the wife judicially that right which she has in her husband's property, and which he neither carried away with him nor defeated by his removal? To admit the greater right of the foreign decree is to derogate from our own sovereignty, and to withdraw from one of our own citizens the protection due her. No correct principle of interstate law can demand this."<sup>4</sup> This case seems to me to

1. *Kline v. Kline*, 57 Iowa 386 (10 405); *Prosser v. Warner*, 47 Vt. 667 N. W. R. 825; *accord*, *Barney v. De Kraft*, 6 D. C. 361.

2. *Middleworth v. McDowell*, 49 15 Phila. 403.

*Ind.* 386; *Phelps v. Baker*, 60 Barb. 107, 110 (41 How. Pr. 237); *Rigney v. Rigney* — N. Y. — (28 N. E. R. 380.

3. *City of Philadelphia v. Wetherby*,

4. *Colvin v. Reed*, 55 Pa. St. 375.

is not such a judgment. We have seen in the last section, that a decree canceling a claim held by a non-resident creditor, is a personal judgment, and is void when rendered on constructive service. It has been decided three times by the Supreme Court of the United States, that a judgment canceling the bonds of a town is personal, and void when rendered on constructive service.<sup>1</sup> So a decree canceling a life insurance policy after the death of the insured, as against the payee, a non-resident infant, upon constructive service, is a personal judgment and no bar to an action on the policy by the payee;<sup>2</sup> and where a divorce was granted in New York against the wife residing in Pennsylvania, upon constructive service, a clause in the decree prohibiting her from remarrying, was said to be void.<sup>3</sup> A person purchased stock of a Georgia bank at a sale upon an execution against one Peck. On the books of the bank, the stock stood in the name of the cashier of a South Carolina bank. The purchaser brought a suit in a Georgia court to enjoin the South Carolina bank from asserting its title on the ground that it was fraudulent, and also to compel the Georgia bank to transfer the stock to him on its books; and after personal service on the Georgia bank and constructive service on the South Carolina bank, a decree was rendered by default, granting the relief prayed for. The supreme court of Georgia held that this was a decree *in personam* against the South Carolina bank, and void because rendered on constructive service.<sup>4</sup> I cannot agree with this case, as the stock was not an evidence of indebtedness from the bank to the holder, like a note or bond. It represented his title to a share of the corporate property which had its *situs* in Georgia. The statutes, for convenience, permit the shares of stock owned by a debtor, instead of the corporate property, to be seized on execution. If a statute authorized the deed of a person to be levied upon, instead of his land, and required a note thereof to be made on the

132; *Bischoff v. Wethered*, 9 Wall. 812; *Public Works v. Columbia College*, 17 Wall. 521; *Pennoyer v. Neff*, 95 U. S. 714; *Freeman v. Alderson*, 119 U. S. 185 (7 S. C. R. 165); *Schibsby v. Westenholz*, L. R., 6 Q. B. 155; *Brisbane Oyster Fishery Co. v. Emerson*, Knox (New South Wales) 80; *Maiden v. Marwedel*, 1 Queensland Law Rep. (Part III) 69.

1. *Brooklyn v. Insurance Co.* 99 U. S. 362, 370; *Empire v. Darlington*, 101 U. S. 87, 92; *Pana v. Bowler*, 107 U. S. 529, 545 (2 S. C. R. 704).

2. *Insurance Co. v. Bangs*, 103 U. S. 435.

3. *Dictum* in *Van Storch v. Griffin*, 71 Pa. St. 240.

4. *Dearing v. Bank of Charleston*, 5 Ga. 497 (48 Am. D. 300).

record where it was recorded, and authorized a sale of the deed, and required the recorder to make the proper entry showing a transfer of the title to the land described in it to the purchaser, that would be akin to the statutes authorizing a levy on corporate stock, and would not be unlawful, in my opinion. In other words, it seems to me that the *situs* of the thing sold on the execution was in Georgia.

Where no property of a corporation could be found whereon to levy an execution, the statute of Missouri authorized the plaintiff, after notice in writing to any stockholder, to obtain an order from the court for the issuing of an execution against him to the amount of his unpaid stock. In such a case, a stockholder resided in New York, and after notice in writing had been served upon him there, the Missouri court, upon default, ordered an execution to issue against him for the amount he was still owing upon his stock, and upon this writ his stock was seized and sold. This sale was held to be void because the order of the court was a personal judgment on constructive service.<sup>1</sup> This case seems to me to be sound.

LEADING CASES CONSIDERED.—Three of the cases cited to sustain the first point made in this section need special notice. *Pennoyer v. Neff* (95 U. S. 714), the leading case, holds that a statute of Oregon authorizing a personal judgment against a non-resident upon service by publication, denies to the defendant “due process of law,” and is unconstitutional and void, and that a sale of land by virtue of such a judgment passes no title. This is all the case decides. The facts involved in *Freeman v. Alderson* (119 U. S. 185), were these: A non-resident was rightfully served by publication in proceedings in partition, but a personal judgment was rendered against him for costs upon which his share of the land was sold, and this sale was held void. I doubt this case. He was certainly liable for his share of the costs, and they constituted a lien on his share of the land. If the court had sold the land in order to make a division, it would have had the power to deduct his share of the costs from his share of the proceeds, even though nothing would have remained. As these costs constituted a lien on his share of the land, the court necessarily had the power to order a sale to satisfy the lien; because

1. *Wilson v. St. Louis & S. F. Ry.* R. 154; *affirmed*, 144 U. S. 41 (— S. Co., — Mo. — (18 S. W. R. 286); C. R. —; 34 Cent. Law J. 446). *accord*, *Wilson v. Seligman*, 36 Fed.

it reached the same result by rendering a personal judgment upon which his share was sold on execution, looks to me like an error in practice that did no actual harm. *Janney v. Spedden* (38 Mo. 395, 399), was this: A suit was begun to foreclose a vendor's lien against a non-resident, and due publication was made. The plaintiff dismissed so much of his complaint as referred to the vendor's lien, and took a personal judgment on the notes, on which other land was sold. The statute required the published notice to state the nature of the cause of action, which was done; but because the plaintiff changed his cause of action to one entirely different, the judgment was held void. The same court held a personal judgment rendered in New York against a Kansas corporation not doing business in New York, upon service on one of its directors who chanced to be in that state, void.<sup>1</sup>

**§ 394. Non-resident—Personal judgment against, in particular proceedings—Attachment proceedings.**—The seizure of the property of a non-resident gives no power to render a personal judgment against him upon constructive service, and all such judgments are void.<sup>2</sup> A few cases hold to the contrary,<sup>3</sup> but they are against the weight of authority, and seem to me to be wrong on principle.

**GUARDIANSHIP PROCEEDINGS.**—A guardianship was duly pending in Wisconsin, but the bulk of the property of the ward was in Missouri, where the ward was kept in school, and where

<sup>1</sup> 1. *Latimer v. Union Pacific Ry. Co.*, 43 Mo. 105 (97 Am. D. 378).

2. *Kimball v. Merrick*, 20 Ark. 12; *Wilson v. Spring*, 38 Ark. 181; *East-erly v. Goodwin*, 35 Conn. 273, 278; *Mitchell v. Ferris*, 5 Houst. (Del.) 34; *Borders v. Murphy*, 78 Ill. 81, 85; *Henrie v. Sweasey*, 5 Blackf. (Ind.) 335; *Williams v. Preston*, 3 J. J. Marsh. 600 (20 Am. D. 179); *McVicker v. Beedy*, 31 Me. 314 (50 Am. D. 666); *Middlesex Bank v. Butman*, 29 Me. 19; *Eastman v. Wadleigh*, 65 Me. 251 (20 Am. R. 695); *Woodward v. Tremere*, 6 Pick. 354; *Gilman v. Gilman*, 126 Mass. 26; *Chew v. Randolph*, Walk. (Miss.) 1; *Miller v. Dungan*, 36 N. J. L. (7 Vr.) 21; *Kilburn v. Woodworth*, 5 Johns. 41; *Robinson v. Ward*, 8 id. 86; *Fitzsimmons v. Marks*, 66 Barb.

333; *Armstrong v. Harshaw*, 1 Dev. L. 187; *Pelton v. Platner*, 13 O. 209 (42 Am. D. 197); *Steel v. Smith*, 7 Watts & S. 447 (A. D. 1844); *White v. Floyd*, Speers Eq. 351; *Earthman's Adm'r v. Jones*, 10 Tenn. (2 Yerger) 483; *Price v. Hickok*, 39 Vt. 292; *National Bank v. Peabody*, 55 Vt. 492 (45 Am. R. 632); *Jones v. Spencer*, 15 Wis. 583.

3. *Betancourt v. Eberlin*, 71 Ala. 461, 468; *Brown v. Tucker*, 7 Colo. 30 (1 Pac. R. 221); *McCormick v. Fiske*, 138 Mass. 379—the original judgment being in Massachusetts; *Kendrick v. Kimball*, 33 N. H. 482, 486; *Skinner v. Moore*, 2 Dev. & Bat. Law 138 (30 Am. D. 155); *Sutherland v. De Leon*, 1 Tex. 250 (46 Am. D. 100)—a judgment under the Mexican law.

she got married, and continued to reside. The guardian then gave notice by publication for a final settlement, and one was made, by default, and a judgment rendered in his favor against the ward for six hundred and twelve dollars and forty-seven cents, on which he sued her in Missouri. This was held to be a personal judgment on constructive service, and void for that reason.<sup>1</sup> The court seems to have been in error. The ward was a party to the Wisconsin guardianship proceeding, and that court alone had lawful power to settle the trust; and if the ward was found to be in debt to the guardian, it necessarily had the power to render a judgment for the amount. No notice at all was necessary, unless to comply with some provision of the statute. According to this decision, when a ward removes to another state, it is necessary to transfer the guardianship proceedings there in order to obtain a settlement.

**PERSONAL JUDGMENT, VALID.**—A few cases hold personal judgments against non-residents on constructive service, valid. Such judgments are held valid in Tennessee in proceedings to foreclose a vendor's lien,<sup>2</sup> or a mortgage,<sup>3</sup> by virtue of a statute. So where a bill in equity was filed in Ohio against non-residents to compel specific performance of an agreement to sell real estate, and for an accounting, and where, after service by publication, an accounting was taken, and a personal judgment alone rendered against the defendant, upon which an execution was issued and the land sold, this was held to be merely erroneous and not void.<sup>4</sup> The last three cases seem to me to be unsound.

**§ 395. Non-resident—Revivor against.**—A statute of Pennsylvania authorizes a judgment to be revived after two returns of "*nihil*," without personal service. A judgment was rendered in that state against a principal and surety, and afterwards the record was burned. The surety having removed to Ohio, the burned record was restored, and the judgment revived against him without personal notice. This revived judgment was held conclusive on him in Ohio.<sup>5</sup> But the contrary was held in Maryland and Kansas in respect to judgments revived against non-residents on two *nihils*.<sup>6</sup> But these decisions are wrong, in my opinion, and

1. Gillett v. Camp, 23 Mo. 375, 378.

4. Lessee of Boswell v. Sharp, 15 O.

2. Kyle v. Philips, 6 Baxter 43; 447, 466.

Mulley v. White, 3 Tenn. Ch. 9.

5. Poorman v. Crane, Wright (O.)

3. Taylor v. Rountree, 83 Tenn. (15 347.

Lea) 725.

6. Weaver v. Boggs, 38 Md. 255, 261; Kay v. Walter, 28 Kan. 111.



the Ohio decision right. The law requiring a revivor is for the exclusive benefit of the defendant in order that he may show a satisfaction since rendition. The law could just as well let the judgment stand good forever; and it may keep it so upon any kind of notice it may prescribe. The judgment of revivor being without actual notice, was subject to equitable defenses, but was not void.

**§ 396. Non-resident—Right, title or interest of, in property, adjudicated upon constructive service.**—As an action cannot be maintained to recover a personal judgment against a non-resident, on constructive service, it necessarily follows that the plaintiff, in such cases, must have some alleged lien or claim upon or title to some specific property within the jurisdiction of the court, which he is proceeding to enforce, or the proceeding will be void. But when he is thus proceeding, errors and irregularities are no more harmful than in any other proceeding. Thus, while a decree in partition against unknown owners upon constructive service bars them from contesting plaintiff's seisin,<sup>1</sup> yet where no property is described in the petition, or attached,<sup>2</sup> the judgment is void; and the same ruling was made concerning a proceeding to subject the interest of unknown heirs to the payment of a debt against their ancestor, where no lien existed, and no property was seized or described.<sup>3</sup> But where the proceeding is to enforce an alleged lien on property described, although not seized, the proceeding is not void.<sup>4</sup> An early case in Wisconsin held that the statute authorizing judgments against non-residents having property in the state upon service by publication (without seizing it or claiming any lien upon it) was valid;<sup>5</sup> but I hardly think that case would be upheld now.

**QUIETING TITLE.**—It was a vexed question for a time whether or not a decree quieting title against a non-resident on constructive service was not wanting in "due process of law," and void. This arose from the construction placed upon *Hart v. Sansom*.<sup>6</sup> The federal circuit courts, thus construing this case, and being bound by it, held all such decrees void;<sup>7</sup> but the state courts

1. *Cole v. Hall*, 2 Hill 625.

2. *Trabue v. Connors*, 84 Ky. 283 (1 S. W. R. 470); *Lydiard v. Chute*, 45 Minn. 277 (47 N. W. R. 967).

3. *Green v. Wilson*, — Ky. — (2 S. W. R. 564).

4. *Trabue v. Connors*, *supra*.

5. *Jarvis v. Barrett*, 14 Wis. 591, 595.

6. *Hart v. Sansom*, 110 U. S. 151 (3 S. C. R. 586).

7. *Clark v. Hammett*, 27 Fed. R. 339; *Pitts v. Clay*, *id.* 635; *Viele v. Van Steenberg*, 31 *id.* 249, 252.



not being under such compulsion, refused to follow it.<sup>1</sup> Finally, another case coming before the Supreme Court of the United States, it declared that *Hart v. Sansom* would bear no such construction, and held that such a decree was not wanting in "due process of law."<sup>2</sup> A federal circuit court held that a judgment, after service by publication, divesting a person of title to land on the ground that it was held to defraud creditors was void.<sup>3</sup> I cannot think that that is law.

§ 397. **Resident—Divorce against, on constructive service.**—A husband and wife were domiciled in Illinois, when the wife separated from the husband and removed to Massachusetts. Afterwards the husband procured a divorce in Illinois upon service by publication, which did not come to the knowledge of the wife. She afterwards brought a suit for a divorce in Massachusetts and the Illinois decree was held to be a bar; that her removal to Massachusetts did not legally change her domicile, and that she was precluded from showing that the evidence given in Illinois was false in fact.<sup>4</sup> On a second appeal (or case), it was held that the Illinois decree determined her *status* in respect to all the world, and barred her right to dower in his land in Massachusetts.<sup>5</sup>

So where the husband and wife were domiciled citizens of Louisiana, and the husband, during her absence in New York, procured a divorce upon service by publication and the appointment of a *curator ad hoc* to represent her, according to the law of Louisiana, this was held to bar an action by her in New York for a divorce on the ground of adultery.<sup>6</sup>

**PARTITION AGAINST.**—A petition for partition was filed against "unknown owners," and service made by publication, as authorized by statute, and partition was duly made and confirmed. This was held not to be void against a resident in the actual possession of the land, claiming it adversely.<sup>7</sup>

1. *Sweeley v. Van Steenburg*, 69 Iowa 696 (26 N. W. R. 78); *Commissioners of Marion Co. v. Welch*, 40 Kan. 767 (20 Pac. R. 483); *Watson v. Ulbrich*, 18 Neb. 186 (24 N. W. R. 732).

2. *Arndt v. Griggs*, 134 U. S. 316 (10 S. C. R. 557); *accord*, *Bennett v. Fenton*, 41 Fed. R. 283.

3. *Remer v. Mackay*, 35 Fed. R. 86—Blodgett, J.

4. *Hood v. Hood*, 11 Allen 196 (87 Am. D. 709).

5. *Hood v. Hood*, 110 Mass. 463.

6. *Hunt v. Hunt*, 16 N. Y. Supr. (9 Hun) 622; *affirmed*, 72 N. Y. 217, 242.

7. *Nash v. Church*, 10 Wis. 303, 312 (78 Am. D. 678), *relying upon* *Cook v. Allen*, 2 Mass. 461, which supports it at all points.

§ 398. **Resident—Proceeded against as a non-resident, upon constructive service.**—That service by publication against a resident upon an affidavit of his non-residence, does not make the judgment of a superior court void, is held in Kansas, Missouri, Ohio, Tennessee and Virginia,<sup>1</sup> while the contrary is held by a federal circuit court in Iowa.<sup>2</sup> An early case in New York decided that a writ of attachment issued by a justice of the peace upon sufficient proof, was not void, even though the defendant was a resident and not subject to attachment, and that trover would not lie against the officer for seizing property.<sup>3</sup> A case in Indiana held that, where a justice rendered a judgment against a resident of the state on service by publication made on an affidavit of non-residence, he could not set it aside after the time limited by statute, on motion, but that the defendant must resort to a court of equity<sup>4</sup>—thus seeming to hold that the judgment was not void. The Indiana statute provided that, in proceedings before the board of commissioners to annex territory to a town, the notice of the application should be published, and that a copy should be personally served on landowners residing in the county; and the failure to serve such personal notice on known resident owners was held to make the proceeding void as to them.<sup>5</sup> This case permitted the record to be contradicted by parol evidence showing that persons not personally served were residents, and seems to be wrong on principle.

## TITLE C.

## IN REM, OR QUASI IN REM.

§ 399. Principle involved in, and effect of, proceedings *in rem* or *quasi in rem*—Definition—Effect of.

400. *In rem*—Is notice necessary?—Custom of London.

401. Administrator or guardian, appointed without notice—

Notice of appointment having been made, omitted.

§ 402. Administrator, claim allowed against, without notice.

403. Administrator, distribution by, without notice.

404. Administrator's or guardian's final discharge without notice.

1. Ogden v. Walters, 12 Kan. 282, 295; Larimer v. Knoyle, 43 Kan. 338 (23 Pac. R. 487); Payne v. Lott, 90 Mo. 676 (3 S. W. R. 402, 404); Hammond v. Davenport, 16 O. St. 177; Walker v. Day, 67 Tenn. (8 Baxt.) 77, 80; Lawson v. Moorman, 85 Va. 880 (9 S. E. R. 150, 153).

2. Hartley v. Boynton, 17 Fed. R. 873—Shiras, J.

3. Schroepel v. Taylor, 10 Wend. 196.

4. Brown v. Goble, 97 Ind. 86.

5. Town of Cicero v. Williamson, 91 Ind. 541, 544.

- § 405. Administrator's or guardian's petition to sell land, allowed without notice — Sales not void—Administrator's second sale.
- 406. Section 405, continued—Sales void.
- 407. Administrator, removed without notice.
- 408. Adoption of child without notice to parent.
- 409. Attachment proceedings without notice.
- 410. Bankruptcy and insolvency proceedings without notice.

- § 411. Condemning or assessing for public purpose without notice.
- 412. Infants — Proceedings against, without notice.
- 413. Insanity inquest, held without notice.
- 414. Pauper, removed without notice—Perishable goods, sold without notice—Slave.
- 415. Widow's rights, set off without notice.
- 416. Will, probated without notice —Setting aside.

§ 399.—Principle involved in, and effect of, proceedings in rem or quasi in rem.—In all proceedings where the court has the possession and control of property, holding it in trust for the rightful owner, or to use to raise means to pay his debts, such as proceedings in administration, admiralty, attachment, bankruptcy and insolvency, and seizures for breach of the criminal, penal, or revenue laws, the seizure of the property gives jurisdiction, and notice is a mere matter of courtesy.<sup>1</sup> The property being in the possession of the court, it cannot let the matter rest forever. It is its duty to take steps to make the proper division or distribution. The evidence which it shall hear, the petitions which it shall consider, the officers whom it shall appoint or remove, or the bonds it shall exact to aid it in reaching a correct conclusion, are all mere matters of procedure, not touching or affecting its jurisdiction. In so far as the procedure in any of those matters is fixed by common law or statute, to disregard the same is an error which may subject the proceeding to a reversal, but it no more touches the jurisdiction than does the admission of illegal evidence. The petitions which the officers appointed by the court to aid in executing the trust are required to file, are not for the purpose of tendering issues to an adverse party, but to give the court information. The bonds which such officers are required to give, and the oaths which they are required to take before proceeding to act, are not for the purpose of giving the court jurisdiction to proceed, but as an additional security against the unfaithfulness or incompetency of the officer.

1. This is a controverted matter. See the next two sections.

So in regard to notice to infants and *non compotes*. It is the duty of the court to protect them, and to appoint special officers to aid it in so doing; and notice to them is not jurisdictional. Nothing is more absurd than to read a summons to an idiot, or infant in its cradle. So also, statutes frequently authorize a judgment to be entered without notice against one signing cost bonds, forthcoming bonds, and the like, thus virtually making him a party to the proceeding, and such judgments are not even erroneous, much less void.

DEFINITION.—“A judgment *in rem* is founded on a proceeding instituted not against the person, as such, but against or upon the thing or subject-matter itself, whose state or condition is to be determined. It is a proceeding to determine the state or condition of the thing itself; and the judgment is a solemn declaration upon the *status* of the thing, and it, *ipso facto*, renders it what it declares it to be. The probate of a will I conceive to be a familiar instance of a proceeding *in rem* in this state. The proceeding is, in form and substance, upon the will itself. No process is issued against any one, but all persons . . . are notified . . . by publication to appear and contest the probate.”<sup>1</sup>

EFFECT OF.—“In England sentences in admiralty are held conclusive, not only *in rem* but also as to all points and facts which they professedly or incidentally decide. In some of the American states, the same doctrine prevails, while in others the sentences or judgments are held conclusive only *in rem*, and may be controverted as to all incidental grounds and facts upon which they profess to be founded.”<sup>2</sup>

A vessel was in the actual custody of a sheriff under a writ of attachment. Pending this, a writ of attachment was issued from an admiralty court and delivered to the marshal who made return, “Attached the bark Royal Saxon and found a sheriff’s officer on board claiming to have her in custody.” Both courts proceeded to final judgment and to sell the vessel. It was held that the sale in admiralty was void for want of a lawful seizure; that the marshal could not take her away from the sheriff.<sup>3</sup>

I do not see how this case can be supported on principle. There was no want of jurisdiction over the subject-matter in

1. *Dictum* of Hall, J., in *Woodruff v. Taylor*, 20 Vt. 65, 73.

2. *Melhop v. Doane*, 31 Iowa 397, 401.

3. *Taylor v. Carryl*, 20 How. 583.

either court, which was the power to grant the relief sought against vessels *in all proper cases*. Nor was there any want of jurisdiction over the person in either court. The plaintiff in the state court had two remedies—namely: either to move to quash the proceedings in the federal court, because the return showed that the rightful jurisdiction was in the state court, or to push the proceedings in the state court to a final judgment and then plead that in bar of further proceedings in the federal court. But neither of those moves having been made, the judgment last rendered was the controlling one, because it called upon the parties and their privies to show any cause that existed why it should not be rendered, and its rendition conclusively established its priority over the first judgment. All the world were parties to the admiralty proceedings, which included the plaintiffs in the state court; and as the vessel was seized first by the writ from the state court, all subsequent attachers were necessarily privies to the defendants in that case.

It has been held that the sentence of a foreign prize court was conclusive evidence of the facts it purports to decide,<sup>1</sup> and of the title of the property condemned,<sup>2</sup> and concluded the insurers of a condemned vessel from showing that the port she was trying to enter was not, in fact, blockaded.<sup>3</sup> But an early case in New York held that such a sentence did not conclude the owner of the vessel from showing, as against the insurers, that it was, in fact, neutral.<sup>4</sup>

A proceeding *in rem* against a vessel adjudged that she had not been sold to a foreigner, but to a citizen of the United States. In a collateral suit on a bond, alleging as a breach that this same sale was made to a foreigner, Mr. Chief Justice Taney held that the judgment *in rem* was not evidence against the government, and that it might prove that the sale was made to a foreigner. He said that proceedings *in rem* were only evidence against private individuals.<sup>5</sup>

§ 400. *In rem*—Is notice necessary?—Whether or not the absence of any notice, except such as the seizure of the property gives,

1. *Maryland, etc., Ins. Co. v. Bathurst*, 5 Gill & J. 159, 220; *Dictum* of Duncan, J., in *M'Pherson v. Cunliff*, 11 Serg. & R. 422, 430.

2. *Armroyd v. Williams*, 2 Wash. C. Ct. 508, 510; *Vandenheuvel v. United Ins. Co.*, 2 Cai. Cas. 217, 284.

3. *Baxter v. New England Marine Ins. Co.*, 6 Mass. 277.

4. *Vandenheuvel v. United Insurance Co.*, 2 Cai. Cas. 217, 284.

5. *Allen v. United States*, Taney 112, 118.

makes a proceeding *in rem* void, is an important question. That jurisdiction is acquired by the seizure of the *res*, seems to have been assumed by all the early cases and text writers. In no work published prior to the Vermont case hereinafter considered, have I been able to find a suggestion that notice was necessary in order to confer or to complete the jurisdiction. If there is any such suggestion in any English or Irish case, I have not been able to find it. The earliest American case I have succeeded in finding, is *The Bolina*,<sup>1</sup> decided by Mr. Justice Story, in 1812. He said: "In the admiralty, in all proceedings *in rem*, the court has a right to order the thing to be taken into the custody of the law, . . . and when once a vessel is libeled, then she is considered as in the custody of the law . . . and monitions may be issued to persons having the actual custody, to obey the injunctions of the court. *The jurisdiction of the admiralty, however, is not founded on that circumstance.*" It has always been supposed that that eminent jurist knew something about law, and especially the law of admiralty and proceedings *in rem*, yet he positively asserts that the jurisdiction does not depend upon the monition. So, Mr. Chief Justice Marshall, in delivering the opinion of the Supreme Court of the United States, in 1815, said: "Notice of the controversy is necessary in order to become a party; and it is a principle of natural justice, of universal obligation, that before the rights of an individual shall be bound by a judicial sentence, he shall have notice, express or implied, of the proceedings against him. Where those proceedings are against the person, notice is served *personally or by publication*; where they are *in rem*, notice is *served upon the thing itself*. This is, necessarily, notice to all those who have any interest in the thing, and is reasonable because it is necessary, and because it is the part of common prudence for all those who have any interest in it to guard that interest by persons who are in a situation to protect it."<sup>2</sup> It will be seen that this case explicitly decides that, while notice, either personally or by publication, is necessary in proceedings against the person, yet when they are *in rem*, the notice is served upon the thing itself.

In 1830, the supreme court of Tennessee said: "Proceedings *in rem*, operating upon the property claimed *without notice to adverse claimants*, are had in prize courts in all civilized countries;

1. *The Bolina*, 1 Gallison 75, 81 (A. D. 1812)—Story, J.

2. *The Mary*, 9 Cranch 126, 142, 144.

the same course is pursued in the English court of exchequer, in cases of forfeitures for treasons, felonies, or a violation of the revenue laws. Proceedings are had in the *nature* of proceedings *in rem*, and *without notice*, in courts admitting wills to probate and granting administration, and the expectancies of heirs and distributees are swept away.”<sup>1</sup> In Henry’s Admiralty Jurisdiction, section 134, it is said: “Seizure by a court of competent jurisdiction *in rem* is equivalent to notice in proceedings *in personam*.” The question of notice is not commented upon in Benedict’s Admiralty or Conkling’s U. S. Admiralty, or Roberts’ Admiralty. An Arkansas statute provided that, when it shall be made to appear to the court that the estate of a decedent does not exceed \$300 “the court shall make an order that the estate vest absolutely in the widow,” etc. Such an order was made without notice. It was held to be *in rem* and that no notice was necessary either to heirs or creditors,<sup>2</sup> and the same ruling was made in California, where it was decided that an order of the probate court setting off a homestead to a widow was a proceeding *in rem*, and not void because no notice was given to the heirs;<sup>3</sup> and in a recent case on the federal circuit, it was said that in admiralty proceedings, “the seizure of the vessel is notice to the world, and no other notice is necessary,” and that errors do not make the sentence void.<sup>4</sup> At common law, the proceeding known as a “common recovery” was carried on without any notice whatever; but afterwards certain statutes were enacted requiring proclamations to be made in open court. The judgment was *in rem* and bound the whole world, with certain exceptions, unless they put in their claim within a year and a day.<sup>5</sup> With this law in force in New York, a statute was passed, in 1808, requiring notice of the pendency of the proceeding to be published; but where this notice was omitted, it was held to be merely an error which did not make the proceeding void.<sup>6</sup>

CUSTOM OF LONDON.—A debtor was garnished under the custom of London and compelled to pay. His creditor afterwards sued him and contended that, as he, the creditor, had had no notice of the garnishment proceedings, they were void. To

1. Pinson v. Ivey, 9 Tenn. (1 Yerger) 296, 349.

2. Harrison v. Lamar, 33 Ark. 824, 827.

3. Kearney v. Kearney, 72 Cal. 591 (15 Pac. R. 769).

4. Daily v. Doe, 3 Fed. R. 903, 912.

5. 2 Bl. Com. 354.

6. Roseboom v. Van Vechten, 5 Denio 414, 418.



this Lord Mansfield answered: "The very essence of the custom is, that the defendant shall not have notice; because it is a proceeding against an absent man, who cannot be found, and has nothing to be summoned by. It is a proceeding *in rem*, like confiscations in the exchequer."<sup>1</sup>

In *Douglas v. Forrest*,<sup>2</sup> Best, C. J., in speaking of *Fisher v. Lane*,<sup>3</sup> concerning the custom, said: "The report . . . shows that the court did not think a personal summons necessary, or any summons that could convey any information to the person summoned, but a summons with a return of *nihil*; that is, such a summons as I have mentioned—viz., one that shows that the debtor is not within the city, and has nothing there by the seizing of which he may be compelled to appear." Prior to 1839, I have not been able to find even a suggestion that any notice or monition was necessary in order to warrant the complete exercise of jurisdiction. In that year, Mr. Justice Story said by way of *dictum* that a seizure and condemnation of a vessel in a prize court without any public notice of the proceeding would have no binding force in another government.<sup>4</sup> In 1847, Mr. Justice Hall, of Vermont, relying upon this *dictum*, said, by way of *dictum* himself, that, "It is just as essential to the validity of a judgment *in rem*, that constructive notice, at least, should appear to have been given, as that actual notice should appear upon the record of a judgment *in personam*. A proceeding professing to determine the right of property, where no notice actual or constructive is given, whatever else it might be called, would not be entitled to be dignified with the name of a judicial proceeding. It would be a mere arbitrary edict, not to be regarded anywhere as the judgment of a court."<sup>5</sup> This *dictum* was quoted as law in *Windsor v. McVeigh*,<sup>6</sup> the court saying that the mere seizure of property does not give jurisdiction *in rem*; that some public notice must be given so that the claimant may have an opportunity to be heard; that it is just as material to the validity of proceedings *in rem* that constructive notice should be given as that actual notice should be given in proceedings *in personam*. An earlier case,<sup>7</sup> in the same court, held that notice was necessary in

1. *Tamm v. Williams*, 3 Douglas 281 (26 E. C. L. 190).

2. *Douglas v. Forrest*, 4 Bingham 701.

3. *Fisher v. Lane*, 2 W. Bl. 834.

4. *Bradstreet v. Neptune Ins. Co.*, 3 Sumner 600, 607.

5. *Dictum* in *Woodruff v. Taylor*, 20 Vt. 65, 76.

6. *Windsor v. McVeigh*, 93 U. S. 274, 281.

7. *Earle v. McVeigh*, 91 U. S. 503, 510.

order to impart validity to proceedings *in rem*, relying on *The Mary*, from which the first quotation in this section is taken to show the contrary. The same doctrine was reasserted by that learned court in a still later case.<sup>1</sup> Notwithstanding the high and controlling authority of that very able tribunal, I cannot think that that is the law. The point was not in the cases of *Windsor v. McVeigh* or *Earle v. McVeigh*, because public notice was actually given in the proceedings then under consideration, the vice being that the court refused to let the claimant appear, which caused the court to lose the jurisdiction it theretofore possessed; and I am unable to deduce any such doctrine from the opinion of Chief Justice Marshall in *The Mary*. I think the authorities herein cited show that no notice is necessary. But, in order to demonstrate that point beyond question, it seems to me to be necessary to refer only to the appointment of administrators. The proceeding which leads to the appointment of these officers is purely *in rem*. Only a few states, by statutes, so far as I have been able to discover, require any notice. Property worth hundreds of millions of dollars is taken possession of and sold every year by these officers, who derive their power from a judicial order made on a petition without notice of any kind; and among the numerous cases cited in this work, where the orders appointing administrators have been attacked collaterally in states where no statute expressly required notice of the petition to be given, no lawyer ever thought of doing so because the order was made without notice; and in those few states where notice of the petition for an appointment is expressly required by statute, a majority of the decisions hold that a failure to give it does not touch the jurisdiction, as is shown in the next section.

§ 401. **Administrator or guardian, appointed without notice.**—A New York statute required notice of a petition for the appointment of an administrator, to be given to the widow and next of kin. But an order making such an appointment without notice to the widow,<sup>2</sup> or next of kin,<sup>3</sup> was held not void. The same ruling was made in Kansas and Massachusetts.<sup>4</sup> But the contrary was decided in Michigan,<sup>5</sup> and by the federal circuit court

1. *Hassall v. Wilcox*, 130 U. S. 493, 504 (9 S. C. R. 590).

2. *Kelly v. West*, 80 N. Y. 139, 145.

3. *Sheldon v. Wright*, 7 Barb. 39, 42; *James v. Adams*, 22 How. Pr. 409.

4. *Taylor v. Hosick*, 13 Kan. 518, 526; *Emery v. Hildreth*, 5 Gray 228;

*Bassett v. Crafts*, 129 Mass. 513, 516.

5. *Gillett v. Needham*, 37 Mich. 143, 146.

**§ 404. Administrator's or guardian's final discharge without notice.**—A final settlement by an administrator without notice to the heirs,<sup>1</sup> or infant legatees,<sup>2</sup> or without giving the public notice prescribed by statute,<sup>3</sup> or without having given to the creditors the notice to present their claims prescribed by statute,<sup>4</sup> is void against the persons entitled to the notice. The supreme court of Arkansas holds that the failure to give such notice does not make the discharge void;<sup>5</sup> and in Kansas, where notice for a final settlement was given for a certain term, and no action was taken for five terms, when the discharge was granted without further notice, this was held erroneous, but not void.<sup>6</sup> At the final settlement of a guardian, an Alabama statute required a guardian *ad litem* to be appointed to represent the ward. Where one was appointed, and was present, but did no act signifying his acceptance,<sup>7</sup> or where the record failed to show his acceptance,<sup>8</sup> the discharge was held void. But it was held in Texas, that no notice for the final discharge of a guardian need be given, as the ward was the only person interested, and was necessarily in court.<sup>9</sup>

**§ 405. Administrator's or guardian's petition to sell land, allowed without notice—Sale not void.**—It is held in Alabama,<sup>10</sup> Arkansas,<sup>11</sup> Louisiana,<sup>12</sup> Texas<sup>13</sup> and Washington, that a proceeding by an

1. *Winborn v. King*, 35 Miss. 157; *Baldwin v. Carleton*, 11 Rob. (La.) 109, 121; *Gillespie v. Day*, 14 La. 289 (7 La. N. S. 552).

2. *Davis v. Crandall*, 101 N. Y. 311, 321; and the appointment of a guardian *ad litem* for the infant does not aid the proceeding. *Id.* *Ingersoll v. Mangam*, 84 N. Y. 622.

3. *Washburn v. Phillips*, 13 Miss. (5 Sm. & M.) 600—and several other cases.

4. *Pollock v. Buie*, 43 Miss. 140, 156.

5. *Dooley v. Dooley*, 14 Ark. 122, 124.

6. *Smith v. Eureka Bank*, 24 Kan. 528.

7. *Laird v. Reese*, 43 Ala. 148.

8. *Searcy v. Holmes*, 43 Ala. 608.

9. *Roberts v. Schultz*, 45 Tex. 184, 188, relying upon *Pierce v. Irish*, 31 Me. 54.

10. *Doe ex dem. Duvall's Heirs v. McLoskey*, 1 Ala. 708, 732; *Perkins'*

*Ex'rs v. Winter's Adm'x*, 7 Ala. 855, 864; *Field v. Goldsby*, 28 Ala. 218; *Matheson's Heirs v. Hearin*, 29 Ala. 210, 216; *Satcher v. Satcher*, 41 Ala. 26 (91 Am. D. 498); *May v. Marks*, 74 Ala. 249, 253; *Lyons v. Hamner*, 84 Ala. 197 (4 S. R. 26); *Cantello v. Whitley*, 85 Ala. 247 (4 S. R. 610); *dictum* in *Goodwin v. Sims*, 86 Ala. 102 (5 S. R. 587).

11. *Rogers v. Wilson*, 13 Ark. (8 Eng.) 507, 509; *Bennett v. Owen*, *id.* 177; *Apel v. Kelsey*, 47 Ark. 413, 418 (2 S. W. R. 102).

12. *Heirs of Herriman v. Janney*, 31 La. Ann. 276, 280; *Oriol v. Herndon*, 38 *id.* 759; *Beauregard v. City of New Orleans*, 18 How. 497, 503.

13. *Lynch v. Baxter*, 4 Tex. 431 (51 Am. D. 735); *George v. Watson*, 19 Tex. 369, *overruling* *Finch v. Edmondson*, 9 Tex. 504; *Heath v. Layne*, 62 Tex. 686, 691.

administrator to sell land is *in rem*; that the petition gives the jurisdiction, and that the failure to give the notice or bond prescribed by statute is merely an error which does not make the proceeding void. The Indiana statute of 1824, page 348, section 10, provided that, upon the presentation of an administrator's petition to sell land, "the heirs or devisees of the testator shall be summoned" to show cause, etc. In such a case, land of minor heirs was sold after notice to their general guardian, but without notice to them, but this error did not make the sale void.<sup>1</sup> It was held in North Carolina,<sup>2</sup> and Ohio,<sup>3</sup> that an administrator's sale was not void for want of notice to minor heirs, when a guardian *ad litem* was appointed and appeared for them. And in a late case in Iowa, where one who had acquired the interest of a devisee in the land, sought collaterally to overhaul an administrator's sale for want of notice, the court said that, conceding that he was entitled to notice of the petition, yet the failure to give it was a mere irregularity which did not make the sale void.<sup>4</sup>

An administrator's proceeding to sell land in Washington is a proceeding *in rem* to which all the world are parties; and where no notice of the presentation of the petition for leave to sell is required by the statute, none is necessary, and its absence does not make the sale void.<sup>5</sup>

It was lately held in Iowa that the heirs who had no notice of the administrator's petition to sell land would be barred from recovering it in an equitable action, by their laches, although there seems to have been no statute of limitations barring their legal rights.<sup>6</sup>

ADMINISTRATOR'S SECOND SALE.—An administrator's sale of land in Texas was confirmed and a deed made. Afterwards, and without notice to the first purchaser, the court made a second order to sell, and the land was sold again to a third person. This sale was held void.<sup>7</sup> A Texas statute authorized the heirs to sell land to pay debts without taking out letters of administration. The heirs, by virtue of this statute, sold a parcel to a cred-

1. Doe *ex dem.* Hawkins v. Harvey, 5 Blackf. 487.

2. Hare v. Holloman, 94 N. C. 14, 21.

3. Benson v. Cilley, 8 O. St. 604, 614.

4. Spurgin v. Bowers, — Iowa. — (47 N. W. R. 1029).

5. Ryan v. Ferguson, — Wash. St. — (28 Pac. R. 910).

6. Bacon v. Chase, — Iowa — (50 N. W. R. 23).

7. Lindsay v. Jaffray, 55 Tex. 626, 635.

itor of the estate. Afterwards, an administrator was appointed who sold the same parcel to a stranger, without notice to the purchaser from the heirs, and this was held void.<sup>1</sup>

GUARDIAN'S SALE.—As the guardian represents and acts for the ward, and not adversely like an administrator does to the heirs, an order to sell the ward's land made without notice,<sup>2</sup> or upon insufficient notice,<sup>3</sup> is not void. But in a late case in Iowa, where the guardian of an insane widow filed a petition for authority to make an election for her to take under the will of her husband, and a guardian *ad litem* was appointed for her, and relief granted, the supreme court held that the proceeding was void because of want of notice to her. This was upon the idea that the action of the guardian was adverse to her.<sup>4</sup> I think this case unsound.

§ 406—§ 405 continued — Sales void.—That an administrator's petition to sell land is not *in rem*, and that a failure to give notice of its presentation makes the sale void, is held in Illinois,<sup>5</sup> Indiana,<sup>6</sup> Kansas,<sup>7</sup> Mississippi,<sup>8</sup> New Hampshire,<sup>9</sup> New York,<sup>10</sup> North Carolina,<sup>11</sup> Oregon,<sup>12</sup> South Carolina,<sup>13</sup> Tennessee,<sup>14</sup> and Wisconsin.<sup>15</sup> A statute of Alabama required notice to be given to heirs of an application of an administrator for leave to make a conveyance to himself of lands purchased by him at his own sale. It was held

1. Morris v. Holbert, 36 Tex. 19.

2. Mason v. Wait, 5 Ill. (4 Scam.) 127, 133; Gibson v. Roll, 27 Ill. 88 (81 Am. D. 219); Smith v. Race, 27 Ill. 387 (81 Am. D. 235); Campbell v. Harmon, 43 Ill. 18.

3. Mohr v. Manierre, 101 U. S. 417; Thaw v. Ritchie, 136 U. S. 519, 548 (10 S. C. R. 1037); Mohr v. Porter, 51 Wis. 487, *overruling* Mohr v. Tulip, 40 Wis. 66; Gager v. Henry, 5 Sawyer 237, 244; *contra*, Kennedy v. Gaines, 51 Miss. 625, and Rule v. Roach, 58 Miss. 552.

4. *In re* Hunter's Estate, — Iowa — (51 N. W. R. 20).

5. Fell v. Young, 63 Ill. 106.

6. Doe *ex dem.* Platter v. Anderson, 5 Ind. 33; Doe v. Bowen, 8 Ind. 197.

7. Mickel v. Hicks, 19 Kan. 578, 582; Chicago, K. and N. Ry. Co. v. Cook 43 Kan. 83 (22 Pac. R. 988).

8. Joslin v. Caughlin, 26 Miss. 134, 141; Root v. McFerrin, 37 Miss. 17 (75 Am. D. 49).

9. French v. Hoyt, 6 N. H. 370 (25 Am. D. 464).

10. Corwin v. Merritt, 3 Barb. 341, 345; Jenkins v. Young, 42 N. Y. Supr. (35 Hun) 569.

11. Perry v. Adams, 98 N. C. 167 (3 S. E. R. 729).

12. Fiske v. Kellogg, 3 Or. 503.

13. Johnson v. Cobb, 29 S. C. 372 (7 S. E. R. 601, 603).

14. Frazier v. Pankey, 31 Tenn. (1 Swan) 74; Wheatley's Lessee v. Harvey *id.* 484.

15. *Dictum* in Humes v. Cox, 1 Pinney 551; Gibbs v. Shaw, 17 Wis. 197 (84 Am. D. 737); Blodgett v. Hitt, 29 Wis. 176; O'Dell v. Rogers, 44 Wis. 172.

that an application of that kind and order made without notice, was void.<sup>1</sup>

An administrator in Indiana, after notice to the heirs, obtained an order to sell real estate. Afterwards, upon a proper petition, but without any new notice, he procured an order to mortgage, which he did, and it was confirmed. This mortgage, in ejectment by the heirs, was held to be void, upon the ground that the heirs were not in court in respect to the petition to mortgage.<sup>2</sup> The court admits that the proceedings in regard to the sale were *in fieri*, but denies that they were "*in fieri* to such an extent that another and different proceeding could be grafted upon it." But the heirs were in court; and whether a proceeding to mortgage could be had in the cause was a question for the court to decide. It was simply an amendment of the original petition with a prayer for different relief. The error, if any, was one of practice. It is the same as if the petition to sell had been amended into one to mortgage on the day set for hearing, and the heirs had been present and allowed the order to go without objection.

An administrator in North Carolina, in 1870, procured an order to sell land, without any notice to infant heirs or the appointment of a guardian *ad litem*. The general statutes required both notice and the appointment of a guardian *ad litem*, but a curative statute provided that, in all such cases, the proceedings should be held valid, although no "personal service" was made on infants. Notwithstanding this statute, the sale was held void.<sup>3</sup>

§ 407. **Administrator, removed without notice.**—An Illinois statute authorized the probate court, after notice, to remove an executor for mismanagement. The attention of the court being called to the fact that an executor was guilty of mismanagement, it cited him to appear "and present his accounts of said estate for final settlement as executor," which he failed to do, whereupon the court made an order removing him, and appointed an administrator *de bonis non*, who sued the executor for his default. It was decided that the action could not be maintained, because both the order removing the executor and the one appointing his successor were void.<sup>4</sup> Two judges dissented, upon the ground that the

1. Ligon v. Ligon, 84 Ala. 555 (4 S. R. 405).

2. Martin v. Neal, 125 Ind. 547 (25 N. E. R. 813, 815)—Mitchell, J., *dissenting*.

3. Harrison v. Harrison, 106 N. C. 282 (11 S. E. R. 356).

4. Hanifan v. Needles, 108 Ill. 403, 409—two judges *dissenting*.

court had power to enforce the settlement of the estate, and that the removal and new appointment were simply steps in the proceeding. This case accords with a prior one where an administratrix was ordered to pay a claim, and after waiting twenty-nine days, the court removed her without notice, which was held void.<sup>1</sup> It is also held in Alabama<sup>2</sup> and Wisconsin,<sup>3</sup> that the removal of an administrator without notice, and the appointment of a successor, are void acts. But it seems to me that such acts do not touch the jurisdiction of the court. The appointee, as long as he continues to hold, is not only clothed with all the insignia of office, but is upheld by the power of the state, and seems to come within the definition of an officer *de facto*.

§ 408. **Adoption of child without notice to parent.**—On the presentation of a petition, accompanied by the written consent of the parents, the Oregon statute authorized the court to make a decree in favor of the petitioner adopting a child. A husband and wife presented a petition, accompanied by the written consent of the mother, which gave as an excuse for not having the consent of the father, that he was a non-resident, and divorced from the mother, to whom the decree gave the care and custody of the child. A decree of adoption was made without notice to the father. The adopting father died, and then the adopting mother denied the right of the child to inherit, and she brought ejectment for her share of the real estate. It was held that the decree of adoption was void for want of consent of the child's father, and that the child could not recover.<sup>4</sup> The divorced father had no actual power over the child. His consent or opposition to the lawful wishes of the mother amounted to nothing. The statute as construed by the adopting court, did not require the consent of the divorced parent in such a case. That was a legal question the court had to settle, and its judgment was conclusive. It does not destroy the force of the argument or decision to say that the father had no notice and could not be bound, for the conceded facts show that he had no interest. All parties in interest—the adopting parents, the mother and the child—were before the court. The statute required the written consent of both parents, and the question before the court was this:

1. *Munroe v. People*, 102 Ill. 406, 410.

2. *Matthews v. Douthitt*, 27 Ala. 273 (62 Am. D. 765).

3. *Dictum* in *Humes v. Cox*, 1 Pinney 551.

4. *Furgeson v. Jones*, 17 Or. 204 (20 Pac. R. 842).



When the father has ceased to have any interest in the child, is his consent still necessary to enable the mother to transfer her interest in it? The court decided that it was not. It does not seem to me that the decision was even erroneous. The mother could exercise all the common-law rights of the parents without the consent of the father, and no reason occurs to me why she could not also exercise the statutory power of both parents. A late case in Illinois is directly the reverse. There the child was in the actual custody of the mother, and she gave consent, but the father did not. This was held to make the adoption erroneous, but not void.<sup>1</sup> The court gets jurisdiction in such cases by the filing of the petition and the production of the child, and the failure to notify the parents, or to obtain their consent, is a mere error which, in my opinion, does not touch the jurisdiction. But if there is any want of jurisdiction in such cases, it is in respect to the person and not the subject-matter; and as long as the natural parents do not object, the adopting parents ought to be estopped. Equity and good conscience called loudly for the application of this doctrine in the Oregon case.

§ 409. **Attachment proceedings without notice.**—That the seizure of property gives jurisdiction in attachment proceedings, and that the failure to give the statutory notice, is merely an error which does not make the proceeding void, is held in Georgia,<sup>2</sup> Missouri,<sup>3</sup> Ohio<sup>4</sup> and Pennsylvania,<sup>5</sup> and by the Supreme Court of the United States;<sup>6</sup> while the opposite is held in Louisiana,<sup>7</sup> Maryland,<sup>8</sup> Minnesota,<sup>9</sup> Mississippi,<sup>10</sup> Nebraska,<sup>11</sup> Tennessee<sup>12</sup> and Wisconsin.<sup>13</sup> In the Louisiana cases cited, the statute required the

1. *Barnard v. Barnard*, 119 Ill. 92 (8 N. E. R. 320).

2. *Craig v. Fraser*, 73 Ga. 246.

3. *Hardin v. Lee*, 51 Mo. 241, 244; *Freeman v. Thompson*, 53 Mo. 183, 194; *Kane v. McCown*, 55 Mo. 181, 200; *Johnson v. Gage*, 57 Mo. 160, 165; *contra*, *Bray v. McClury*, 55 Mo. 128, 133.

4. *Lessee of Paine v. Moreland*, 15 O. 435, 444 (45 Am. D. 585); *Lessee of Cochran v. Loring*, 17 O. 409, 431.

5. *McDonald v. Simcox*, 98 Pa. St. 619, 624.

6. *Cooper v. Reynolds*, 10 Wall. 308; *Needham v. Wilson*, 47 Fed. R. 97—*Hallett, J.*

7. *Walworth v. Stevenson*, 24 La. Ann. 251; *Wooldridge v. Montause*, 27 id. 79, 81.

8. *Clark v. Bryan*, 16 Md. 71.

9. *Barber v. Morris*, 37 Minn. 194 (33 N. W. R. 559, 561).

10. *Edwards v. Toomer*, 22 Miss. (14 Sm. & M.) 75, 77.

11. *Wescott v. Archer*, 12 Neb. 345, 347—by two judges against one, and *overruling* *Crowell v. Johnson*, 2 Neb. 146, 154.

12. *Ingle v. Curry*, 48 Tenn. (1 Heisk.) 26.

13. *Cummings v. Tabor*, 61 Wis. 185 (21 N. W. R. 72).

appointment of a curator *ad hoc* for the non-resident defendant, and the posting of a copy of the citation on the court room door. It was the omission of the posting which was held to make the proceeding void. The Pennsylvania case cited was this: In cases of attachment before a justice of the peace, the statute required that, after the goods were seized, a summons for the defendants should issue returnable in not more than eight days nor less than five days. A summons was made returnable in three days, and was returned "not found" the next day, and a judgment for the sale of the goods was rendered. It was held that jurisdiction was acquired by the seizure of the goods, and that the judgment was not void, and that the defendants (who were residents of another county in the same state) could not recover the value of the goods from the plaintiff.

§ 410. **Bankruptcy and insolvency proceedings without notice.**—All the cases agree that proceedings in bankruptcy are strictly *in rem*; and they nearly all agree upon the propositions, that the omission of the name of a creditor from the petition and schedules,<sup>1</sup> even when fraudulently done,<sup>2</sup> or the failure to notify him,<sup>3</sup> does not make the discharge void as to him. I presume that, in all the cases just cited, the publication required by statute was made. A *dictum* in a New Hampshire case,<sup>4</sup> with which I do not agree, says that the omission of the publication would

1. Sawyer v. Rector, 5 Dak. 110 (37 N. W. R. 741, 746); Heard v. Arnold, 56 Ga. 570 (15 N. B. R. 543); Magoon v. Warfield, 3 G. Greene 293; Payne v. Able, 7 Bush 344 (3 Am. R. 316), citing Burnside v. Bingham, 8 Metc. 79 and Brown v. Rebb, 1 Rich. 374; Thurmond v. Andrews, 10 Bush 400 (13 N. B. R. 157); Symonds v. Barnes, 59 Me. 191 (6 N. B. R. 377); Benedict v. Smith, 48 Mich. 593 (12 N. W. R. 866); State v. Gaston, 52 N. J. L. 321 (19 Atl. R. 608); Platt v. Parker, 11 N. Y. Supr. (4 Hun) 135 (13 N. B. R. 14); Hubbell v. Cramp, 11 Paige 310, 313; Mitchell v. Singletary, 19 O. 291; Brown v. Causey, 56 Tex. 340; *In re* Archenbrow, 11 N. B. R. 149; Lamb v. Brown, 12 id. 522; *contra*, Barnes v. Moore, 2 N. B. R. 573 (Cin. Super. Ct.).

2. Black v. Blazo, 117 Mass. 17; Fuller v. Pease, 144 Mass. 390 (11 N. E. R. 694); Rayl v. Lapham, 27 O. St. 452—where debtor falsely alleged that he did not know the address of the creditor. *Contra*, Jones v. Le Baron, 3 Demarest 37; Batchelder v. Low, 43 Vt. 662 (8 N. B. R. 571).

3. Wiley v. Pavey, 61 Ind. 457, 459; Smith v. Engle, 44 Iowa 265, 270—a case where the notice to the creditors of the composition meeting was insufficient. Brown v. Covenant Mutual Life Ins. Co., 86 Mo. 51; Thornton v. Hogan, 63 Mo. 143, 148—where the marshal, by mistake, mailed the notice to a wrong place.

4. *Dictum* in Morse v. Presby, 25 N. H. (5 Foster) 299, 307.

make the proceeding void. The English cases take a different view. Thus, where the statute of bankruptcy provided for publication, and for such notice to the creditors of five pounds and upwards as the court should direct, where the debtor, by mistake without fraud, inserted a creditor's claim at three pounds instead of seven pounds, the true amount, by reason of which no personal notice was issued to him, the discharge did not bar his claim.<sup>1</sup>

The English statute required an insolvent debtor to give the names of all his creditors so far as known to him. The petitioner knew that a bill made by him had been transferred by the payee to a third person whom he also knew. He gave the name of the payee as the creditor, and his discharge was held void as against the holder.<sup>2</sup> The New York statute concerning insolvency proceedings provided that the *fraudulent* concealment of the name of a creditor should avoid the discharge. Under this statute, it has been uniformly held that where the concealment or omission was not fraudulent, the discharge was not void.<sup>3</sup> So the fact that one claim was not mentioned in the bankruptcy schedules, does not make the discharge void in respect to that claim.<sup>4</sup>

§ 411. **Condemning or assessing for public purpose without notice.**—That a proceeding to take or assess land for a public purpose,<sup>5</sup> is *in rem*, the cases substantially agree. The statutes universally require a public notice to be given describing the land to be taken or affected, and frequently require the name of the owner or occupant to be given. When the land is described in the petition and notice, does the omission of the name of the owner or occupant, or the insertion of the name of the wrong person, make the proceeding void? It seems to me that, if the property is actually seized, or described in a public notice, jurisdiction at once attaches, and that the omission of the name of the owner or occupant, or a mistake therein, no more than in any other proceeding *in rem*, does not cause a loss of jurisdiction. But the cases differ.

1. *Hoyles v. Blore*, 14 M. & W. 387, per Parke, B. Co. v. Son, 20 N. Y. Super. (7 Robt.) 233.

2. *Lambert v. Smith*, 11 C. B. (73 E. C. L.) 358.

4. *Rogers v. Western Marine & Fire Ins. Co.*, 1 La Ann. 161.

3. *Small v. Graves*, 7 Barb. 576, 578; *Hall v. Robbins*, 61 Barb. 33 (4 Lans. 463, 466); *American Flask and Cap*

5. *McIntyre v. Marine*, 93 Ind. 193, 199; *Tainter v. Mayor of Morristown*, 19 N. J. Eq. (4 C. E. Green) 46, 59; *Simons v. Kern*, 92 Pa. St. 455, 459.

NAME OF WRONG PERSON GIVEN.—The statute of Indiana concerning drainage provided that, upon the filing of a petition describing the *terminii* and course of the proposed ditch, viewers should be appointed to compute the amount of earth to be removed, and to estimate the cost, and to “set apart and apportion to each parcel of land a share of said work in proportion to the benefits to be derived by such work.” Their report was to be filed with the court, and notice was then to be published and posted “of the pendency and prayer of said petition, and the time set for the hearing thereof, which notice shall contain a pertinent description of the terminus of said proposed work, its direction and course from its source to its outlet, and the names of the owners of the lands that will be affected thereby.” A married woman was the owner of land affected, while the notice published and posted described it as belonging to her husband; but it was held that this mistake did not make the assessment on the land void.<sup>1</sup> The court said: “This requirement is in terms unqualified. It must be the names of the owners, whether they are known or not, and whether the ownership appears by the record, by unrecorded deed, by devise, descent, or by limitation or estoppel. A literal and mandatory construction of the statute, would make all procedure under it difficult, if not impossible.” While this shows the difficulty of complying with the statute in some cases, it scarcely furnishes a reason for disregarding it. The true reason why the proceeding was not void, is this: When a parcel of land is described, and it is alleged that a person named owns it, that raises a question of fact to be decided on the evidence, and all the world have an opportunity to contest that allegation, and the judgment necessarily concludes the world on the point. Thus, a statute of Kentucky authorized the county court to grant the right to maintain a ferry to a person upon his *ex parte* application, showing, among other things, that he owned the land at the terminus of the ferry. On such an application, an order granting a ferry was made, reciting that the grantee was the owner of the land at the terminus. Another person applied for the grant of a ferry within the distance prohibited by statute, and upon being resisted by the first grantee, attempted to show that he did not own the land at the terminus, and that, therefore, his grant was void. But the court said that the proceeding was *in rem*, from which any person might bring a

1. Featherston v. Small, 77 Ind. 143, 145.

writ of error, and that it was conclusive that the grantee did own the land at the terminus.<sup>1</sup> For the same reason, the adjudication in the Indiana case last cited, so far as that assessment was concerned, was conclusive against the world that the husband was the owner. It was decided by the supreme court of Pennsylvania, that a proceeding by *scire facias* to enforce a street assessment was *in rem*, and that it mattered not that the person named was not the owner.<sup>2</sup> The statute of Missouri requires proceedings to foreclose a tax lien to be brought against the owner; and the supreme court has steadily held that a suit against the record owner was not void, although he had conveyed it.<sup>3</sup> But the Indiana case last cited was expressly overruled (and erroneously so, as it seems to me) by a later case, where the name of a prior owner was given. The court said that not to name him was to take his property without "due process of law."<sup>4</sup> This case has been adhered to in later decisions.<sup>5</sup> So it was held in New York, that an assessment for a street improvement upon a lot in the name of one who was not the owner, was void.<sup>6</sup>

NAME OMITTED.—An Indiana statute in regard to laying out highways, required notice to be posted or published describing the lands to be taken, but it did not expressly require the names of the owners or occupants to be given. Still, the supreme court had held that the petition and notice ought to contain their names and were erroneous without them. Nevertheless, it was decided that the omission of the names of the owners did not make the proceeding void.<sup>7</sup> It will be seen that the scope of this decision, which has never yet been overturned, is very broad. It is a direct authority to the point that the proceeding is *in rem*, and that the failure to name the owner when the statute did not so require, did not make the proceeding wanting in "due process of law," and that a total disregard of the decision of the supreme

1. Churchill v. Grundy, 5 Dana 99; Everston v. Sanders, 6 J. J. Marsh. 142.

2. Delaney v. Gault, 30 Pa. St. 63.

3. Payne v. Lott, 90 Mo. 676 (3 S. W. R. 402), *relying upon* Vance v. Corrigan, 78 Mo. 94; State v. Sack, 79 Mo. 661; Watt v. Donnell, 80 Mo. 195, and Cowell v. Gray, 85 Mo. 161.

4. Vizzard v. Taylor, 97 Ind. 90, 94; *accord*, McCollum v. Uhl, 128 Ind. 304 (27 N. E. R. 132 and 725).

5. Young v. Wells, 97 Ind. 410, 414; *dictum* in Jones v. Cardwell, 98 Ind. 331, 332; Troyer v. Dyar, 102 Ind. 396, 398; Brosemer v. Kelsey, 106 Ind. 504, 507 (7 N. E. R. 569); a *dictum* in Porter v. Stout, 73 Ind. 3, 6, is to the same effect.

6. Chapman v. City of Brooklyn, 40 N. Y. 372, 377.

7. McIntyre v. Marine, 93 Ind. 193, 199.

court that the statute impliedly required the names of the owners to be given in both the petition and notice, did affect it collaterally. A statute of Maine required selectmen of a town, before laying out a highway, to give notice to owners of land over which it would be located. The failure to give this notice was held to make the location void;<sup>1</sup> and the same ruling was made in Missouri.<sup>2</sup> If the law required a public notice describing the land to be taken, I cannot agree with these decisions. A proceeding by a city in Pennsylvania to sell a lot for an assessment is *in rem*, yet where the statute required both posting of notices and personal service on the record owner, a judgment rendered on posting alone, with a return of not found as to the record owner, was held void.<sup>3</sup>

**FERRY LICENSE.**—The Kentucky statute provided that “No application to establish a ferry shall be heard unless notice of the application shall have been posted at the courthouse door of the county on the first day of the term of the court next preceding that at which the application is made.” It was held that a license granted without any notice was void.<sup>4</sup>

**OWNERSHIP OF GOODS.**—A statute of New York required goods to be assessed to the owner. Under this statute goods were assessed to the actual possessor as the owner. In a collateral proceeding, he offered to show that the goods were simply in his possession as the agent of the owners residing in New Jersey, but the assessment, being a judicial act, was held to be conclusive that he was the owner and personally liable.<sup>5</sup> That all the proceedings above mentioned are *in rem*, the cases all agree. No such thing as naming the owner, or giving him personal notice, was ever heard of in a notice issued in a proceeding *in rem*, conceding that a notice was necessary. The fact that the statutes in such cases require the name of the owner or occupant to be given, does not change the proceeding from one *in rem* to one *in personam*, nor does it make that jurisdictional which was before a matter of convenience and courtesy. All they do is to require greater effort on the part of the plaintiff to give actual notice to the persons adversely interested. The failure to do

1. Howard v. Hutchinson, 10 Me. 335.

2. Golahar v. Gates, 20 Mo. 236.

3. Simons v. Kern, 92 Pa. St. 455,

4. Hazelip v. Lindsey, — Ky. — (18 S. W. R. 832).

5. Matter of McLean v. Jephson, 48

N. Y. Supr. (41 Hun) 479.

as required, in my opinion, makes the proceeding erroneous merely, and not void collaterally.

§ 412. **Infants—Proceedings against, without notice.**—Is a judicial proceeding void because carried on against an infant without notice? In an early case in Ohio, Mr. Justice Hitchcock, in delivering the opinion of the court, said: "It seems to me to be unnecessary in this case to go into an investigation of the question, whether infants can be made parties to a suit in chancery, so as to be bound by a decree without personal service, merely by the appointment and appearance of a guardian *ad litem*. Much is said in the books on the subject. But I apprehend it will be found, upon examination, that decrees entered under such circumstances are generally, if not universally, holden to be voidable, not void. Such, I have no doubt, is the weight of authority."<sup>1</sup> In Alabama, it was said that "the chancery court is the general guardian of all infants within its jurisdiction, and by virtue of its general powers has authority to protect their rights, when defendants in that court, by the appointment of a guardian *ad litem*, . . . but we have found no case which goes to the length of denying to the chancellor the power of making the appointment without service."<sup>2</sup> The supreme court of Kentucky said: "Actual notice to an infant will not enable him to defend a suit, because he is, in judgment of law, incompetent. . . . Even though in court, he cannot be heard, nor can the suit proceed, except through the intervention of a guardian *ad litem*, appointed to defend for him. . . . In such cases, of the prosecution or defense of suits, the court acts, *pro hac vice*, as the guardian of infants;" and a judgment against him without notice but merely upon defense by a guardian *ad litem*, was held not void.<sup>3</sup> It was said in South Carolina that "the sole purpose of the service of the subpoena on infants is to attract the attention of their friends, that a due regard may

1. Robb v. Lessee of Irwin, 15 O. 689, 700; *approved*, McAnear v. Epperson, 54 Tex. 220, 224; *accord*, Alston v. Emmerson, — Tex. — (18 S. W. R. 566); *accord*, concerning an Ohio judgment, is Lessee of Nelson v. Moon, 3 McLean, 319; Also *in accord*, Ewing's Lessee v. Higby, 7 O. (part 1) 198; Snevely v. Lowe, 18 O. 368; Sheldon v. Newton, 3 O. St. 494, 505.

2. Preston v. Dunn, 25 Ala. 507; *approved*, Frierson v. Travis, 39 Ala. 150, 153.

3. Bustard v. Gates, 4 Dana 429, 435; *accord*, Downing's Heirs v. Ford, 9 Dana 391; Bank of U. S. v. Cockran, 9 Dana 395; Benningfield v. Reed, 8 B. Mon. 102, 105.



be had to their rights, and that the mind of the court may be directed to them," and a judgment against an infant upon defense by a guardian *ad litem*, without service, was decided not to be void.<sup>1</sup> As the infant can only appear by guardian *ad litem*, even when personally notified, and as he cannot employ the guardian *ad litem*, but must rely upon the court to do so, it would seem that when a guardian *ad litem* is appointed and appears and acts, the object of service is accomplished just as completely as by the voluntary appearance of an adult. Theoretically, the rights of the infant will be better protected when service is made upon him, and the suit brought to the attention of his friends who may be active in bringing his evidence to the attention of the guardian and the court; but, practically, I never knew or heard of a case where the friends and relatives of the infant did not know all about it, and when and where it would be brought, before the complaint was filed; and when the infant has any actual rights, they are never slow to bring them forward. About as absurd an act as I ever saw was that of the sheriff in awakening a little boy of four years lying in the arms of his grandmother, in order to read a summons to him in compliance with the Indiana statute. If he had found him all alone and read the summons to him, the statute would have been complied with. As the advantage actually gained by service on infants is very small, if not wholly theoretical and imaginary, and as the actual harm done to innocent persons by holding service to be jurisdictional is very great, I think the cases which hold that it is not, are founded on the better reason. When infants are very young, and especially when their parents are parties and actually representing them, they are liable to be overlooked in making service. Of course, if they are not parties, their rights cannot be adjudicated, and in such cases the record does not purport to bind them, and no one can be deceived. So, where there is neither service upon nor an appearance for them, the proceeding against them is void.<sup>2</sup> A Kansas statute required service to be made on each and every defendant by "personal notice in writing." The return of service on an infant two years old showed that a copy of the summons and petition for him was delivered to his mother,

1. *Bulow v. Witte*, 3 S. C. 318; 2. *Shaefer v. Gates*, 2 B. Mon. 453  
quoted with approval in *Simmons v. Baynard*, 30 Fed. R. 532, 534; accord, *ad litem* was appointed but did not  
*Bulow v. Buckner*, 1 Rich Eq. 401. accept.

in his presence, as his natural guardian. This was held not void.<sup>1</sup> The supreme courts of Kentucky and Ohio seem to have changed their earlier rulings, and now hold judgments against infants upon appearance by guardian *ad litem* only, without service, void.<sup>2</sup> Other cases in accord are cited in the foot-note.<sup>3</sup>

§ 413. **Insanity inquest, held without notice.**—In a collateral attack on an Illinois judgment appointing a conservator for a lunatic, made forty years afterwards, because no notice was given the lunatic, the court said: "We are of the opinion that the validity of Lisk's appointment as conservator cannot be inquired into in a collateral proceeding like the present."<sup>4</sup> A Missouri statute provided that, in proceedings to declare a person insane, the court, in its discretion, might cause the person to be brought before it, but it did not provide for notice to him. A guardian was appointed without notice and without the production of the person in court, and sold land. Afterwards the lunatic brought ejectment on the ground that the appointment was void, but he was defeated.<sup>5</sup> The failure to notify a person of an inquisition of lunacy, or to have him present, was held not to make the proceeding void in North Carolina and South Carolina,<sup>6</sup> and in a late case in Massachusetts,<sup>7</sup> although the earlier cases in that state are the other way.<sup>8</sup> That such proceedings, when held without notice to or the production of the alleged insane person in court, are void, is held in Alabama,<sup>9</sup> New York,<sup>10</sup> and West Virginia.<sup>11</sup> In such proceedings, a statute of Maine required the court to notify the municipal officers of the town where the alleged lunatic resided "to make inquisition into the allegations made in the application," and to require them to make a report in respect to his condition.

1. Havens v. Drake, 43 Kan. 484 (23 Pac. R. 621, 623).

2. Allsmiller v. Freutchenicht, 86 Ky. 198 (5 S. W. R. 746); Moore v. Starks, 1 O. St. 369—Thurman, J., *dissenting*.

3. Chambers v. Jones, 72 Ill. 275, 278; McKee v. McKee, 14 Pa. St. 231; Rucker v. Moore, 48 Tenn. (1 Heisk.) 726.

4. Dodge v. Cole, 97 Ill. 338, 351 (37 Am. R. 111).

5. Dutcher v. Hill, 29 Mo. 271, 273.

6. Bethea v. M'Lennon, 1 Ired. L. 523, 527; Medlock v. Cogburn, 1 Rich. Eq. 477.

7. McKim v. Doane, 137 Mass. 195.

8. Wait v. Maxwell, 5 Pick. 217 (16 Am. D. 391); Chase v. Hathaway, 14 Mass. 222; Hathaway v. Clark, 5 Pick. 490; Conkey v. Kingman, 24 Pick. 115; Smith v. Burlingame, 4 Mason 121.

9. McCurry v. Hooper, 12 Ala. 823 (46 Am. D. 280); Eslava v. Lepretre, 21 Ala. 504 (56 Am. D. 266).

10. Board of Supervisors v. Budlong, 51 Barb. 493, 515.

11. *Dictum* in Lance v. McCoy, 34 W. Va. 416 (12 S. E. R. 728).

This report, it seems, was to be used as evidence before the court, and the proceedings were held to be void where there was an omission to notify those officers.<sup>1</sup> So where an inquisition of lunacy was carried on in Maryland, without notice, against a lunatic confined in an asylum in Pennsylvania, the proceeding was decided to be void in the latter state.<sup>2</sup> If a person is a lunatic, service is absurd. When a guardian is appointed and obtains actual possession of the property of the alleged lunatic, he is certainly an officer *de facto*. The danger arising from want of notice is imaginary.

§ 414. **Pauper, removed without notice.**—I cannot discover that any notice was required or given in respect to proceedings in England for the removal and settlement of paupers, and such an order settling one in a designated parish was held to be conclusive on all the world; and evidence to show it to be erroneous, in a suit against a third parish, not a party to the original proceeding, was decided to be incompetent.<sup>3</sup>

**PERISHABLE GOODS, SOLD WITHOUT NOTICE.**—An order to sell goods as perishable, is a proceeding *in rem*, and the purchaser gets a good title, no matter on what kind of a writ they were seized, nor to whom they belong. This kind of a sale is wholly different from one on execution, because upon that writ only such title as the defendant has, is sold.<sup>4</sup>

**SLAVE.**—An adjudication in Alabama that a person was a slave, without notice to or bringing him before the court, was held to be void.<sup>5</sup>

§ 415.—**Widow's rights, set off without notice.**—An order made in Arkansas vesting the whole estate of a decedent in the widow, where it was made to appear to the court that it did not exceed \$300, without notice to heirs or creditors;<sup>6</sup> and an order made in California setting aside the homestead to the widow, without notice,<sup>7</sup> were held to be proceedings *in rem*, and not void. A

1. Coolidge v. Allen, 82 Me. 23 (19 Atl. R. 89). How. 583; and Jennings v. Carson, 4 Cranch 2, and Griffith v. Fowler, 18

2. Com. v. Kirkbride, 7 Phila. 8. Vt. 390, and other cases. Buller v.

3. King v. Inhabitants of Corsham, Woods, 43 Mo. App. 494, 501.  
11 East 388; Rex v. St. Mary, Lambeth, 6 T. R. 615; Rex v. Evenwood, 3 Q. B. 370.

4. Young v. Kellar, 94 Mo. 581 (7 S. 827.

W. R. 293)—an able and exhaustive opinion by Sherwood, C. J., *citing*, 7. Kearney v. Kearney, 72 Cal. 592 (15 Pac. R. 769).

Taylor v. Carryl, 24 Pa. St. 259, and 20

statute of Indiana provided, in substance, that if the entire estate of a decedent was less than \$300, it should go, without administration, to the widow, in trust for herself and the infant children of the decedent; but that, on her subsequent marriage, the title to such property should vest absolutely in the children. In such a case, the court, on the application of the widow, set off and confirmed the title to the property to her absolutely, without saying anything about holding in trust for her children. This was held to bar the rights of the children, and that her subsequent marriage gave them no title.<sup>1</sup> Here was a proceeding *in rem* by which infants were barred out of their rights, without notice, and without being formal parties. A statute of Missouri provided for the setting apart of a homestead to the widow and required no notice. After the administration of an estate was closed, and the land divided among the children, the widow, still having her right to a homestead, made application, and it was set apart to her out of the land of one of the children, without notice. This was held void.<sup>2</sup> This case seems to me to be erroneous. The proceeding was *in rem*, no notice was necessary, and the children made their division subject to her rights; and because they divided the land into parcels was no reason why her homestead should be divided. The assignment of dower is not regarded as a proceeding *in rem*, and when assigned without notice to a person in interest, it is void as to him.<sup>3</sup> A justice of the peace had power in North Carolina to allot a homestead to the widow, but she had no right to one where there were children; and where such an allotment was made upon published notice for creditors, as provided by statute, it was decided to be void as to the heirs because they had no notice—that it was a proceeding merely *quasi in rem*, and binding only on those notified.<sup>4</sup>

§ 416. Will, probated without notice.—It was recently held in Alabama that the probate of a will was a matter *in rem*, and that the failure to give the statutory notice of the application, made the probate decree erroneous, but that it was not wanting in “due process of law,” and was not void.<sup>5</sup> The cases all agree

1. Spencer v. McGonagle, 107 Ind. 410, 416 (8 N. E. R. 266).

2. Miller v. Schnebly, 103 Mo. 368 (15 S. W. R. 435).

3. Hess v. Cole, 23 N. J. L. (3 Zab.) 116.

4. Williams v. Whitaker, — N. C. — (14 S. E. R. 924).

5. Dickey v. Vann, 81 Ala. 425, 430 (8 S. R. 195).

that proceedings concerning the probate of wills are strictly *in rem* and not *in personam*, and bind the world.<sup>1</sup>

SETTING ASIDE.—The statute of Ohio authorized any person interested to appear within two years after the probate of a will, and contest its validity before a jury “whose verdict shall be final between the parties,” unless a new trial should be granted. It was held that such a proceeding was *in rem*, and bound all the world, as the verdict fixed the *status* of the will, which could not be tried over and over again by different parties, with differing results, and that it was not void for errors.<sup>2</sup>

## TITLE D.

### SUBSTITUTED SERVICE, EFFECT OF.

§ 417. Scope of, and principle involved in, Title D.

§ 418. Foreign corporations.

419. Partner or joint-debtor.

§ 417. Scope of, and principle involved in, title D.—When a copy of the process is left for a person in his absence, either with some other person or at some place, that is called substituted service. In this title, we assume that such service was made as prescribed by law, and consider the collateral force and effect of the judgment. A judgment rendered upon such service against a resident of the state,<sup>3</sup> even though he be absent,<sup>4</sup> is regarded as personal, and will support an action in another state. An Englishman upon taking shares in a French corporation was required by law to elect, and did elect, a domicile in France where copies of process could be left for him; and a judgment rendered on such service was held valid in England.<sup>5</sup> So where, by the law of France, a stockholder in a company was liable to be proceeded against personally after notice served at a certain-named office, a personal judgment rendered against an English stockholder on such service alone, was held valid.<sup>6</sup> And where a foreign law provided that service upon an absent resident could be made

1. *St. Clair v. Morris*, 9 O. 15, 18; *State v. McGlynn*, 20 Cal. 234; *Bogardus v. Clark*, 4 Paige 623; *Hodges v. Bauchman*, 16 Tenn. (8 Yerger) 185.

2. *M'Arthur v. Allen*, 3 Fed. R. 313, 318—Swayne, J.

3. *Bimeler v. Dawson*, 5 Ill. (4 Scam.) 536 (39 Am. D. 430); *Harryman*

*v. Schryver*, 52 Md. 64, 74; *Barney v. White*, 46 Mo. 137, 139.

4. *Cassidy v. Leitch*, 2 Abb. N. Cas. 315; *Huntley v. Baker*, 40 N. Y. Supr. (33 Hun) 578.

5. *Vallee v. Dumergue*, 4 Exch. 290.

6. *Copin v. Adamson*, L. R., 1 Exch. Div. 17 (45 L. J. Exch. Div. 15; 33 L. T. N. S. 33; 24 W. R. 85).

by copy served upon the attorney-general, a judgment on such service was decided to be valid;<sup>1</sup> and the same was ruled concerning an Irish judgment where service was made on an absent defendant by copy left with his local attorney and the transmission of a copy by mail to him, in accordance with a statute.<sup>2</sup> A colonial statute provided that a banking company might sue and be sued in the name of its chairman, and that execution on any judgment against the company might be issued against the property of any member for the time being, in like manner as if such judgment had been obtained against such member personally. Such a judgment was rendered against the company, and it was held to be a valid judgment against a member in England, although he had no notice.<sup>3</sup>

§ 418. **Foreign corporations.**—Where the statute provided that a foreign corporation doing business in the state should appoint an agent upon whom service could be made, it was held that a valid personal judgment could be rendered against the corporation by virtue of service on such agent.<sup>4</sup> A New Jersey corporation opened an office in New York and transacted business, and then withdrew from the state. Afterwards its president was found in New York and there served with process in an action against the corporation on a contract made by it in New York, in accordance with the statute of that state, and judgment was taken by default, and suit brought thereon in New Jersey, and it was held valid.<sup>5</sup> Such appointment is irrevocable as long as it may be necessary to bring suit on account of business done in the state.<sup>6</sup>

§ 419. **Partner or joint debtor.**—In accordance with the decisions cited in the last two sections, which seem to me to be sound, a valid personal judgment may be rendered against a partner or joint debtor by virtue of service on his copartner or codebtor, when the statute so provides. But it has been decided in Arkansas, Massachusetts, Michigan and South Carolina, and by the Supreme Court of the United States, that such a judgment was void against a non-resident partner when sued upon in the state

1. *Becquet v. MacCarthy*, 2 B. & Ad. 951 (22 E. C. L. 398).

2. *Crawley v. Isaacs*, 16 L. T. N. S. 529.

3. *Bank of Australasia v. Nias*, 16 Ad. & El. N. S. (Q. B.) 717, 733 (71 E. C. L. 717, 733).

4. *Gibbs v. Queen Ins. Co.*, 63 N. Y. 114.

5. *Moulin v. Trenton Mutual Life and Fire Ins. Co.*, 25 N. J. L. (1 Dutch) 57.

6. *Gibson v. Manufacturers' Ins. Co.*, 144 Mass. 81 (10 N. E. R. 729).

of his residence.<sup>1</sup> But if the state has the power, which seems to be conceded, to authorize personal judgments to be rendered against its own citizens upon service on a copartner or joint owner, I cannot see why non-residents should be exempt. If they do not wish to abide by the laws of the state and to be treated the same as its own citizens, they ought to stay away or refuse to do business there. But when they find it to their profit to do business in a state having such a law, they ought to take the benefits subject to the same burdens placed on citizens. No court has, as yet, made it very clear why they should not. All the cases cited, except the one from Massachusetts, were actions upon judgments rendered in New York. But where such a judgment from New York was sued upon in Connecticut, it was held that the statute of New York did not make it valid against the partner not served, until "the liability of such defendant shall have been established by other evidence" than the judgment itself; and that, therefore, no action could be maintained on it in Connecticut.<sup>2</sup>

## TITLE E.

### UNAUTHORIZED PROCEEDINGS.

#### § 420. Scope of, and principle involved in, title E.

Sub-title I.—Consent of

plaintiff, wanting, . . . § 421-423

Sub-title II.—Consent of

defendant, wanting, . . . § 424-435

**§420.—Scope of, and principle involved in, title E.**—This title treats of the validity of rights and titles derived through judicial proceedings where they were unauthorized in law or in fact, either on behalf of the plaintiff or the defendant. When such want of authority is a question of fact the record is always invulnerable collaterally, because it imports absolute verity; but when it is a question of law, it is likewise invulnerable, if there was any question for the court to decide.

1. Pickett v. Ferguson, 45 Ark. 177 (55 Am. R. 545); Phelps v. Brewer, 9 Cush. 390; Bonesteel v. Todd, 9 Mich. 371 (80 Am. D. 90); Menlove v. Oakes,

2 McMull. 162; D'Arcy v. Ketchum, 11 How. 165.  
2. Wood v. Watkinson, 17 Conn. 500 (44 Am. D. 562).

*Whether in the spirit of the advocate  
rather than the investigator.*



## SUB-TITLE I.

## CONSENT OF PLAINTIFF, WANTING.

§ 421. Civil proceedings—Not void.

422. Civil proceedings—Void.

§ 423. Criminal, or *quasi* criminal proceedings—Consent of state, wanting.

§ 421. Civil proceedings—Not void.—A suit was brought in a justice's court without the knowledge or consent of the plaintiff, but the justice's record falsely recited an appearance by him, and judgment was rendered against him for costs upon which his land was sold. This sale was held not to be void.<sup>1</sup> So, where the name of the widow appeared as one of the plaintiffs in a petition to sell the land of a decedent, she could not show collaterally that its use was unauthorized.<sup>2</sup> And where an attorney brings a suit for a plaintiff without his consent and forecloses a mortgage in his favor,<sup>3</sup> or suffers a judgment to go against him for costs,<sup>4</sup> it is not void.

NON-RESIDENT PLAINTIFF.—A judgment for costs was rendered against a plaintiff residing in Massachusetts, in the federal court in Vermont. It was held that he could not show in a state court of Vermont that the suit was begun and carried on without his authority.<sup>5</sup> The owners of land in North Carolina lived in Alabama—one being a minor. An attorney without authority, began a partition suit for them which resulted in a sale of the land. They did not learn of these facts for fourteen years; but it was held that the proceedings were not void, and that they could not recover the land.<sup>6</sup> The same ruling was made where the plaintiffs were all minors and residents, and the suit was carried on in the name of a next friend for them, without authority from them or the next friend.<sup>7</sup> But where such a judgment against a non-resident plaintiff is taken to his own state, and there sued upon, he may show in defense that he did not authorize the suit.<sup>8</sup> Thus, where a record from Maine showed that the plaintiff had died, and that his (non-resident) administrator came in,

1. Williams v. Hays, 77 Tex. 283 (13 S. W. R. 1029).

2. Brittain v. Mull, 99 N. C. 483 (6 S. E. R. 382, 385).

3. Dictum in Thomas v. Jarden, 57 Pa. St. 331, 334.

4. Finneran v. Leonard, 7 Allen 54 (83 Am. D. 665).

5. Town of St. Albans v. Bush, 4 Vt. 58 (23 Am. D. 246).

6. England v. Garner, 90 N. C. 197.

7. Morris v. Gentry, 89 N. C. 248.

8. Watson v. New England Bank, 4 Metc. 343; *contra*, Ward v. Barber, 1 E. D. Smith 423.

and afterwards suffered a nonsuit to be entered, it was held that when he was sued thereon in Massachusetts, he could show that he neither appeared nor authorized an appearance in Maine.<sup>1</sup> These last two Massachusetts cases are correct, and they do not contradict the North Carolina and Vermont cases just cited. When a person is sued on a foreign judgment he may always show a want of jurisdiction over the person in contradiction of the record. This is in the nature of an equitable defense. But when his property is sold in the foreign state to a *bona fide* purchaser relying upon the record, he can no more recover such property than a resident can. In other words, non-residents do not stand upon more favorable grounds in a domestic court than residents. So, a recital in a Pennsylvania record that an administrator appeared and requested the sale of land, cannot be contradicted collaterally in ejectment.<sup>2</sup>

Before a petition in bankruptcy could be filed on behalf of a corporation, the statute required an order to be made by a majority of the corporators at a legal meeting called for that purpose, and the petition was then to be signed and verified by certain specified officers. But in such a case, the president, without any order, filed a petition, upon which the corporation was adjudged to be bankrupt, and, in due time, was discharged from all its debts. This discharge was held void in New York, and no bar to a recovery of the remainder due on a claim after deducting the dividends received;<sup>3</sup> but this judgment was reversed by the Supreme Court of the United States, which expressly held that the authority of the president was a question for the bankruptcy court to decide, and that error therein did not make the decision void.<sup>4</sup> The petition filed in this case lacked no allegation of substance or form, but it showed that it was made by one officer when the law required it to be made by several others also, and it failed to show that it was authorized by the corporators. But as the proceeding was *in rem*, to which all persons in interest, including the corporators as well as the creditors, were parties, they were all called upon to show cause why it should not proceed; and the technical defects mentioned were

1. Gleason v. Dodd, 4 Metc. 333.

2. Selin v. Snyder, 7 Serg. & R. 166.

3. Ansonia Brass and Copper Co. v. New Lamp Chimney Co., 64 Barb. 435; *affirmed*, 53 N. Y. 123.

4. New Lamp Chimney Co. v. Ansonia Brass and Copper Co., 91 U. S. 656. See section 428.

waived by allowing the cause to proceed without objection. The allegations of the petition gave the jurisdiction; and the defects existing, like the reception of incompetent evidence, were mere errors of law which did not affect the power of the court. So in Texas, where the defendant and one purporting to be an attorney in fact for the plaintiff, but who did not show his authority, appeared, and by consent corrected a judgment after an appeal had been taken, this was held to be erroneous, but not void.<sup>1</sup> So also, proceedings before a justice of the peace in New York are not void because the person who officiated as constable also acted as plaintiff's attorney, in violation of a statute.<sup>2</sup>

§ 422. **Civil proceedings—Void.**—In an early English case, an attorney brought suit on a claim, obtained judgment and collected it, all of which was done without the authority of the plaintiff. This judgment and payment were held to be no protection to the defendant, and he was compelled to pay it over again.<sup>3</sup> Where a petition to have dower assigned was filed in South Carolina, and a judgment for money in lieu of dower was rendered, it was held not to bind the widow when done without her authority.<sup>4</sup> In a late Iowa case, a father, without authority, employed an attorney to sue an insurance company for his son, and the defendant recovered a judgment for costs, by virtue of which land of the son was sold to the company. The son brought a suit in equity to set aside this sale, which was done, on the ground that the original suit was unauthorized. There was no offer to make the company whole, but it was compelled to lose both land and costs.<sup>5</sup> A Wisconsin statute required a party desiring an appeal from a justice to the circuit court to make and present to the justice a notice of appeal together with an affidavit that the appeal was made in good faith. This could be done by himself or any person authorized by him. When such a notice and affidavit were filed by an unauthorized person, it was held that the circuit court obtained no jurisdiction over the subject-matter, and that the ratification by the appellant gave it no jurisdiction.<sup>6</sup> That learned court was confused and mistook

1. *Watson v. Hopkins*, 27 Tex. 637, 642.

2. *Wilkinson v. Vorce*, 41 Barb. 370.

3. *Robson v. Eaton*, 1 T. R. 62—*Mansfield, C. J.*

4. *Latimer v. Latimer*, 22 S. C. 257, 260.

5. *Markham v. Burlington Ins. Co.*, 69 Iowa 515 (29 N. W. R. 435).

6. *Palmer v. Peterson*, 46 Wis. 401 (1 N. W. R. 73).

record. See section 555, *infra*. A person went before a justice of the peace in Vermont, and complained of himself for a crime, and a fine was entered and paid. Apparently, the record showed that the state was not represented. The court admitted that the justice did have jurisdiction over both subject-matter and person, and held the judgment void because the justice failed to make the necessary indorsements on the complaint before he issued the process.<sup>1</sup> But a judgment in a criminal case is never void for defects in, or the absence of, process, as is shown in section 383, *supra*. So where, before a justice of the peace, a person procured a warrant to be issued for himself;<sup>2</sup> or procured an accomplice to prosecute him;<sup>3</sup> or employed an attorney to do so on behalf of the state,<sup>4</sup> the convictions were held void. Two cases in Tennessee held a plea of former conviction before a justice bad because of the failure to allege that the justice heard the evidence, *as required by statute*.<sup>5</sup> In an Indiana case, the defendant had procured the prosecution to be instituted, and the person injured could not be present, which the statute required, and the justice refused to grant a continuance on request of the prosecuting attorney: whereupon, as shown by the justice's record, the prosecuting attorney "withdrew from the case and the court." The conviction was held void.<sup>6</sup> But after a person was indicted in the superior court in North Carolina, he procured himself to be indicted in the county court and voluntarily submitted himself to that court and was fined, and this was held to bar further proceedings in the superior court.<sup>7</sup> Many of the cases cited in this section are wrong, in my opinion. The record can be tried by inspection only; and unless it shows, either expressly, or by implication, that the state was not represented, the proceeding is not void. The pleading which is necessary to raise these questions will be considered in Chapter — *infra*.

1. State v. Wakefield, 60 Vt. 618 (15 Atl. R. 181, 183).

2. State v. Colvin, 11 Humph. (30 Tenn.) 598; *accord*, De Haven v. State, 2 Ind. App. 376 (28 N. E. R. 562).

3. State v. Green, 16 Iowa 239, 242.

4. State v. Little, 1 N. H. 257.

5. State v. Spencer, 10 Humph. (29 Tenn.) 430; State v. Atkinson, 9 Humph. (28 Tenn.) 676.

6. Halloran v. State, 80 Ind. 586, 588.

7. State v. Wright, Busbee, Law 209.

SUB-TITLE II.

CONSENT OF DEFENDANT, WANTING.

Division A.—Consent appearing in record, insufficient in law, . . . . .	§ 424-427	Division C.—Person appearing or consenting for defendant, unauthorized in fact, . . . . .	§ 430-432
Division B.—Person appearing or consenting for defendant, unauthorized in law, . . . . .	428-429	Division D.—Fraud, collusion and duress—Appearance or service made by, or lawful service prevented by,	433-435

DIVISION A.

CONSENT APPEARING IN RECORD, INSUFFICIENT IN LAW.

§ 424. Power of attorney, defective.	§ 426. Waiver of service indorsed on complaint.
425. Waiver of service or consent to judgment, defective.	427. Waiver of service indorsed on summons.

§ 424. Power of attorney, defective.—An Illinois statute provided that: “Any person, for a debt *bona fide* due, may confess judgment by himself or attorney duly authorized, either in term time or vacation, without process.” It did not provide what the evidence should be to show the authority of the attorney. In a case where the confession was by power of attorney before the clerk in vacation, with no affidavit of its execution attached, it was held void collaterally in replevin.<sup>1</sup> But as the clerk acted judicially, he had the same power to pass on the sufficiency of the evidence that the appellate court had. A judgment entered in one court in Pennsylvania by virtue of a power of attorney authorizing its entry in another, is not void, and its validity cannot be attacked by other creditors on a motion for distribution.<sup>2</sup> But where a confession was entered in Ohio, on a power of attorney contained in a note executed in Pennsylvania authorizing any attorney in the world to appear and confess judgment in any court anywhere, it was held void in Tennessee for its “comprehensive uncertainty.”<sup>3</sup> It seems to me that that was a question for the Ohio court to decide. A Texas contract provided that the creditor might select an attorney to confess judgment for the debtor, which was done. It was held that if this was illegal, it was not void.<sup>4</sup> But a confession entered in

1. Bunn v. Gardiner, 18 Ill. App. 94, 97.

2. Hauer's Appeal, 5 Watts & S. 473.

3. Carlin v. Taylor, 75 Tenn. (7 Lea) 666, 668.

4. Mikeska v. Blum, 63 Tex. 44, 47.

Illinois, on a note dated April 24, 1856, with interest, by virtue of a power of attorney given in 1858, authorizing a confession on a note, dated April 24, 1846, bearing six per cent. interest, was held void in ejectment.<sup>1</sup> The declaration gave jurisdiction over the subject-matter, and it was a question of law for the court to decide whether or not the cognovit was sufficient to bring in the defendant. A resident of Maryland gave a cognovit authorizing "any attorney of any court of record in the state of New York, or any other state, to confess judgment against me for the said sum of three thousand dollars." On this cognovit, a judgment was entered in Pennsylvania by the prothonotary, under a statute authorizing him to do so on a bond empowering an attorney to confess. This judgment was held void in Maryland because not confessed by an attorney.<sup>2</sup> But it does not seem to me that it was even erroneous. By authorizing the confession to be entered in Pennsylvania, the law of that state became a part of the power when it was there presented. A confession entered against two persons in Missouri, on a power of attorney which, in its body, professed to be given by one alone, but was signed by two, is not void.<sup>3</sup>

§ 425. **Waiver of service or consent to judgment, defective.**—The statute of Indiana in relation to administrators' sales of land dispensed with notice of the filing of the petition, upon the written consent to such sale, signed by the adult "persons interested" and the guardians of the minors. In such a case, the widow and children were all made defendants, and described as "heirs;" and they filed their written consent, each adult, except the widow Elizabeth J. Helms, signing it personally, and she signing it thus: "Elizabeth J. Helms, guardian of Nancy J. Helms, Jas. W. Helms, Wm. F. Helms." On this a sale was made of the entire tract in fee. This sale was held void in respect to the widow's one-third, because she did not sign it for herself, but only as guardian.<sup>4</sup> The court treated the case as though before it on appeal, overlooking the point that the capacity in which she signed was a question of construction for the probate court—a question which it had ample power to determine. A Vermont statute provided that "a justice is authorized to accept and

1. Chase v. Dana, 44 Ill. 262, 264.

2. Grover and Baker Sewing Machine Co. v. Radcliffe, 66 Md. 511 (8 Atl. R. 265).

3. Wood v. Ellis, 10 Mo. 382, 385.

4. Helms v. Love, 41 Ind. 210.

record a confession of any debt to a creditor, made by the debtor personally, either with or without antecedent process, as the parties shall agree, and render judgment on such confession." A Vermont justice's judgment recited that the defendant appeared "and confessed and acknowledged himself indebted to Nicholas Henry, without antecedent process, in the sum of two hundred and thirty-four dollars' debt," whereupon judgment was rendered. This was held void in Massachusetts, because it failed to show that he agreed that his acknowledgment should be taken as a confession of judgment, or that judgment should be rendered thereon without antecedent process.<sup>1</sup> But what that learned court thought the defendant was doing, it did not say. He went before the Vermont justice and confessed and acknowledged himself to be indebted to Nicholas Henry, and waived process. The justice understood that to mean that he wished to confess judgment—as any person not skilled in the law would—and he entered one. But what did the defendant intend by such conduct? That was a question which the justice was called upon to decide; and his decision does not seem to me to be so lacking in color as to be void. A justice's record in Arkansas showed the title of a cause, and recited that the plaintiff appeared and filed a note, describing it, and that "the said defendant says that she is indebted to the said plaintiff in the sum of sixty dollars, and confesses that judgment may be rendered against her for said amount;" and a judgment for sixty dollars was rendered. This was held void; and also that parol evidence was admissible to show a want of jurisdiction.<sup>2</sup> If she was not satisfied with the construction put upon her language by the justice, she ought to have appealed. The Iowa statute in respect to the sale of land by an administrator provided that "such notice as the court may prescribe must be given to all the persons interested in such real estate," but a sale made on the written consent of the widow was held valid collaterally, although no notice was prescribed by the court or given to her.<sup>3</sup>

§ 426. **Waiver of service indorsed on complaint.**—An Indiana statute enacted that "The summons shall be served, either personally on the defendant, or by leaving a copy thereof at his usual or last place of residence. An acknowledgment on the back of

1. *Henry v. Estes*, 127 Mass. 474.

3. *Bacon v. Chase*, — Iowa —

2. *Smith v. Finley*, 52 Ark. 373 (12 S. W. R. 23).  
S. W. R. 782).



*process*, or the voluntary appearance of a defendant, is equivalent to service." The defendants indorsed on the *complaint* and signed the following: "We hereby enter an appearance to the foregoing action, and waive the issuing and service of process," on which a judgment was taken by default. This was held void for want of service.<sup>1</sup> In an earlier case in the same state, where the events occurred prior to the statute just quoted, and depended on the common law, a declaration was indorsed by the defendant thus: "I, Francis Comparet, . . . do confess the debt mentioned in the within declaration, to the amount of two thousand nine hundred and forty-two dollars, and desire that judgment be rendered against me to that amount. October 17, 1840. Francis Comparet." On this, in the absence of the defendant, a judgment was rendered, which was decided to be void.<sup>2</sup> The same ruling was made in Mississippi, where a judgment was founded on a waiver of service and consent that a case be docketed and judgment rendered, indorsed on the complaint and signed by the defendant;<sup>3</sup> but in Tennessee, where the maker of a note indorsed it: "A. D. Whitterspoon, Esquire: I confess judgment on this note. January 25, 1848. B. F. Williamson," and delivered it to the justice, who rendered a judgment for the amount of the note, it was held valid collaterally.<sup>4</sup> This Tennessee decision shows that the question involved is debatable at common law, because, after a careful consideration, it held the service good collaterally; that shows that the Mississippi and earlier Indiana cases are wrong, and also that the later Indiana case is wrong, because it was a question for the trial court to decide whether or not the mode of service provided by statute excluded the common-law mode. On principle, the Tennessee case is the sounder. It teaches the people that the courts are not to be trifled with on so barren a technicality as the particular paper in the case on which the defendant indorses his consent to waive service.

§ 427. **Waiver of service indorsed on summons.**—A statute of Indiana authorized actions to be commenced before justices of the peace "by agreement," and the entry of that fact upon the docket. A complaint was filed before a justice in that state, and

1. McCormack v. First National Bank, 53 Ind. 466.

2. Comparet v. Hanna, 34 Ind. 74, 76.

3. Hemphill v. Hemphill, 34 Miss. 68, 70.

4. Taliaferro v. Herring, 29 Tenn. (10 Humph.) 271.

a summons was issued, upon which the defendant indorsed: "I hereby acknowledge service of the within notice, waive jurisdiction of the court, and give consent to time and place of service, expressly waiving all informality. Done at Tama City, Iowa, this 19th day of April, 1878. (Signed) O. J. Stoddard." The summons, with the above indorsement, was delivered to the justice on the return day, by the plaintiff's attorney, and thereupon the justice copied the summons and return into the record, and rendered judgment against Stoddard. This was held void.<sup>1</sup> The word "agreement" in the statute was one that the justice was called upon to construe in that case; and his construction that the return presented constituted an agreement within the statute, was necessarily conclusive collaterally, or else the doctrines laid down in Chapter VI, *supra*, are wrong. So a judgment of a justice founded on a *letter* written to him by defendant requesting its rendition;<sup>2</sup> and a judgment of a probate court ordering the sale of land founded on an acceptance of service by an *infant*,<sup>3</sup> were held void. Where there is a purported admission of service indorsed on the summons, with a recital that service was duly proved,<sup>4</sup> although the record fails to show that proof of the genuineness of defendant's signature was made,<sup>5</sup> the judgment is not void; and the same ruling was made in Iowa where the acceptance of service was not "filed" by the clerk, as required by the statute.<sup>6</sup>

## DIVISION B.

PERSON APPEARING OR CONSENTING FOR DEFENDANT, UNAUTHORIZED  
IN LAW.

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| § 428. Corporation officer—Garnishee<br>—Infant, by attorney—In-<br>fant, by guardian. | § 429. Partner, confessing for firm. |
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§ 428. Corporation officer.—A confession of judgment in Pennsylvania against a bank by its president, when no law gave him such power, is not void, and creditors of the bank cannot attack it on the distribution of its assets.<sup>7</sup> But where the "manager"

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| 1. Penrose v. McKinzie, 116 Ind. 35<br>(18 N. E. R. 384). | accord, Draper v. Bryson, 17 Mo. 71<br>(57 Am. D. 257).          |
| 2. Evans v. Pierce, 3 Ill. (2 Scam.) 468.                 | 6. Stevenson v. Polk, 71 Iowa 278                                |
| 3. Finley v. Robertson, 17 S. C. 435,<br>439.             | (32 N. W. R. 340, 346).  |
| 4. Sharp v. Lumley, 34 Cal. 611, 616.                     | 7. Drexel's Appeal, 6 Pa. St. 272.                               |
| 5. Alderson v. Bell, 9 Cal. 315;                          | See section 421, page 422, note 5, and<br>430, page 436, note 1. |

of a corporation in Nebraska appeared for it and confessed a judgment without a warrant of attorney, when the statute in such cases required a personal appearance of the defendant or the production of a warrant executed by him, the judgment was held void.<sup>1</sup>

**GARNISHEE.**—The collateral effect of erroneous service upon a person garnished, or “trusteed” in New England, is a vexed question. Where a garnishee appears and answers without service, the judgment against him is held to be void, and no protection against a suit by his creditor, in Louisiana, Michigan and Missouri, because he is a mere custodian, with no right to “favor one party at the expense and injury of another;”<sup>2</sup> but in Florida, Illinois, Indiana, Vermont, Virginia and West Virginia, it is held that service on him is for his own benefit, which he can waive, and that to do so is not even erroneous.<sup>3</sup> The Michigan case cited was this: A justice of the peace had power to issue and to cause garnishment process to be served on the agents of foreign insurance companies in his county. In such a case, where the service was accepted and a disclosure made by an agent in another county, upon which a judgment was rendered and paid by the company, it was held to be no protection to the company when sued by an assignee of its creditor. When it is remembered that the creditor of the garnishee is served with process, and in court, the doctrine of the courts which hold that the appearance of the garnishee without service gives no jurisdiction, seems to be untenable. Such appearance causes no legal harm to the principal defendant. If the claim is just, he ought to pay it. If it is unjust, he has an opportunity to show that fact. But whether the doctrine is correct or not, the question is a debatable one, at least, and that is sufficient to shield the judgment collaterally.

**INFANT, BY ATTORNEY.**—A judgment taken against an infant, on an appearance for him by an attorney instead of a guardian *ad litem*, is erroneous, but not void.<sup>4</sup>

1. *Howell v. Gilt-Edge Mfg. Co.*, — Neb. — (49 N. W. R. 704).

2. *Schindler v. Smith, Bullins & Co.*, 18 La. Ann. 476, 479; *Hebel v. Amazon Ins. Co.*, 33 Mich. 400, 406; *Gates v. Tusten*, 89 Mo. 13, 22 (14 S. W. R. 827).

3. *Mercer v. Booby*, 6 Fla. 723;

*National Bank of Commerce v. Titworth*, 73 Ill. 591; *Whitney v. Lehmer*, 26 Ind. 503; *Cahoon v. Morgan*, 38 Vt. 234; *Pulliam v. Aler*, 15 Gratt. 54; *Joseph v. Pyle*, 2 W. Va. 449.

4. *Drake v. Hanshaw*, 47 Iowa 291; *Townsend v. Cox*, 45 Mo. 401, 403; *Turner v. Douglass*, 72 N. C. 127, 133;

INFANT, BY GUARDIAN.—Whether or not a judgment against an infant founded upon an appearance for him by his general guardian who is without lawful authority so to act, is void, or merely erroneous, the cases differ. It seems to me that the authority of the guardian is a question of law or of fact for the trial court to decide, and that its judgment is valid collaterally. A judgment against an infant upon an appearance and answer by his general guardian instead of a guardian *ad litem*, after due service on the infant,<sup>1</sup> or where such service was omitted in violation of the statute,<sup>2</sup> was held not void. A sensible decision was made in Florida, that a general guardian appearing for his ward was acting as a guardian *ad litem*;<sup>3</sup> but in an earlier case, the same court refused to give effect to a Georgia decree, because the general guardian had appeared and consented to it without the appointment of a special guardian *ad litem*.<sup>4</sup> In an administrator's proceeding to sell land in Illinois, where the statute required service, either personal or by publication, a judgment taken against an infant upon an acknowledgment of service by his guardian, was held void, and that the sale passed no title.<sup>5</sup> Decrees against infants without service, upon appearance of their general guardian were held void in Missouri;<sup>6</sup> but in New York, where a non-resident infant idiot was made a defendant in partition proceedings, and his non-resident guardian appeared without service and filed a petition showing those facts, and asked for the appointment of a guardian *ad litem*, which was done; and where an answer was prepared by him but not filed until after final decree, when it was filed *nunc pro tunc*, the decree was decided not to be void;<sup>7</sup> and the same ruling was made in Iowa where the infant appeared by attorney instead of guardian.<sup>8</sup> So a confession of judgment in Pennsylvania upon a note and warrant of attorney given by a lunatic, is not void.<sup>9</sup>

*Dictum* in Barber v. Graves, 18 Vt. 290, 292; Marshall v. Fisher, Jones, Law 111, 116.

1. Colt v. Colt, 111 U. S. 566 (4 S. C. R. 553).

2. Smith v. McDonald, 42 Cal. 484.

3. Price v. Winter, 15 Fla. 66, 104.

4. Braswell v. Downs, 11 Fla. 62, 71.

5. Clark v. Thompson, 47 Ill. 25 (95 Am. D. 457).

6. Gibson v. Chouteau's Heirs, 39 Mo. 536, 565; Campbell v. Laclede Gas Co., 84 Mo. 352, 366.

7. Rogers v. McLean, 34 N. Y. 536, reversing 31 Barb. 304, 311.

8. Milne v. Van Buskirk, 9 Iowa 558.

9. Weaver v. Brenner, — Pa. St. — (21 Atl. R. 1010).

§ 429. **Partner, confessing for firm.**—Concerning the collateral validity of judgments confessed by one partner for the firm, the cases differ. All or nearly all the cases view the question of the authority of the confessing partner as one of law, and base their decisions upon that; but that, in my opinion, is not the correct view. When such a judgment is assailed collaterally, it is not void if it can be upheld under any possible circumstances of *law or fact*. Whatever authority the law gave him, he had, of course; and whatever actual authority the other partners could possibly give him, he is conclusively presumed to have possessed when his action is assaulted collaterally. The same principle applies in respect to confessions by one joint debtor for the others. According to this doctrine, a confession for the firm by one member is never void, and so it has been held in Alabama, Connecticut and Pennsylvania.<sup>1</sup> In the Alabama and Connecticut cases, the decisions were based upon the presumption that the confessing partner proved his actual authority; but the contrary has been held in Indiana, New York and South Carolina;<sup>2</sup> and in the last case cited it was held that a creditor of the firm could treat the judgment as a nullity, even though the non-confessing partner did not object. And in Mississippi, where a forthcoming bond was executed by one partner, without authority, in the name of the firm, and a statutory judgment taken thereon, upon which the land of the other partner was sold, it was held that he might recover it in ejectment.<sup>3</sup> This question seems to be slightly confused in Indiana. In a collateral litigation concerning the validity of an order appointing a receiver, where the pleading alleged that the one copartner filed a complaint against the other for the appointment of a receiver for the firm, and at the same time filed an answer for the defendant signed by him, upon which the receiver was appointed, the appointment was decided to be void, and the judgment was reversed.<sup>4</sup> The pleading was then amended so as to show that the one copartner employed attorneys to prepare and file a petition for the appointment of a receiver for the firm, in the name of the other partner as

1. Elliott v. Holbrook, 33 Ala. 659, Pr. 229, 231; Mills v. Dickson, 6 Rich. 665; Dennison v. Hyde, 6 Conn. 508, 487.  
 516; Bank of Northern Liberties v. 3. Doe v. Tupper, 4 Sm. & M. 261  
 Munford, 3 Grant's (Pa.) Cases 232; (43 Am. D. 483).  
 Fobes v. Adams, 17 Phila. 222. 4. Pressley v. Harrison, 102 Ind. 14,  
 20 (1 N. E. R. 188).  
 2. Hopper v. Lucas, 86 Ind. 43, 52; Stoutenburgh v. Vandenburg, 7 How.

plaintiff, without his consent, against himself, as defendant, upon which the receiver was appointed; and on a second appeal, this was held not void.<sup>1</sup> Partners were sued for a partnership debt after the dissolution of the firm, and the local partner entered an appearance, without service, for the non-resident ex-partner, and judgment was taken. In an action on this judgment against the non-resident partner, in his own state, he was permitted to show that the local partner had no authority, and thus to defeat the action,<sup>2</sup> which was undoubtedly correct.

### DIVISION C.

PERSON APPEARING OR CONSENTING FOR DEFENDANT, UNAUTHORIZED IN FACT.—(See Title I, sections 451-463, *infra*).

§ 430. Agent or attorney, unauthorized—Non-resident defendant.

§ 431. Joint defendant or maker.  
432. Foreign and other state.

§ 430. Agent or attorney, unauthorized.—The court having the power to decide the cause presented, and the law being imperative that the plaintiff shall be given his rights, when a person offers to appear for the defendant, the court *must* determine his authority to do so. That is one of the necessary preliminary steps before the merits can be considered; and the power to decide the merits necessarily carries with it the power to decide all preliminary matters. On this point, the same as on all others, the court may err; but such error does not, in my opinion, make the proceeding void. The cases, however, differ. Thus, where there was no legal service before a justice of the peace in Michigan, but on the return day an unauthorized person appeared for the defendant and agreed to a continuance to another day, a judgment by default on that day is not void, and will protect the justice, because he “*acted judicially in determining the authority of the person to appear.*”<sup>3</sup> A judgment was rendered in Kentucky, and at the next term the attorneys filed a written stipulation that a new trial might be granted, which was done. It was held that the plaintiff could not show, collaterally, that his attorney had no authority, *as the court necessarily passed upon his authority at the time.*<sup>4</sup> In a collateral attack in a federal circuit

1. Pressley v. Lamb, 105 Ind. 171, 180 (4 N. E. R. 682).

2. Hall v. Lanning, 91 U. S. 160.

3. Morton v. Crane, 39 Mich. 526, 530. See section 451, *infra*.

4. Holbert v. Montgomery's Adm'r, 5 Dana 11, 16.

court upon a judgment of confession by a corporation, the court said: "Upon a confession of judgment by a corporation, the court in which the action is pending must of necessity judge of the authority of any person who may appear for the company in that behalf, whether it be an attorney at law or an agent of the company, and its judgment as to the right and authority of the person so appearing to bind the corporation must be conclusive in all other proceedings where the same judgment is drawn in question."<sup>1</sup> That a judgment against a defendant based solely upon an unauthorized appearance of an attorney, without service, is not void, has been held in Arkansas, Florida, Illinois, Indiana, Iowa, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Vermont and West Virginia.<sup>2</sup> In the Iowa case cited (*Macomber v. Peck*) the court said that such a judgment was void, but that laches in permitting it to stand would make a sale under it to an innocent purchaser valid. Evidently, the word "void" was used for "voidable," or is a misprint. But a later case in Illinois holds that such a judgment is void;<sup>3</sup> and *dicta* in Kansas cases are to the same effect.<sup>4</sup> In Louisiana, a firm of three members was sued, and the prayer was for them to be cited individually. An alleged agent appeared and confessed judgment for them. On a suit to revive, they were allowed to show that the agent only had authority to confess for the *firm* and not for the *members*, and thus to avoid the judgment.<sup>5</sup>

In an old case in New York, an attorney was authorized by the defendant to appear and confess judgment before a justice

1. *White v. Crow*, 17 Fed. R. 98, 101, Hallett, J. See section 428, *supra*.

2. *Denton v. Roddy*, 34 Ark. 642, 646; *Marks v. Matthews*, 50 Ark. 338 (7 S. W. R. 303); *Haddock v. Wright*, 25 Fla. 202 (5 S. R. 813); *Martin v. Judd*, 60 Ill. 78, 84; *Wiley v. Pratt*, 23 Ind. 628; *Macomber v. Peck*, 39 Iowa 351, 356; *Everett v. Warner Bank*, 58 N. H. 340; *Dickinson v. City of Trenton*, 33 N. J. Eq. (6 Stew.) 63, 65; *Reed v. Pratt*, 2 Hill 64; *Brown v. Nichols*, 42 N. Y. 26; *Vilas v. Railroad Co.*, 123 N. Y. 441, 456, 457 (25 N. E. R. 941); *Edwards v. Moore*, 99 N. C. 1 (5 S. E. R. 13); *Lessee of Pillsbury v. Dugan*, 9 O. 117 (34 Am. D. 427);

*Cyphert v. McClune*, 22 Pa. St. 195; *Hubbard v. Dubois*, 37 Vt. 94 (86 Am. D. 690); *Mussey v. White*, 58 Vt. 45 (3 Atl. R. 319); *Abbott and Co. v. Dutton*, 44 Vt. 546; *Wandling v. Straw*, 25 W. Va. 692, 705.

3. *Anderson v. Hawhe*, 115 Ill. 33 (3 N. E. R. 566).

4. *Reynolds v. Fleming*, 30 Kan. 106, 111—a direct proceeding to set aside the judgment. *Accord, dictum* in *First National Bank v. Dry Goods Co.*, 45 Kan. 510 (*First National Bank v. Wm. B. Grimes Dry Goods Co.*, 26 Pac. R. 56).

5. *Conery v. Rotchford*, 34 La. Ann. 520, 522, *affirming* 30 id. 692.



in a suit then pending. This suit was discontinued by the failure of the plaintiff to appear. Two months afterward, by consent of the plaintiff and the defendant's attorney, the case was taken up and the attorney confessed judgment. In an action on this judgment, it was held void for want of authority in the attorney.<sup>1</sup> In a suit on a judgment of the marine court of the city of New York—not a court of record—the defendant may show that the attorney who appeared for him was unauthorized, and thus defeat the action.<sup>2</sup> But where a justice of the peace in Pennsylvania entered the name of a person on his docket as bail for the stay of execution, it was held incompetent for him to show that the entry was made in his absence upon a forged letter purporting to be signed by him.<sup>3</sup> A judgment was duly rendered against a defendant in a justice's court in Texas. An unauthorized person carried the case to the district court, on *certiorari*, where judgment was rendered against the defendant. This judgment was held to be void, and its collection was restrained, because the defendant did not consent to the proceeding, although he knew of it at the time.<sup>4</sup> But in a late case in Iowa, where an alleged agent for the defendant appeared before a justice of the peace and consented to a continuance to a time beyond that authorized by law without such consent, it was decided that it could not be shown, collaterally, that he was not such agent.<sup>5</sup>

NON-RESIDENT DEFENDANT.—But in an earlier case in the same state, where a plaintiff filed a petition to foreclose a mortgage against a non-resident, and fraudulently procured an attorney to appear for him, and recovered an unjust decree upon which the land was sold to an innocent purchaser, it was held that he got no title.<sup>6</sup> But just why a domestic record should be void as against a non-resident, and valid against a resident, and why that does not violate fundamental principles by denying to residents and citizens "the equal protection of the law," no case has ever

1. *Hubbard v. Spencer*, 15 Johns. 244. that a judgment by consent of an attorney appearing without authority is

2. *Porter v. Bronson*, 29 How. Pr. 292. void.

3. *Clark v. M'Comman*, 7 Watts & Serg. 469.

4. *Glass v. Smith*, 66 Tex. 548 (2 S. W. R. 195); there is a *dictum* in *Parker v. Spencer*, 61 Tex. 155, 161, *infra*.

5. *Iowa Union Tel. Co. v. Boylan*, — Iowa — (48 N. W. R. 730).

6. *Harshey v. Blackmarr*, 20 Iowa 161, 182, *relying upon* *Shelton v. Tiffin*, 6 How. 163. See section 476,

yet explained in a very satisfactory manner. But precisely the same rulings as in the Iowa case last cited were made in Indiana<sup>1</sup> and Nebraska,<sup>2</sup> where the appearance of the attorney for the non-resident was simply unauthorized but not fraudulent, and in Georgia where a confession was made by an unauthorized agent;<sup>3</sup> but the latter court held that if the non-resident was actually present in the court room, he would be bound by the acknowledgment of service by an unauthorized person.<sup>4</sup>

§ 431. **Joint defendant or maker.**—Where one joint defendant appears for another not served, without authority, and confesses for him in Georgia;<sup>5</sup> or a judgment goes against him upon such appearance in Indiana,<sup>6</sup> the judgment is not void. The same ruling was made in New Jersey, where one joint maker of a note confessed a judgment for the other without authority.<sup>7</sup> But in California, where five persons had entered into a written contract, and four of them united in a written submission of the differences between them to arbitrators, stipulating that the court should render judgment on the award, a judgment so rendered against all was held void as to the one not signing.<sup>8</sup> As it was a question of fact whether the four had authority to submit for the fifth, I think the decision erroneous.

§ 432. **Foreign and other state.**—When a person is sued upon a judgment of another state or country, founded upon an appearance for him by an attorney, an answer that the attorney appeared without authority has been recognized as a defense in Connecticut, Illinois, Indiana, Iowa, Kansas, Massachusetts, Missouri, Nebraska, New Jersey, New York, and Virginia, and in the courts of the United States.<sup>9</sup> The leading case on this question is *Star-*

1. *Dictum* in *Wiley v. Pratt*, 23 Ind. 628, 632.

2. *Vorce v. Page*, 28 Neb. 294 (44 N. W. R. 452).

3. *Howell v. Gordon*, 40 Ga. 302.

4. *Hightower v. Williams*, 38 Ga. 597, 602.

5. *Jackson v. Tift*, 15 Ga. 557.

6. *Bagott v. Mullen*, 32 Ind. 332.

7. *Little v. Moore*, 4 N. J. L. (1 South.) 74.

8. *Gray v. Hawes*, 8 Cal. 562.

9. *Aldrich v. Kinney*, 4 Conn. 380 (10 Am. D. 151)—*A. D.* 1822; *Welch v. Sykes*, 8 Ill. 197 (44 Am. D. 689);

*Whittaker v. Murray*, 15 Ill. 293;

*Thompson v. Emmert*, 15 Ill. 415;

*Sherrard v. Nevius*, 2 Ind. 241 (52 Am. D. 508), *relying upon* *Shelton v.*

*Tiffin*, 6 How. 163; *Boylan v. Whitney*, 3 Ind. 140; *Baltzell v. Nosler*, 1

Iowa 588 (63 Am. D. 466); *Brinkman v. Shaffer*, 23 Kan. 528; *Hall v. Wil-*

*liams*, 6 Pick. 232 (17 Am. D. 356); *Phelps v. Brewer*, 9 Cush. 390 (57

Am. D. 56); *Gilman v. Gilman*, 126 Mass. 26 (30 Am. R. 646); *Wright*

*v. Andrews*, 130 Mass. 149; *Marx v. Fore*, 51 Mo. 69 (11 Am. R. 432);

*Napton v. Leaton*, 71 Mo. 358, 366;

buck v. Murray (5 Wend. 148), which was an action on a judgment of another state. The defendant answered, contradicting a recital of an appearance, that he never was served and did not appear. In answer to the contention that the record could not be contradicted, Mr. Justice Marcy said: "The plaintiffs in effect declare to the defendant: The paper declared on is a record, because it says you appeared, and you appeared because the paper is a record. This is reasoning in a circle. The appearance makes the record uncontrollable verity, and the record makes the appearance an unimpeachable fact. The fact which the defendant puts in issue is the validity of the record, and yet it is contended that he is estopped by the unimpeachable credit of that very record from disproving any one allegation contained in it." The high esteem in which this eminent jurist and statesman was held, induced the courts of New York, and those of some other states, to apply his reasoning without much consideration, not only to foreign records but also to domestic ones, which, in my opinion, overturns the very foundation of all judicial proceedings—namely, that a domestic record must be tried collaterally by inspection only, and that the only plea of fact allowed against is "*nul tiel record*." Contrary to these decisions is one in Kentucky.<sup>1</sup> Such an answer was held not good in Louisiana unless a meritorious defense were also shown.<sup>2</sup> Where such a judgment purported to be rendered upon confession by virtue of a power of attorney, an answer denying its execution was held good in Iowa and New York.<sup>3</sup> But in such a case, where the defendant had employed an attorney who appeared, and then withdrew, it was held that the withdrawal did not oust the jurisdiction, and that the judgment was not void because another attorney appeared and conducted the defense without authority.<sup>4</sup> But where a defendant who was in court in Ohio died during its pendency, and an

[*contra*, Baker v. Stonebraker, 34 Mo. 172;] Eaton v. Hasty, 6 Neb. 419 (29 Am. R. 365); Price v. Ward, 25 N. J. Law (1 Dutcher) 225; Starbuck v. Murray, 5 Wend. 148, 158; Shumway v. Stillman, 6 Wend. 447; Howard v. Smith, 42 How. Pr. 300; Kerr v. Kerr, 41 N. Y. 272, 274; Fisher v. March, 26 Gratt. 765, 778; Bowler v. Huston 30 Gratt. 266 (32 Am. R. 673); Graham v. Spencer, 14 Fed. R. 603; Citi-

zens' Bank v. Brooks, 23 id. 21; Snelton v. Tiffin, 6 How. 163, 186.

1. Roberts v. Caldwell, 5 Dana 512.

2. Walworth v. Henderson, 9 La. Ann. 339.

3. Hindman v. Mackall, 3 G. Greene 170; Hall v. Littleton, 13 N. Y. Supp. 323.

4. Wilson v. Hilliard, — (Pa.) — (5 Atl. R. 258).

administrator was appointed in Illinois, who appeared and defended the Ohio case, the judgment rendered against him was held void in Illinois upon the ground that he had no authority to appear in Ohio.<sup>1</sup> But that was a question the Ohio court was competent to decide, and I am unable even to detect error. The action did not abate by death; and whether or not the Ohio court should appoint a special administrator of its own to defend or should recognize the Illinois administrator as such, would seem a matter of practice entirely within its discretion. It was held in California that a divorce granted in Indiana solely upon the unauthorized appearance of an attorney for the defendant, was not void; but the point that the judgment was of another state was not noticed.<sup>2</sup>

## DIVISION D.

FRAUD, COLLUSION AND DURESS—APPEARANCE OR SERVICE MADE BY, OR  
LAWFUL SERVICE PREVENTED BY.

§ 433. Arbitration.

434. Divorce—Drunk.

§ 435. Privileged person—Decoyed into state—Extradited or fraudulently held—Foreign consul—General privilege.

§ 433. **Arbitration.**—Where a person was induced in Indiana to submit a disputed claim to arbitration through the fraud of the opposite party, which he did not discover until the award was made, this was held to be a defense against the award in a collateral action.<sup>3</sup> But one judge dissented, upon the ground that an award, like a judgment, was not void for fraud, which seems to me to be the sounder doctrine.

§ 434. **Divorce.**—It was said in Michigan that if the record showed that the defendant authorized an attorney to appear for him and waive process in order that his wife might procure a divorce, the decree would not be void.<sup>4</sup> A husband and wife were both domiciled in Ohio, and he commenced a suit against her for a divorce in the proper county, and caused service to be made by publication, as required by statute. The statute also required him to mail to her a copy of the petition and summons, unless he did not know her address and after due diligence was unable to discover it. He did know her address,

1. *Judy v. Kelley*, 11 Ill. 211 (50 Am. D. 455).

2. *Elliott v. Wohlfrom*, 55 Cal. 384.

3. *Rice v. Loomis*, 28 Ind. 399, 409—Elliott, J., *dissenting*.

4. *Dictum* in *People v. Dawell*, 25 Mich. 247, 249.

but filed his affidavit that he did not, and had used due diligence to discover it without avail, by reason of which no copy of the complaint or summons was mailed to her, and she did not learn of the suit until after the divorce was granted. He afterwards died in New York, and it was there held that the divorce was void, and that she was entitled to letters of administration as his widow, upon the ground that the affidavit which conferred jurisdiction was knowingly false.<sup>1</sup> The court could find no case exactly in point, which was not very strange, as the cases which hold the judgments of other states between their own citizens void on account of an error of fact, or because fraudulent, must be very few. Precisely the same question in regard to the validity of a domestic divorce was recently decided the other way in Kansas.<sup>2</sup> But a divorce was held to be void in Indiana because the wife, knowing that her husband had been a non-resident of the state for two years, procured the sheriff to make a return of service by copy left at his residence.<sup>3</sup> I think this case is unsound because it permitted a domestic record, fair on its face, to be contradicted collaterally by parol evidence. The opposite view was taken in Illinois, where a judgment was decided not to be void because the plaintiff bribed a deputy sheriff to make a false return of service.<sup>4</sup> So it was held in California that a judgment against a city could not be overturned collaterally, by showing that service was fraudulently and collusively made on an ex-mayor, who collusively employed an attorney to appear for the city.<sup>5</sup> A husband and wife were domiciled in Kentucky, but the wife, who was a lunatic, was kept by the husband in an asylum in another state. The law allowed a divorce to be granted for lunacy, and required a guardian *ad litem* to be appointed for the defendant. The husband applied for a divorce, and duly advertised for her as a non-resident. A guardian *ad litem* was duly appointed for her and made defense, and a divorce was granted to the husband. Afterwards he died, and the wife, by her next friend, brought a suit to recover dower. It was held that the divorce was void, and that she could recover.<sup>6</sup> The decision was put upon the ground that the wife was absent and

1. Stanton v. Crosby, 16 N. Y. Supr. (9 Hun) 370.

2. Larimer v. Knoyle, 43 Kan. 338 (23 Pac. R. 487).

3. Cavanaugh v. Smith, 84 Ind. 380, 383.

4. Rivard v. Gardner, 39 Ill. 125, 127.

5. Carpentier v. Oakland, 30 Cal. 439, 446, citing 1 Ch. Pl. 486.

6. Newcomb's Ex'rs v. Newcomb, 13 Bush 544 (26 Am. R. 222).

under the control of the husband, and had no power to appear if she had seen the warning order. It says that the fact of insanity made no difference; that if the wife had been sane and imprisoned by the husband, the decree would have been equally void. It also relies on the supposed fact that the time for a new trial, or an appeal, or for a motion to set aside the judgment had expired. This decision seems to me to be wrong. The service of the warning order on a lunatic either personally or constructively was a mere form of no benefit to her. If it had been served on her personally, some friend could have had a guardian *ad litem* appointed to defend for her; but that was, in fact, done, and a fair trial was had. There was no pretense that it could or would have been different if she had been personally present in court. The proceedings were regular on their face, and the court held them void on parol testimony. The court made another mistake in holding that her right to equitable relief was barred by lapse of time. An insane person cannot be guilty of laches; and a court of equity, where she had no guardian, would allow a guardian or next friend appointed at any future time, to open the original judgment and retry it on the merits. The supreme court of Illinois held that a divorce granted in that state to a plaintiff, who was then confined in an asylum in another state, would be set aside on her petition, on the ground that she was incapable of comprehending it at the time.<sup>1</sup> The court of appeals of Missouri held that a divorce obtained by the husband by preventing the wife from making a just defense, through duress and intimidation, was not void, and would bar an action by her for divorce and alimony in another court. The court said: "For fraud in obtaining the jurisdiction, relief can be obtained only in the court possessed of the original record."<sup>2</sup>

**DRUNK.**—One who causes his name to be entered on the record in Indiana as "replevin-bail" for the stay of an execution, which operates as a judgment confessed, cannot collaterally impeach the entry by showing that he was so drunk as to be unconscious.<sup>3</sup>

**§ 435. Privileged person — Decoyed into state — Extradited or Fraudulently held—Foreign consul—General privilege.**—A judgment is never void because the defendant was privileged from being

1. *Bradford v. Abend*, 89 Ill. 78 (31 Am. R. 67).

2. *DeGraw v. DeGraw*, 7 Mo. App. 121, 125, 126.

3. *Doe v. Harter*, 1 Ind. 427.

sued. In such a case, the supreme court of Maryland said: "Service of process on a privileged person is not void; it is treated as an irregularity even in cases where, under the process the party may be held to bail. It may be waived by a trial or confession of judgment; and this shows that it does not avoid the proceedings, for what is a nullity cannot be cured."<sup>1</sup> So, where a person is decoyed or enticed within the state and then served with process;<sup>2</sup> or fraudulently detained within the state until he can be served,<sup>3</sup> the proceedings are not void. A person was extradited for one crime, and without objection on his part put on trial for another which resulted in a mistrial, and he was held for a second trial, and then discharged on *habeas corpus*, on the ground that his imprisonment was void. Then a witness for him on his trial was indicted and convicted of perjury therein, and his defense was that the court had no jurisdiction of the cause wherein he testified, but it was held that the court did have jurisdiction, because the defendant in that case did not object.<sup>4</sup> A case in Iowa is sometimes cited as holding that, where one is decoyed into another state and there sued, the judgment is void, but it does not so hold. The case was this: A citizen of Iowa was enticed into another state and there sued, and he let judgment go by default. He was then sued on that judgment in Iowa, and it was held that he was not obliged to have the service quashed in the foreign state, but that he might make any equitable defense he had to the action in Iowa.<sup>5</sup> This was simply according him the same rights at home that a court of equity would have given him in the foreign state. The service being fraudulent to the plaintiff's knowledge, the rules of equity would permit him to move against the judgment at his convenience. But as the judgment on such service is not void, the defendant must show an equitable defense. Thus, where a New York judgment recovered on such service was sued upon in Pennsylvania, it was decided that an answer setting up the fraudulent service, but omitting to state that the claim was unjust, was bad.<sup>6</sup> A judgment against a

1. *Peters v. League*, 13 Md. 58 (71 Am. D. 622); *Marks v. Townsend*, 97 N. Y. 590, 596—defendant exempt because already arrested under another statute.

2. *Steele v. Bates*, 2 Aiken 338 (16 Am. D. 720).

3. *Ex parte Everts*, 2 Disney (O. Super. Ct.) 33, 37.

4. *Cordway v. State*, 25 Tex. App. 405 (8 S. W. R. 670).

5. *Dunlap v. Cody*, 31 Iowa 260 (7 Am. R. 129).

6. *Luckenback v. Anderson*, 47 Pa. St. 123.



foreign consul, who was privileged from suit, is not void.<sup>1</sup> As the defendant in the Texas case cited was held by an order of court it was a collateral assault on that order to release him on *habeas corpus*, and it was wrong to do so, in my opinion. The correct and direct method of procedure would have been a motion for a discharge addressed to the court that held him. A non-resident of Georgia, attending court in that state as a suitor, is privileged from suit. But if he is sued, and permits a judgment to go against him, it is not void.<sup>2</sup> A Missouri judgment by default against one who was fraudulently induced to go into that state for the purpose of obtaining service upon him, is not void in Arkansas.<sup>3</sup> A resident of Kentucky was entitled to exempt certain property. His creditor, in order that he might defeat the exemption, induced him to take it into Tennessee, where he sued him, and attached the property, and procured personal service and a judgment by default, and sold the property. The debtor then sued the creditor in Kentucky for the value of the property, and it was held that the Tennessee judgment was void, and that he could recover.<sup>4</sup> It was held in Virginia that service made on the defendant while in the military service of the confederate states was erroneous, but that the judgment was not void.<sup>5</sup>

## TITLE F.

## MODE OF SERVICE, WRONG.

- § 436. Copy of process, not certified—  
“Each defendant”—Indorsed  
with amount—Offered, but  
not read.
- 437. Copy of process, omitted.
- 438. Copy of process, mailing,  
omitted, or wrong.
- 439. Manner of making personal  
service—“Executed”—  
“Served”—“Summoned.”
- 440. Personal service out of state, in-  
stead of publication.

- § 441. Posting of notice instead of  
publication—Posting, defect-  
ive.
- 442. Publication instead of personal  
service—Publication instead  
of posting—Publication with-  
out personal service—Publi-  
cation without posting.
- 443. Reading instead of copy.
- 444. Substituted service by copy, in-  
stead of personal.
- 445. Summons instead of warrant.

§ 436. Copy of process, not certified.—A disregard of the statute by failing to certify that a copy of a justice's summons left at the

1. Hall v. Young, 3 Pick. 80 (15 Am. D. 180).

2. Thornton v. American Writing Machine Co., 83 Ga. 288 (9 S. E. R. 679).

3. Peel v. January, 35 Ark. 331 (37 Am. R. 27).

4. Wood v. Wood, 78 Ky. 624.

5. Terry v. Dickinson, 75 Va. 475; Turnbull v. Thompson, 27 Gratt. 306. See section 383, *supra*.

defendant's residence in Kansas is a true one,<sup>1</sup> or to certify the copy of the complaint delivered to defendant in California,<sup>2</sup> does not make the judgment by default void.

"EACH DEFENDANT."—Where the return was "executed by leaving copy with Ogden H. Whitman, Julia H. Whitman, Charles N. Whitman, this 14th day of September, 1853," without saying that a copy was left for each defendant, as required by the Illinois statute, and the finding was that "process has been duly served," the judgment was decided not to be void.<sup>3</sup>

INDORSED WITH AMOUNT.—A judgment is not void because the copy of the summons left for the defendant was not indorsed with the amount for which plaintiff would take judgment upon failure to answer.<sup>4</sup>

OFFERED, BUT NOT READ.—A copy of a summons was offered to defendant, which he refused to take. It was then thrown down at his feet instead of being read to him, and he neither picked it up nor read it. The person made return by affidavit that he had delivered a copy of the writ to the defendant, and judgment was taken by default, and suit was brought thereon in New Jersey, where it was held that the judgment of the trial court holding the service good could not be controverted collaterally.<sup>5</sup> But where the return upon a justice's summons in Michigan was: "I personally attempted to serve the within attachment on the defendant by reading the same and offering a copy to him at the house of Daniel Dean, but he ran away. I could not deliver a copy to him," which was duly signed and dated, the judgment was held void because it did not appear that he knew that the officer had a writ.<sup>6</sup> But it seems to me that this return will bear the construction that he did read the summons to defendant, but could not deliver a copy because he ran away. At least, its proper construction was a question for the justice, and an error committed by him ought not to make the judgment void.

§ 437. Copy of process, omitted.—The Iowa statute required service to be made by reading and delivering a copy of the summons, but on a collateral assault on a judgment because no copy

1. Friend v. Green, 43 Kan. 167 (23 Pac. R. 93).

2. Brown v. Lawson, 51 Cal. 615; *accord*, where there was a failure to deliver a copy of the petition. Thompson v. Chicago, S. F. and C. Ry. Co., — Mo. — (19 S. W. R. 77).

3. Whitman v. Fisher, 74 Ill. 147, 153.

4. Isaacs v. Price, 2 Dill. 347.

5. Jardine v. Reichert, 39 N. J. L. (10 Vroom) 165, 169.

6. Holden v. Ranney, 45 Mich. 399 (8 N. W. R. 78).

was delivered, the court said: "Where there is a service insufficient only in the manner of making it, a question of jurisdiction is raised which the court must decide, and if it does so erroneously, the judgment, though voidable, is binding until reversed and corrected on appeal."<sup>1</sup>

The Mississippi statute being the same as that of Iowa, a summons in a foreclosure suit was issued for a widow, minor children, and the administrator. The return was: "Executed, and copies of the within writ delivered to," the administrator and widow. In ejectment by the minors, it was held that this return meant that it was executed or read to all the defendants, and that copies were also given to the widow and administrator, and that the failure to give copies to the minors did not make the foreclosure void.<sup>2</sup>

So, where a Kansas statute required a copy of a writ of attachment to be left with the occupant of premises, it was held that the failure to do so did not make the proceeding void;<sup>3</sup> but the contrary was held in an early case in New York.<sup>4</sup> A failure to serve a copy of the complaint with the summons is erroneous in California and New York, but it does not make the judgment void.<sup>5</sup> The same ruling was made where the affidavit showed that a copy of the summons was served *on* the defendant instead of *delivered to* him.<sup>6</sup>

§ 438. Copy of process, mailing, omitted or wrong.—In order to obtain service upon non-residents, the statutes of several states require the affidavit of non-residence to state the post office address of the defendant, if known, and when the address is given require, in addition to publication, that a copy of the petition and summons be mailed to him. It has been held that the failure to mail copies,<sup>7</sup> or the mailing to a different place than that indicated in the affidavit,<sup>8</sup> makes the judgment void. In attachment proceedings against a non-resident, an Iowa record recited that

1. Myers v. Davis, 47 Iowa 325, 330.

2. Rigby v. Lefevre, 58 Miss. 639.

3. Wilkins v. Tourtelott, 28 Kan. 825, 835, *denying* Sharp v. Baird, 43 Cal. 577.

4. Wright v. Douglass, 3 Barb. 554, 574, and 10 Barb. 97, 109.

5. Sacramento Sav. Bank v. Spencer, 53 Cal. 737, 740; Foster v. Wood, 30 How. Pr. 284.

6. Drake v. Duvenick, 45 Cal. 455, 464.

7. McGahen v. Carr, 6 Iowa 331, 336; Hallett v. Richters, 13 How. Pr. 43, 45.

8. Smith v. Wells, 69 N. Y. 600; Beaupre v. Keefe, — Wis. — (48 N. W. R. 596).

summons had been returned "not found," and that publication had been made, giving the time and name of paper, and that default was entered by order of court. A sale on this judgment was held void because no proof was made to the court that a copy of the petition and notice had been mailed to the defendant. There was no recital to that effect.<sup>1</sup> So, an insolvent's discharge was decided to be void in New York because the record showed that the copy of the order to show cause against it was mailed to the creditors' "places of business" when the statute read "places of residence."<sup>2</sup> As this was not an original notice, I think the decision is wrong for reasons given in section —, *infra*.

§ 439. **Manner of making personal service—"Executed."**—The Mississippi statute required the return to show in what manner the service was made. Where the return was "executed," it was held to be informal but to present a question for the court to decide, and that the judgment thereon was not void;<sup>3</sup> but a personal judgment rendered by a justice of the peace on such a return was held void.<sup>4</sup> Why the justice was not as competent to construe the word "executed" as the circuit court was not made very clear. In a later case, a justice's record showed that a summons was issued for two defendants. The return was, "Executed this 11th day of December, 1882, by leaving a copy at their house of abode." The justice construed this to be a personal service on one of the defendants, and she sought to enjoin the judgment. The court said it was competent for him so to construe the return;<sup>5</sup> and, in an earlier case in the same court, where the return was, "executed in person, on Davis," the judgment against E. P. Davis was held not to be void.<sup>6</sup>

"SERVED."—The return on a New Jersey summons was "served," on which a judgment was rendered. This was held valid in Iowa.<sup>7</sup> In a later case in the same court, the return of the sheriff in a record from another state read: "I caused the same to be served," instead of, "I served this writ personally." This was held to raise a question for the original court to decide,

1. Hodson v. Tibbetts, 16 Iowa 97.

2. Billings v. Pickert, 1 N. Y. St. 606.

Rep'r. 70.

3. Campbell v. Hays, 41 Miss. 561; 675.

Crizer v. Gorren, id. 563.

4. Heirmann v. Stricklin, 60 Miss. 234.

5. Fleming v. Nunn, 61 Miss. 603,

606.

6. Christian v. O'Neal, 46 Miss. 669,

675.

7. Latterett v. Cook, 1 Iowa 1 (63

Am. D. 428); accord, Smith v. Bradley, 14 Miss. (6 Sm. & M.) 485, 492—a domestic judgment.

and that an erroneous decision did not make the judgment void.<sup>1</sup> But where the Illinois statute required service to be made by copy delivered, a decree based on a return of "Served this writ on the within-named" defendants, without saying how, was held void.<sup>2</sup> This case I conceive to be wrong. Where the constable's return was "Served by reading," not saying "to defendant," the judgment was held not void.<sup>3</sup> In the last Indiana case cited, the court said: "In deciding upon the sufficiency of the service of the writ, the justice determined a fact essential to jurisdiction, and this decision cannot be overthrown upon a collateral attack." A New York statute required service of a justice's summons to be made by a copy of the writ delivered to some member of the defendant's family, at his last place of abode, with information given of its contents. A judgment based on a return of "served by copy, March 13, 1847," was decided not to be void.<sup>4</sup>

"SUMMONED."—A return in a Pennsylvania record sued upon in Iowa, read: "Summoned per copy, October 24, 1838—so answers Wm. Glover, sheriff." This was decided to be valid.<sup>5</sup>

- § 440. **Personal service out of state instead of publication.**—The United States bankruptcy statute permitted one or more members of a partnership to file a petition in bankruptcy for the firm, without the consent of the other members, but it required personal service to be made on the non-consenting members if they could be found in the district, and if not, it required service by publication. Two members of a firm filed a petition against the wish of the third, and notice was issued to him and served personally outside of the district, instead of by publication, and the court held this to be good service and adjudged them all bankrupts. The assignee brought a suit in Illinois to set aside a mortgage made by the non-consenting partner. The supreme court of Illinois held the order adjudicating him a bankrupt void because the service was personal outside of the district instead of by publication.<sup>6</sup> But this identical adjudication was held not void by the supreme court of Iowa, upon the ground that, under

1. Schee v. La Grange, 78 Iowa 101 (42 N. W. R. 616, 618).

2. Botsford v. O'Connor, 57 Ill. 72, 77.

3. Pardon v. Dwire, 23 Ill. 572 (523); Boker v. Chapline, 12 Iowa 204; Pressler v. Turner, 57 Ind. 56; Hume v. Conduitt, 76 Ind. 598, 601.

4. Foster v. Hazen, 12 Barb. 547, 551.

5. Hart v. Cummins, 1 Iowa 564, 566.

6. Isett v. Stuart, 80 Ill. 404, 407; (22 Am. R. 194).

the bankruptcy act, personal service could be made wherever the defendant could be "found."<sup>1</sup> It seems to me that the true construction of the statute was a question for the bankrupt court. As the personal service gave actual notice, which was more certain than publication, it is difficult to see upon what ground even error could be based.

§ 441. *Posting of notice instead of publication.*—The Alabama statute concerning the final settlement of administrators, authorized notices to be posted in case no newspaper was published in the county. A final settlement was held void where service was made by posting, and the record did not show that no newspaper was published in the county.<sup>2</sup> The statute of Missouri authorized a justice of the peace, in cases where the property of defendant was *attached* and no personal service made, to notify the defendant by posting notices. In a case where a debtor of defendant was *garnished*, service was made by posting, and judgment rendered against the garnishee. This judgment was held void in Indiana.<sup>3</sup> I cannot agree with these cases. Posting was authorized by law in certain cases. Because the court allowed it in an improper one, did not destroy the jurisdiction within the principles considered in Chapter VII, *supra*. It also seems to me that the Missouri justice was called upon to decide whether or not the word "attached" in the statute included "garnished," and that his decision was conclusive within the principles considered in Chapter VI, *supra*.

POSTING, DEFECTIVE.—Where notices were posted in *two* instead of *four* places, an order made by the board of county commissioners laying out a road, was held void.<sup>4</sup> This was analogous to publication for too short a time, and the case is wrong, in my opinion. The statute of Pennsylvania in reference to judicial sales of land to enforce assessments, provided that the owners of lands should furnish descriptions to the city engineer and that suits should be brought against the owner by name, and that service should be made on him "as in case of a summons, *scire facias*, or other appropriate writ." It seems that when the owner could not be found, the law authorized a copy of the writ to be posted on the land. On a *scire facias* in such a case, the

1. Stuart v. Hines, 33 Iowa 60, 102.

2. Bruce's Ex'r v. Strickland's Adm'r, 47 Ala. 192, 198.

3. Terre Haute & Indianapolis R. Co. v. Baker, 122 Ind. 433, 440 (24 N. E. R. 83).

4. Doody v. Vaughn, 7 Neb. 28, 31.

sheriff posted a copy on the premises and returned "*nihil*" as to the defendant. On a second writ he returned, "Property posted on former writ, and *nihil* as to defendant," whereas the law required him to post a copy of the second writ also. On this service a decree and sale were had, and the owner brought ejectment and showed that he resided in the same ward and received no notice of the proceedings. The court below held that he could not recover, but the supreme court reversed the case, holding the decree void, apparently because the sheriff did not find the defendant, and also because the second writ was not posted.<sup>1</sup> I think this case wrong because the sheriff's return of "*nihil*" could not be contradicted, and for the reason just given in regard to the posting. In an old case in the same state, it was held that a judgment in *scire facias*, after one return of *nihil* instead of two, was not void.<sup>2</sup>

§ 442. **Publication instead of personal service.**—A Nebraska statute authorized the *court* to confirm a tax sale after service by publication, but it only authorized the *judge* in vacation to do so after "ten days' notice to the adverse party." A confirmation by the judge in vacation on service by publication was held void.<sup>3</sup> It was a question for the judge whether "ten days' notice" meant personal or constructive.

**PUBLICATION INSTEAD OF POSTING.**—To give notice of the pendency of a petition to compel an administrator to execute a deed, the Georgia statute required posting in public places, but a decree in such a case after notice by publication was held not void.<sup>4</sup>

**PUBLICATION WITHOUT PERSONAL SERVICE.**—The Iowa statute concerning proceedings by guardians to sell land, required both publication and personal notice to the wards; and an order to sell made on publication alone without personal service, was held void.<sup>5</sup>

**PUBLICATION WITHOUT POSTING.**—The same ruling was made in Mississippi concerning an administrator's order to sell, made on publication without posting notices, when the statute required both.<sup>6</sup>

1. *Ferguson v. Quinn*, 123 Pa. St. 337 (16 Atl. R. 844).

2. *Lessee of Heister v. Fortner*, 2 Binney 40.

3. *Armstrong v. Middlestadt*, 22 Neb. 711 (36 N. W. R. 151).

4. *Peterman v. Watkins*, 19 Ga. 153.

5. *Rankin v. Miller*, 43 Iowa 11, 21.

See section 405, *supra*.

6. *Kempe v. Pintard*, 32 Miss. 324, 327; *Planters' Bank v. Johnson*, 15 Miss. (7 Sm. & M.) 449.



§ 443. **Reading instead of copy.**—The Iowa statute required service on minors to be made by delivering a copy of the notice and petition. In a collateral attack on the judgment in such a case because the service was made by reading only, it was said that the court was called upon to inspect the return and determine its sufficiency, and that its decision, although erroneous, was not void.<sup>1</sup> The same ruling was made in Maine in reference to the discharge of a poor debtor by a justice of the peace on service by reading instead of by copy delivered,<sup>2</sup> while precisely the contrary was held in Massachusetts.<sup>3</sup> It seems to me that the Massachusetts case is wrong, on principle, and that a bad reason was given for the Maine decision. The statute of Maine concerning poor debtors made it the express duty of the justices to inspect the return of service and determine its sufficiency, before proceeding by default; and the court bases all its decisions on such matters on that statute. But that statute added nothing to the law. The trial court has the whole record before it, and it necessarily has judicial knowledge of its contents. To contend that this statute added anything to the duty or power of the court would be like contending that a statute commanding the court to examine the law before deciding what it was, imposed new duties. That judicial proceedings founded upon service by reading when the statute required a copy to be delivered, are void, has been held in Illinois, Ohio and Texas, and by a circuit court of the United States,<sup>4</sup> although the supreme court of Ohio admitted that the objection was merely technical and would probably entirely defeat a just claim. It seems a little strange that so able a court did not say that no one could defeat a just claim in Ohio on a bald technicality that did not and could not mislead him; that he might have had the service quashed at the plaintiff's cost, but not having done that, the point was waived forever.

§ 444. **Substituted service by copy instead of personal.**—A return in Mississippi showing service by copy left with a member of the family, but not showing such member to be white, or that the defendant could not be found, as required by statute, does not

1. *Bunce v. Bunce*, 59 Iowa 533 (13 N. W. R. 705).

2. *Hanson v. Dyer*, 17 Me. 96.

3. *Young v. Capen*, 7 Metc. 287.

4. *Grand Tower, etc., Co. v. Schirmer*, 64 Ill. 106, 108; *Robbins v. Clemmens*, 41 O. St. 285; *McCoy v. Crawford*, 9 Tex. 353; *Hart v. Gray*, 3 Sumner 339.

make the judgment void.<sup>1</sup> The statute of the same state authorized substituted service by copy left with a member of the family at the usual place of abode of defendant, in cases where he could not be found in the county. The return of service in attachment proceedings showed a copy left with defendant's wife, but did not show that it was at his usual place of abode, or that he could not be found. This was held not to avoid the judgment collaterally.<sup>2</sup> A statute of Iowa required a return of "not found" in order to authorize service by copy at defendant's residence. It was held that a return of service by copy with no return of "not found" did not make the judgment void—being merely an error of the court.<sup>3</sup> But in a later case in the same court, the return showed a copy left with a member of defendant's family over 14 years of age. It was defective in not showing that the defendant could not be found, or at whose house it was left, or the name of the person with whom left, or that it was at the defendant's usual place of residence. Judgment was rendered by default. This was in 1856. In 1866, the plaintiff sold and assigned the judgment to other persons, who, in 1873, sued the defendant thereon. He was allowed to defeat this action by swearing that he never got the copy of the summons, and that he never knew of the suit until 1870. The court said this was a *direct attack* by him. The court also said that, as no adjudication of the sufficiency of the return appeared in the record, it could not be presumed that the court had adjudicated it. It also said: "The real question here, then, is not did the court decide that it had jurisdiction, but did the court in fact have jurisdiction."<sup>4</sup> As legal and equitable remedies are merged by the code of Iowa, if the pleadings and testimony showed that there was neither service nor notice, that a meritorious defense existed, and that the assignees were not *bona fide* purchasers, a case for equitable relief was made out. But the court was wrong in deciding that there was no adjudication concerning the sufficiency of the return because none appeared of record. Assuming to act was an adjudication of the right to do so—that all preliminaries were regular and valid. See section 62, *supra*. The statute of Michigan concerning attachment proceedings before justices authorized service by copy left at the last place of residence "if the defendant cannot be found in the county." The return

1. Taylor v. Webb, 54 Miss. 36.

2. Allen v. Dicken, 63 Miss. 91.

3. Bonsall v. Isett, 14 Iowa 309, 312.

4. Clark v. Little, 41 Iowa 497, 500.

showed a copy left at the last place of residence, but did not show that the defendant could not be found. This was held to make the judgment void.<sup>1</sup> In this case the defendant appeared and moved to dismiss the writ for want of proper service, which was denied. He was then allowed to treat the judgment as void and to recover in trespass. But the court certainly had power to pass upon his motion, and the decision on it was not void, however erroneous, and necessarily barred all collateral assaults on the judgment. See section 453, page 462, *infra*. A statute authorized service to be made by copy delivered to some member of his family at his dwelling place if the defendant could not be found. The return of the sheriff showed due service by copy but did not show that defendant could not be found. The record recited due proof of service, but the judgment was held void.<sup>2</sup>

§ 445. **Summons instead of warrant.**—In actions to recover a penalty before a justice of the peace, the New York statute required the defendant to be brought before the court on a warrant; instead of that a summons was served and judgment taken thereon, which was held void.<sup>3</sup> This decision seems to me to be wrong.

#### TITLE G AND SECTION 446.

##### PAPER IN WHICH PUBLICATION IS MADE, UNLAWFUL—GERMAN—ORDER FOR PUBLICATION VARIED FROM—SUNDAY.

§ 446. **Paper in which publication is made, unlawful.**—A statute required notices to be published in some paper of the county, “having a *bona fide* circulation therein, which shall have been regularly published in said county for the period of one month next before the date of the first publication,” and provided that proof should be made by the affidavit of certain designated persons which “shall be the evidence of the publication thereof.” It was held that a judgment founded on proof made by a person not designated, and which failed to show that the paper had a *bona fide* circulation in the county, or how long it had been published therein, was void.<sup>4</sup> But where the proof

1. Michels v. Stork, 44 Mich. 2 (5 N. W. R. 1034).

2. Settlemier v. Sullivan, 97 U. S. 444—three judges *dissenting*.

3. Bigelow v. Stearns, 19 Johns. 39 (10 Am. D. 189).

4. Cissell v. Pulaski County, 3 McCrary, 446, 448 (10 Fed. R. 891)—Caldwell and McCrary, JJ.

of publication did not state the county, or that it was made in a weekly newspaper, the judgment was decided not to be void.<sup>1</sup>

GERMAN.—It was error for the board of county commissioners in Indiana to grant a license to sell intoxicating liquors upon publication of notice in English in a German paper, but the grant was held not void.<sup>2</sup>

ORDER FOR PUBLICATION VARIED FROM.—Where the order was to publish in the "Milwaukee Sentinel," the judgment was not void because the publication was in the "Milwaukee Daily Sentinel."<sup>3</sup> Publication for a non-resident was directed by a New Jersey court to be made in "The Long Branch Times;" but that paper having ceased, it was published in "The Long Branch News," upon which a decree *pro confesso* was entered. The statute required the court to designate the paper, and provided that such a decree might be entered on proof of publication being made to the satisfaction of the chancellor. This decree was held not void, on the ground that the sufficiency of the publication was a question for the chancellor to decide.<sup>4</sup> A Texas statute required the governor of the state to designate the papers in which notices to non-residents should be published. An order was made for publication in the "San Antonio Express." It was held that the presumption was that the "San Antonio Express" was a newspaper, and that it had been so designated by the governor.<sup>5</sup> But in California, where the last publication was made in a paper other than that designated by the court, because the one so designated had ceased to exist, the judgment was held void.<sup>6</sup> But it would seem that the ratification by the court was fully equivalent to a prior order, and I think the case wrong on principle.

SUNDAY.—Where the statute required publication to be made in "a newspaper," it was held that publication in a Sunday paper, if erroneous, did not make the judgment void.<sup>7</sup>

1. Gregg v. Thompson, 17 Iowa 107.

5. Oswald v. Kampmann, 28 Fed. R.

2. Hornaday v. State, 43 Ind. 306, 36—Turner, J.  
309.

6. Townsend v. Tallant, 33 Cal. 45

3. Melms v. Pfister, 59 Wis. 186 (18 (91 Am. D. 617).  
N. W. R. 255).

7. Eason v. Witcofskey, 29 S. C. 239

4. McCahill v. Equitable Life Ass. (7 S. E. R. 291).  
Society, 26 N. J. Eq. (11 C. E. Green)  
531, 534.

## TITLE H.

## PERSON MAKING SERVICE, IMPROPER.

§ 447. Principle involved in title H— <i>De facto</i> officer—Special illustrations.	§ 449. Deputy—Return in name of— Plaintiff serves his own writ —Private person, serving.
448. Deputy—None in fact.	450. Special constable.

§ 447. Principle involved in title H.—When service is alleged to have been made by one claiming to be the proper officer, or his deputy, the court must determine as a question of fact whether or not he was the actual officer or deputy, and that determination is necessarily conclusive collaterally. When the return shows that the service was made by a person not authorized by law, various principles may be involved. If by any possible construction of the statute, or comparison of old and new laws, the service by that person might be sufficient, the decision in favor of the service is conclusive collaterally, within the principles considered in Chapter VI, *supra*. If the service could be made by that person in a proper case, but not in the case before the court, the decision holding it valid is conclusive collaterally, within the principles considered in Chapter VII, *supra*. But when the return shows that the service was made by a person who could not possibly be authorized to do so, I do not think the proceeding ought to be held void. The court has the same power to determine the actual truth of the return as it has to determine the right of a person to appear for the defendant, or the identity of the person offering to appear as the defendant. Hence the action of the court on such service is conclusive that it was, in fact, made as alleged, and that the defendant has had actual notice of the pendency of the suit, and of the issuing of the process. The only defect is that the process was read to him, or a copy delivered to him by the wrong person; and the law furnishes an adequate direct remedy by a motion to quash or dismiss the service at the cost of the plaintiff. But if he will not take the trouble to call the attention of the court to the point, and by an oversight which does him no actual harm, a judgment is rendered against him, it does not seem to me that public policy requires it to be held void.

DE FACTO OFFICER.—A judgment is not void because the

service was made by an officer *de facto*—one acting after his time had expired,<sup>1</sup> and the like.

**SPECIAL ILLUSTRATIONS.**—In a late case in California, it was held that proceedings in contempt were not void because the warrant was not served by the proper person, nor at the proper time or place, nor because the warrant itself was irregular and void.<sup>2</sup> In an old case in Vermont, two of the defendants resided in another county, and the return of service on them was made by the sheriff of the home county that he had served the writ in the other county “by the hand of Ozias Fuller.” The judgment was held not void, the court saying that it could not “be impeached in this collateral way.”<sup>3</sup> A justice’s record in Indiana showed that process was issued to “Wm. Snyder, marshal.” A marshal had no power to serve process from a justice. The record did not show any return of service, but recited that “the summons was duly served” at the proper time, etc. The recital, in the absence of the papers, was held conclusive, and the judgment not void.<sup>4</sup> A *capias* in Illinois was directed to any constable, but the defendant was arrested thereon by the marshal of a city, and he was released on special bail. Judgment was rendered against the defendant, and by virtue of the statute, execution thereon was issued against the special bail, who sought to enjoin its levy, and it was held that he could do so because the arrest was by the wrong officer.<sup>5</sup> So in Texas, where process was directed to the sheriff of one county by a justice of the peace, and served by the sheriff of another county, the judgment was held void.<sup>6</sup>

**§ 448. Deputy—None in fact.**—A poor debtor’s notice in Massachusetts was issued from county N to county S where the creditor resided, and by the return appeared to have been duly served by a deputy sheriff of S county, and the debtor was discharged by default. In a suit on the recognizance, the creditor was permitted to show that the person who made the service was not a deputy sheriff of S county, and thus avoid the discharge.<sup>7</sup> So in an early case in Vermont, where the record showed that

1. *Petersilea v. Stone*, 119 Mass. 465 (20 Am. R. 335); *Gradnigo v. Moore*, 10 La. Ann. 670.

2. *Ex parte Ah Men*, 77 Cal. 198 (19 Pac. R. 380).

3. *Tappan v. Nutting*, *Brayton* (Vt.) 137, 139.

4. *Strohmier v. Stumph*, 1 Wilson (Ind. Super. Ct.) 304.

5. *Hickey v. Forristal*, 49 Ill. 255.

6. *Witt v. Kaufman*, 25 Tex. Supp. 384.

7. *Henshaw v. Savil*, 114 Mass. 74.

the defendant had been arrested on a writ of attachment by a person duly deputed as a constable, he was allowed to show by parol, in trespass for false imprisonment, that the name of the person was not in the deputation at the time the arrest was made.<sup>1</sup> These last two cases permitted records regular on their face to be contradicted by evidence *aliunde*, and overturn the very foundations of all judicial proceedings unless the principles laid down in Chapter XII, *infra*, are wholly erroneous. The Vermont case in so far as the alleged constable was concerned, was correct, but the Massachusetts case, I conceive to be wholly wrong.

§ 449. Deputy—Return in name of.—That the judgment is void when the record shows a return of service in the name of a deputy, instead of in the name of the officer by the deputy, has been held in California;<sup>2</sup> but the contrary was held in North Carolina and by a circuit court of the United States.<sup>3</sup> A judgment was held void in Oregon because the return was made by a “deputy constable” when no such officer was known to the law.<sup>4</sup>

PLAINTIFF SERVES HIS OWN WRIT.—A judgment is erroneous, but not void in New York because the summons was served by the plaintiff, when the statute authorized it to be done by a private person.<sup>5</sup> But where a sheriff was also an administrator, and brought suit as such, and served the summons, the judgment was held valid collaterally in North Carolina,<sup>6</sup> and void in Kentucky.<sup>7</sup> So, a judgment in favor of a constable in Michigan is not void because he served the summons;<sup>8</sup> and where the statute provided that a summons might be served by any person not a party to the action, the judgment is not void because the service was made by a silent partner of the plaintiff.<sup>9</sup>

PRIVATE PERSON SERVING.—Where a private person was deputed to make service in North Carolina, when no statute so authorized,<sup>10</sup> and in Michigan when he was not legally deputed,<sup>11</sup> the

1. Beebe v. Steel, 2 Vt. 314.

2. Rowley v. Howard, 23 Cal. 401.

3. Brickhouse v. Sutton, 99 N. C. 103 (5 S. E. R. 380); Hill v. Gordon, 45 Fed. R. 276.

4. Prickett v. Cleek, 13 Or. 415 (11 Pac. R. 49):

5. Hunter v. Lester, 18 How. Pr. 347; Myers v. Overton, 4 E. D. Smith, 428.

6. Overton v. Cranford, 7 Jones' Law 415 (78 Am. D. 244).

7. Knott v. Jarboe, 1 Met. (Ky.) 504.

8. Parmalee v. Loomis, 24 Mich. 242.

9. Owens v. Gotzian, 4 Dill. 436.

10. McKee v. Angel, 90 N. C. 60.

11. King v. Bates, 80 Mich. 367 (45 N. W. R. 147).



judgments of justices were held to be void ; and in the latter case it was also decided that the justice could not amend the deputation when his record was offered in evidence in the circuit court. The statute of Tennessee authorized a justice to appoint a private person to serve a summons upon an affidavit that no officer was at hand and "the business is urgent." But where such an appointment was made by virtue of an affidavit which omitted the clause in quotation marks, the judgment was held to be valid collaterally.<sup>1</sup>

§ 450. *Special constable.*—The Indiana statute provided that "when a special constable is appointed, the process shall be issued to him by name." A warrant in a criminal case was issued to a person as special constable, but not addressed to him by name, upon which the defendant was arrested and brought before the justice, where he waived an examination and was bound over to the circuit court, in which court he voluntarily appeared and tendered a recognizance for his appearance at the trial, which was accepted and he was released. He failed to appear, and his recognizance was forfeited and suit brought thereon, and the defense was that the whole proceeding was void because the original warrant was not addressed to the special constable by name. The supreme court in a *dictum* concerning the doings before the justice, said: "A justice of the peace cannot acquire jurisdiction of a person accused of crime upon an illegal arrest made under color of a void warrant ;" but, in speaking of the effect of his appearance and tendering a recognizance in the circuit court, it said : "It then became necessary for the court to determine whether it had jurisdiction to receive the bail proffered. The question of jurisdiction was, therefore, one for determination, and, as it was determined, the correctness of that decision cannot be impeached in this collateral manner. It has been again and again decided that the judgment of an *inferior* court upon its own right to take jurisdiction cannot be collaterally questioned ; and there is much stronger reason for applying the rule to courts of general superior jurisdiction." <sup>2</sup> I conceive the *dictum* in this case to be wrong. The warrant, however irregular, gave the justice an actual or *de facto* jurisdiction over the person of the defendant, which would not be void collaterally, according to the cases considered in section 383,

1. Illinois Central R. Co. v. Brooks,  
—Tenn. — (16 S. W. R. 77).

2. State v. Wenzel, 77 Ind. 428, 431,  
436.

*supra*. In an earlier Indiana case, an oral appointment of a special constable to serve process was held to make the judgment void when the statute required it to be made in writing on the docket;<sup>1</sup> and in another case, where a justice issued a warrant to a private person with no pretense of appointing him a special constable, upon which the defendant was arrested, tried and fined, the whole proceeding was held void, and the justice and all others concerned trespassers.<sup>2</sup> The North Carolina statute required that when an execution from a justice should be levied on land, a return should be made to the county court, and notice given defendant to appear and show cause why a sale should not be ordered. All this was done, and a sale ordered. This was held not void in ejectment because the constable who served the process before the justice was not properly appointed by the justices.<sup>3</sup>

## TITLE I.

PERSON SERVED OR NOT SERVED, OR PERSON ACCEPTING SERVICE—  
ERRORS, CONCERNING.(See sections 430-432, *supra*).

§ 451. Acceptance of service by agent or attorney.	§ 457. "Designated person."
452. "Agent" — "Known agent" — "Managing agent" — "Station agent."	458. Father, mother or guardian, defective service, upon.
453. Agent of foreign corporation—Agency, adjudicated.	459. Father, mother or guardian, failure to serve—Near relatives.
454. Attorney in fact.	460. Guardian served, but minor not served.
455. Corporation officer, wrong one served.	461. Plaintiff, service made on, for defendant.
456. Creditors, not all served.	

§ 451. **Acceptance of service by agent or attorney.**—An acceptance of service in North Carolina was signed "J. B. Blount, guardian of J. B. & W. T. Muse, per Thomas M. Blount." In a collateral attack upon the proceedings by the wards, it was held that the court, either expressly or impliedly, decided that Thomas M. Blount was authorized to accept service for the guardian, and that his signature was genuine, and that its decision, however erroneous, could not be thus assailed;<sup>4</sup> and it was held in California

1. Benninghoof v. Finney, 22 Ind. 101.

2. Dietrichs v. Shaw, 43 Ind. 175.

3. Burke v. Elliott, 4 Ired. Law 355, 359 (42 Am. D. 142).

4. Den v. Albertson, 3 Dev. Law 241 (22 Am. D. 719); see section 430, *supra*.

one of general jurisdiction, the presumption was in its favor, even though its record had been entirely silent as to service. But because it was a foreign judgment, the defendant could contradict the record as to service by parol evidence; and, of course, the plaintiff could sustain it by the same kind of evidence.

**AGENCY ADJUDICATED.**—A Virginia insurance company was sued in Louisiana, and service was made on an alleged agent, and default taken. Four days afterwards the company entered a special appearance and pleaded in abatement to the jurisdiction, on the ground that the person served was not its agent, but the court decided to the contrary and rendered judgment. This was held to conclude the company from showing that such person was not its agent when sued on the judgment in the federal court in Virginia.<sup>1</sup>

**§ 454. Attorney in fact.**—A mortgage sued upon in Indiana was executed by an attorney in fact, and in a suit to foreclose it, the sheriff made a return of service on the attorney in fact, and a decree was rendered by default. The plaintiff brought a new suit to foreclose and the defendant relied on the first foreclosure, but the court held it void, partly because the whole record showed the defendant to have been a non-resident.<sup>2</sup> But it seems to me that whether or not service on the attorney in fact who executed the mortgage was good, was a question of law for the trial court to decide, and that the fact of non-residence was of no concern. There is also a *dictum* in California that a judgment founded on service upon an attorney in fact is void.<sup>3</sup>

**§ 455. Corporation officer—Wrong one served.**—Where the statute requires service upon a corporation to be made upon a designated official or person, and the record or return shows that it was made upon another official or person, the judgment is held void in Kentucky, Missouri, Texas and Virginia, and by the Supreme Court of the United States in a case depending on the Virginia statute,<sup>4</sup> and the contrary is held in Alabama.<sup>5</sup> And in such cases, where the return or record shows the service

1. *Moch v. Virginia Fire and Marine Ins. Co.*, 4 Hughes 61 (10 Fed. R. 696). *Dana* 214, 217; *Cloud v. Inhabitants of Pierce City*, 86 Mo. 357, 365; *Galveston, etc., Ry. Co. v. Wave*, 74 Tex.

2. *Woodhull v. Freeman*, 21 Ind. 229. 47 (11 S. W. R. 918); *Fairfax v. City of Alexandria*, 28 Gratt. 16, 28; *Alexandria v. Fairfax*, 95 U. S. 774.

3. *Dictum* in *Drake v. Duvenick*, 45 Cal. 455, 465.

4. *De Wolf v. Mallett's Adm'r*, 3 S. R. 44).

5. *Lehman v. Glenn*, 87 Ala. 618 (6

to have been made upon the proper person or official, that this can be contradicted in a collateral proceeding so as to show the judgment void, is held in Connecticut, Iowa, Kansas and New Jersey,<sup>1</sup> and the contrary is held in New York.<sup>2</sup> Where the statute required service on a town to be made on two officers,<sup>3</sup> or on a defunct railroad to be made on all the trustees,<sup>4</sup> a judgment founded on service made on a lesser number was held void. I do not agree with the last two cases.

§ 456. **Creditors, not all served.**—Where the Massachusetts statute, as construed by the supreme court, required notice of the desire of a poor debtor to take the oath for relief, to be served on all the creditors, even when they were partners, a discharge granted after service on only one partner creditor was held void.<sup>5</sup>

§ 457. **"Designated person."**—A New York statute required service on an infant to be made not only on the infant, but by a copy delivered to a person designated by the order of the court. A failure to follow the latter part of the statute was held to make the decree void, notwithstanding service on the infant and an appointment of a guardian *ad litem* at his request.<sup>6</sup>

§ 458. **Father, mother or guardian, defective service upon.**—The Mississippi statute concerning the final settlement of administrators, required a citation to the adult heirs and the guardians of minors. A citation was issued to the minors themselves, and to "Elizabeth Curry and her husband." Elizabeth Curry was one of the adult heirs, and her husband was the guardian of the minors, although not so designated in the citation. It was held that the service of this citation on all the parties was not sufficient to bring the minors into court, because Curry was not designated as guardian, but merely as husband of one of the adult heirs; and that the order approving the final report and discharging the administrator was void.<sup>7</sup> But precisely the

1. Raymond v. Rockland Co., 40 Conn. 401, 405; State Ins. Co. v. Waterhouse, 78 Iowa 674 (43 N. W. R. 611; *dictum* in Farmers' Ins. Co. v. Highsmith, 44 Iowa 330, 333; Chambers v. Bridge Manufactory, 16 Kan. 270; Jones v. Manganese Iron Ore Co. — N. J. Eq. — (3 Atl. R. 517).

2. New York and Erie R. R. Co. v. Purdy, 18 Barb. 574, 577.

3. *Dictum* in Mariner v. Town of Waterloo, 75 Wis. 438 (44 N. W. R. 512).

4. Witherspoon v. Texas-Pacific R. Co., 48 Tex. 309, 318.

5. Putnam v. Longley, 11 Pick. 487.

6. Moulton v. Moulton, 54 N. Y. Supr. (47 Hun) 606.

7. Dogan v. Brown, 44 Miss. 235, 245.

contrary was decided in Iowa. Where infants lived with their mother in that state and had no guardian, service on them and on the mother gave jurisdiction; and where a return showed service on the infants and on a person who was the mother but did not show that she stood in that relation, it was held that this defect did not make the judgment void.<sup>1</sup> So, where the statute of Kentucky required service for all infants under fourteen years of age to be made on the father, and the return showed that a copy of the summons was delivered to the father for three of the infant defendants, failing to name a fourth which was not yet christened, the judgment was decided to be valid collaterally, against the unchristened infant;<sup>2</sup> and where the father was also a defendant with his infant child, and the return was, "Executed on all . . . defendants . . . by delivering them true copies of the within"—failing to show service on the father, as such, the same ruling was made.<sup>3</sup>

§ 459. **Father, mother or guardian—Failure to serve.**—Where the statute required service on minors to be made personally on them, and also on their father, mother or guardian, a judgment rendered on personal service on them alone, was held void;<sup>4</sup> but in such a case in North Carolina where the record showed service on the minors, but failed to show affirmatively that they had no mother, a recital of due service of process was held to be an adjudication that they had no mother and to shield the judgment from collateral attack.<sup>5</sup> The recital added nothing to the force of the judgment, as action was an assertion and adjudication that the facts proven authorized it. A mortgage was foreclosed in Wisconsin against a woman and her two infant children, and service was made by delivering a copy of the summons to each defendant. The statute required a copy to be delivered to the minor and also a copy to the mother for it. The decree was held void because of the failure to deliver the extra (and useless) copy to the mother.<sup>6</sup> A judgment against a lunatic

1. *Moomey v. Maas*, 22 Iowa 380 (392); *Cox v. Story*, 80 Ky. 64, 67; (92 Am. D. 395); *accord*, *Tharp v. Bellamy v. Guhl*, 62 How. Pr. 460. *Brenneman*, 41 Iowa 251.

5. *Cocks v. Simmons*, 57 Miss. 183.

2. *Donaldson v. Stone* (Ky.), 11 S. W. R. 462.

3. *Cheatham v. Whitman*, 86 Ky. 60, 67—admitting that *Mullins v. Sparks*, 43 Miss. 129, and *Smith v. Pattison*, 45 id. 619, were *contra*, but declining to follow them.

4. *Whitney v. Porter*, 23 Ill. 445

6. *Helms v. Chadbourne*, 45 Wis. 60, 67—admitting that *Mullins v. Sparks*, 43 Miss. 129, and *Smith v. Pattison*, 45 id. 619, were *contra*, but declining to follow them.

under guardianship, after service on him and without service on the committee, is not void.<sup>1</sup> In a proceeding by an executor to sell land in North Carolina, the statute required a guardian *ad litem* to be appointed for the infant heirs, and required notice to be served on him ; still, where the infants were served, and a guardian *ad litem* appointed who was not notified and did not answer, the order to sell was held to be proof against a collateral assault.<sup>2</sup> But, where a Kentucky statute required service on infants under fourteen years of age to be made on the father, if alive, a decree for the sale of the infant's land upon a return of service made on its custodian, not mentioning the father, was held to be void.<sup>3</sup> When the judgment was attacked collaterally, it was not void if right by possibility ; and if the father was dead, which was possible, the service was good.

NEAR RELATIVES.—A Mississippi statute provided that, upon the application of a guardian to sell land, “ a summons shall issue for at least three of the near relatives of the minor, if there be any in the state.” Where this summons was omitted,<sup>4</sup> or was issued and served on one only,<sup>5</sup> the sale was held void. I think these cases unsound.

§ 460. Guardian served, but minor not served.—The Missouri statute concerning partition provided that, instead of process, a copy of the petition with notice of its intended presentment in court should be served on all parties interested who had not joined as plaintiffs, and on the guardians of minors. In a case where the copy was served on the guardian of a minor but not on the minor also, the decree was held void—the court construing the statute to mean that the service on the guardian was to be in addition to service on the minor.<sup>6</sup> But that was a question for the trial court.

§ 461. Plaintiff, service made on, for defendant.—A judgment taken against a corporation in Illinois, after service made on an officer of the corporation who was one of the plaintiffs, was held

1. Allison v. Taylor, 6 Dana 87 (32 Am. D. 68); Sternbergh v. Schoolcraft, 2 Barb. 153, 154; Crippen v. Culver, 13 Barb. 424, 427.

2. Coffin v. Cook, 106 N. C. 376 (11 S. E. R. 371).

3. Jenkins v. Crofton's Adm'r, — Ky. — (9 S. W. R. 406).

C. A.—30

4. Fitzpatrick v. Beal, 62 Miss. 244, 248; Stampely v. King, 51 id. 728.

5. Temple v. Hammock, 52 Miss. 360, 366.

6. Campbell v. Laclede Gas. Co., 84 Mo. 352, 367.

void,<sup>1</sup> although the plaintiff was a director and a proper person to receive service by the words of the statute.<sup>2</sup> Lorenzo E. Wolfer brought suit against Hemmer and Hemmer, infants, alleging that he had furnished money to pay off a deed of trust on their land, and asking to be subrogated to the rights of the trustee, and for a foreclosure. After service, apparently regular, and an answer by a guardian *ad litem*, the relief prayed for was granted, and a sale of the land was made, and Wolfer became the purchaser and got a deed, and sold to an innocent purchaser. In ejectment by Hemmer and Hemmer, the return of service was read which showed that a copy was left at the usual place of residence of the defendants with "Lorenzo E. Wolfer;" but neither the return nor the record showed that the person with whom the copy was left was the plaintiff. They were then permitted to show that they were stepchildren of Wolfer and resided with him, and that the copy was left with him, and upon those facts to recover the land.<sup>3</sup> It seems to me that this case is wrong from top to bottom. In an old case in Pennsylvania, a justice's record showed that service was duly made by copy. Judgment was rendered, execution was issued and goods were seized. The defendants brought replevin, and sought to show that the copy of the summons was left at the house where the plaintiff then resided, after they, the defendants, had moved away; but the evidence was held incompetent to contradict the record.<sup>4</sup>

## TITLE J.

## PLACE OF SERVICE OR ACCEPTANCE OF SERVICE—ERRORS CONCERNING.

§ 462. "Abode"—"Last and Usual"—  
—"Usual."

463. County—District.

464. "Most public places"—Office  
instead of residence—Store  
instead of house.

§ 465. Omission to state place of service in the return.

466. State, acceptance of service outside of.

467. State, service made on president of corporation, outside of.

§ 462. "Abode"—"Last and usual"—"Usual."—Where the Missouri statute authorized substituted service to be made by a copy of the writ left at the "usual place of abode" of defendant, the

1. St. Louis and Sandoval Coal and M. Co. v. Sandoval Coal and M. Co., 111 Ill. 32, 38.

2. Coal and Min. Co. v. Edwards, 103 Ill. 472.

3. Hemmer v. Wolfer, 124 Ill. 435 (11 N. E. R. 885 and 16 id. 652).

4. Tarbox v. Hays, 6 Watts 398 (31 Am. D. 478).



judgment was held void because the return showed that the copy was left at his "last usual place of abode,"<sup>1</sup> or at his "usual place of abode, when in the city of Cape Girardeau,"<sup>2</sup> or at his "usual place of abode in said county;"<sup>3</sup> but precisely the contrary was held in Wisconsin, where it was decided that a return of service by copy left at defendant's "last and usual place of abode in Clark county," would not be construed to mean that he had a place of abode in some other county so as to avoid the judgment collaterally.<sup>4</sup> The construction of the return was a question for the trial court within the principles considered in Chapter VI, *supra*. So, where the return failed to show that the copy was left at defendant's "usual place of abode," the judgments were held void in Massachusetts and Missouri,<sup>5</sup> but the contrary was held in Arkansas and Iowa.<sup>6</sup> The Iowa supreme court said: "The circuit court, before rendering the judgment, was required to examine the return, and to pass upon the question of its sufficiency. Its determination that it was sufficient was an adjudication of that question, which, however erroneous, could, under the well-settled rule, be corrected only on appeal." Where the return showed a copy left at the last and usual place of abode "known to me," the judgment was held void in Massachusetts.<sup>7</sup> How the officer could leave it at any other place, the court did not say. But where the New Hampshire statute required the copy to be left at the defendant's "last and usual place of abode," the judgment was decided not to be void because the return showed that it was left at his "dwelling house," as the two phrases were held to be equivalent in meaning.<sup>8</sup> The South Carolina statute required the affidavit to state "the time and place of service." Where the return simply showed that the defendant was served by a deputy sheriff of Fairfield county "at her residence," it was presumed to be in Fairfield county, and sufficient collaterally.<sup>9</sup>

1. *Madison County Bank v. Suman*, 279; *Laney v. Garbee*, — Mo. — (16 79 Mo. 527, 530. See section 477. S. W. R. 831).

2. *Brown v. Langlois*, 70 Mo. 226.

3. *Swift v. Meyers*, 37 Fed. R. 37.

4. *Healey v. Butler*, 66 Wis. 9 (27 N. W. R. 822).

5. *Fitzgerald v. Salentine*, 10 Metc. 436; *Hewitt v. Weatherby*, 57 Mo. 276,

6. *Byers v. Fowler*, 12 Ark. 218 (54 Am. D. 271); *Ketchum v. White*, 72 Iowa 193 (33 N. W. R. 627).

7. *Smith v. Randell*, 1 Allen 456.

8. *Bruce v. Cloutman*, 45 N. H. 37 (84 Am. D. 111).

9. *Lyles v. Haskell*, — S. C. — (14 S. E. R. 829, 831).

§ 463. **County—District.**—Where a justice's record failed to show that the service was made in the county;<sup>1</sup> and where the record of a proceeding in bankruptcy in a federal court showed that service was made outside of the district,<sup>2</sup> the judgments were held void. But the supreme court of Iowa decided to the contrary on the latter point.<sup>3</sup>

§ 464. **"Most public places."**—Where the Michigan statute concerning guardian's sales, required notices to be posted in the three "most public places" in the township, and the affidavit showed a posting in three "public places," the sale was held to be valid collaterally.<sup>4</sup> The Colorado statute, in respect to notices of attachments before justices, was precisely like the Michigan statute just referred to. In a collateral attack on such a proceeding, where the justice's files were lost, the testimony of a witness that one copy was posted on the courthouse door, one on the stairs leading to the justice's office, and one on a corral fence in front of a livery stable, was held not to show the judgment to be void.<sup>5</sup> But where the copy was left at the *office* instead of the *residence*;<sup>6</sup> or at the *store* of the person with whom the person to be served was boarding, instead of at his *house*,<sup>7</sup> the judgment was held void.

§ 465. **Omission to state place of service in the return.**—Where the Minnesota statute authorized the defendant to accept service by an admission in writing on the summons, giving the time and place, an acceptance signed by defendant with the initials of his first name and his surname in full, failing to give the place, was decided not to make the judgment void, because those matters were questions of law for the trial court to decide.<sup>8</sup> The same ruling on such a statute was made in New York;<sup>9</sup> and, where the sheriff's return in California failed to show the place of service, the judgment was held to be erroneous, but not void.<sup>10</sup>

§ 466. **State, acceptance of service outside of.**—An acceptance of per-

1. Mallett v. Uncle Sam, etc., Co., 1 Nev. 188 (90 Am. D. 484); *contra*, Crowley v. Wallace, 12 Mo. 143, 147.

2. Isett v. Stuart, 80 Ill. 404 (22 Am. R. 194).

3. Stuart v. Hines, 33 Iowa, 60, 102.

4. Dexter v. Cranston, 41 Mich. 448, 451 (2 N. W. R. 674).

5. Conway v. John, — Colo. — (23 Pac. R. 170).

6. Matter of Lockwood, 32 How. Pr. 437.

7. Madison v. Rano, 4 N. H. 79, 84.

8. Kipp v. Fullerton, 4 Minn. 473, 480.

9. White v. Bogart, 73 N. Y. 256; Maples v. Mackey, 89 N. Y. 146.

10. Pico v. Sunol, 6 Cal. 294.

sonal service by indorsement on the summons made out of the state—the statute not providing for such service—in a divorce case in Wisconsin, does not give the court jurisdiction, and the decree is void ;<sup>1</sup> but the contrary was held in California, where the acceptance was made in another state by an attorney for the defendant.<sup>2</sup> I think the California case right and the Wisconsin case wrong. It was held in Iowa, that a stranger could not show that an acceptance of service indorsed on the summons was made outside of the state in order to defeat the judgment collaterally.<sup>3</sup>

§ 467. **State, service made on president of corporation, outside of.**—A Virginia statute provided that suits against a corporation should be brought in the county where its chief office was, and that service should be made on its president. Such a suit was brought in the proper county, and personal service made on its president at the place of his residence out of the state, and a personal judgment taken against the corporation by default. After much comparison and construction of statutes, the court of appeals reached the conclusion that the law did not authorize service on the president outside of the state, and held the judgment void.<sup>4</sup> The trial court had to decide the same question, and was competent in law to do so, and an erroneous conclusion did not make its decision void.

1. *Weatherbee v. Weatherbee*, 20 Wis. 499.

2. *Foote v. Richmond*, 42 Cal. 439.

3. *Wright v. Mahaffey*, 76 Iowa 96 (40 N. W. R. 112).

4. *Dillard v. Central Virginia, Iron Co.*, 82 Va. 734 (1 S. E. R. 124).

## TITLE K.

## PROOF OF SERVICE IN DOMESTIC COURT, FALSE IN FACT.

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| <p>§ 468. Scope of, and principle involved in, title K—Inferior courts, generally—Superior courts, generally—Receiver of partnership.</p> <p>469. Attachment proceedings.</p> <p>470. Bankruptcy, insolvency and poor-debtor's proceedings—Concealed debtor.</p> <p>471. Confession.</p> <p>472. Copy of process served, contradicted by return.</p> <p>473. Criminal proceedings.</p> <p>474. Eluding service—Identity of defendant.</p> | <p>§ 475. Infants—Married women.</p> <p>476. Non-resident contradicting return.</p> <p>477. Place, residence or location, contradiction of record, concerning.</p> <p>478. Probate proceedings.</p> <p>479. Publication, contradicting.</p> <p>480. Recital contradicts return.</p> <p>481. Replevin—<i>Scire facias</i>.</p> <p>482. Time of event or service—Attaching creditors—Service too short—Sunday.</p> |
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§ 468. Scope of, and principle involved in, title K.—Many cases involving the collateral validity of judgments depending upon proof of service which was false in fact will be found in titles I and J, sections 451 to 467, *supra*, where errors of law and fact are treated promiscuously. On principle, a judicial proceeding is never void because the proof of service is false in fact. Such proof is a necessary part of the record, and to permit its verity to be questioned collaterally overturns the very foundations of all judicial proceedings. In relation to the contradiction of records on questions of fact, I refer to Chapters XII and XIII, sections 526 to 659, *infra*, where the cases are considered in detail. The scope of this title covers all cases where there has been an attempt to contradict the recitals or proofs of service of a domestic court, either inferior or superior, in proceedings either civil or criminal.

INFERIOR COURTS, GENERALLY.—A recital upon the record of a magistrate that the defendant appeared and entered an oral plea;<sup>1</sup> or that a summons was issued and returned duly served without copying it on his docket;<sup>2</sup> or that, on a day named, the summons was returned "Served by reading, John Richardson, const.;"<sup>3</sup> or that defendant was served;<sup>4</sup> or that it "appearing that due

1. Facey v. Fuller, 13 Mich. 527, 532.

2. *Dictum* in Willoughby v. Dewey, 54 Ill. 266, 268.

3. Hume v. Conduitt, 76 Ind. 598.

4. Baird v. Campbell, 4 Watts & S. 191; Long v. Bienneman, 59 Tex. 210, 212; Watkins v. Davis, 61 Tex. 414; Heck v. Martin, 75 Tex. 469 (13 S. W. R. 51); Eastman v. Waterman, 26 Vt. 494, 500.

service was had" on the defendant,<sup>1</sup> cannot be contradicted collaterally. It is also held in Alabama,<sup>2</sup> Missouri,<sup>3</sup> New York<sup>4</sup> and North Carolina,<sup>5</sup> that a return of service before a justice of the peace is conclusive collaterally, while the contrary is held in Arkansas concerning a recital of service.<sup>6</sup> And in North Carolina, where a justice signed a person's name to a stay of execution, which was a judgment confessed, in his absence and without his authority, it was held void, even though the person afterwards assented to it;<sup>7</sup> and the same ruling was made where the justice thus acted by the previous authority of the person whose name was signed, on the ground that the justice was an unfit organ to sign and acknowledge at the same time.<sup>8</sup> I cannot agree with the last three cases.

SUPERIOR COURTS, GENERALLY.—That a recital of service in the record of a domestic court of superior or general jurisdiction is conclusive in a collateral action, is held in California,<sup>9</sup> Connecticut,<sup>10</sup> Illinois,<sup>11</sup> Missouri,<sup>12</sup> Tennessee,<sup>13</sup> Texas and Virginia,<sup>14</sup> and in a circuit court of the United States;<sup>15</sup> while the contrary has been decided in California,<sup>16</sup> New York<sup>17</sup> and Wisconsin.<sup>18</sup> The point under consideration is somewhat confused in Illinois. The supreme court of that state first held that the recital of service in a suit in partition was not conclusive, collaterally,<sup>19</sup> and this decision was followed by the Supreme Court of the United

1. *Payne v. Taylor*, 34 Ill. App. 491.
2. *Lightsey v. Harris*, 20 Ala. 409.
3. *Jeffries v. Wright*, 51 Mo. 215, 220.
4. *Putnam v. Man*, 3 Wend. 202 (20 Am. D. 686); *Allen v. Martin*, 10 Wend. 300.
5. *Jones v. Judkins*, 4 Dev. & Bat. Law 454 (34 Am. D. 392).
6. *Jones v. Terry*, 43 Ark. 230.
7. *Rickman v. Williams*, 10 Ired. Law 126.
8. *Weaver v. Parish*, 1 Hawks 319.
9. *Eitel v. Foote*, 39 Cal. 439; *Harnish v. Bramer*, 71 Cal. 155 (11 Pac. R. 888).
10. *Dictum* in *Bridgeport Savings Bank v. Eldredge*, 28 Conn. 556, 562 (73 Am. D. 688).
11. *Osgood v. Blackmore*, 59 Ill. 261, 265.
12. *Rumfelt v. O'Brien*, 57 Mo. 569, 572; *Lingo v. Burford*, — Mo. — (18 S. W. R. 1081).
13. *Harris v. McClanahan*, 79 Tenn. (11 Lea) 181, 185.
14. *Letney v. Marshall*, 79 Tex. 513 (15 S. W. R. 586); *Marrow v. Brinkley*, 85 Va. 55 (6 S. E. R. 605, 608).
15. *Doe ex dem Sargeant v. State Bank*, 4 McLean 339, 346; *Colt v. Colt*, 48 Fed. R. 385—*Blatchford, J.*
16. *McMinn v. Whelan*, 27 Cal. 300, 314.
17. *Adams v. Saratoga and Washington R. R. Co.*, 10 N. Y. 328; *Ferguson v. Crawford*, 70 N. Y. 253, and 86 N. Y. 609.
18. *Pollard v. Wegener*, 13 Wis. 569, 573, *relying upon* *Starbuck v. Murray*, 5 Wend. 148.
19. *Goudy v. Hall*, 30 Ill. 109.

States in applying the law of that state;<sup>1</sup> but in a later case, where the record recited that two writs had been returned "nihil," it was decided that this recital was not overthrown by proof that only one could be found;<sup>2</sup> and then followed the case first cited holding that the recital could not be contradicted. In the California case last cited, it was said: "It is a fundamental rule that no court can acquire jurisdiction by the mere assertion of it or by deciding that it has it."<sup>3</sup> And in the New York case last cited, a junior mortgagee, in foreclosing his mortgage, was permitted to contradict the recitals contained in the record of foreclosure of the senior mortgage showing service upon and appearance by himself.<sup>4</sup> These contrary cases are all founded on the opinion of Mr. Justice Marcy in *Starbuck v. Murray* (5 Wend. 148), wherein, in speaking of a record from another state, he used the language quoted above from the California case. Of course his opinion did not, and could not, apply to a domestic judgment. The New York court had previously decided that a return of service before a justice of the peace was conclusive collaterally, and it afterwards adhered to the same doctrine, as is shown above.<sup>5</sup> It sounds plausible to say that "No court can acquire jurisdiction by the mere assertion of it," but it is not sound in law. The fallacy lies in confusing *law* with *right*. A judgment rendered after the utmost care, at the end of an impartial trial, may not be *right*, and it may unjustly sweep away the life, liberty or property of the defendant; yet it is *lawful*, and a just and rightful foundation for the titles of others; and, although wrong in itself, it is *lawful and right collaterally*. The question of service or appearance must be decided by the court in each case, as a question of fact; and it is the *allegation* of the plaintiff that he has caused service to be made, or the defendant to appear, which gives the jurisdiction to hear his evidence on that point. So, it may be laid down as a general rule that a return of service in a domestic superior court, cannot be contradicted collaterally.<sup>6</sup>

RECEIVER OF PARTNERSHIP.—An Indiana sheriff attempted

1. *Secrist v. Green*, 3 Wall. 744.

2. *Miller v. Handy*, 40 Ill. 448, 451.

3. *McMinn v. Whelan*, 27 Cal. 300,

314.

4. *Ferguson v. Crawford*, *supra*.

5. *Putnam v. Man*, 3 Wend. 202 (20 Am. D. 686); *Allen v. Martin*, 10 Wend. 300.

6. *Sergeant v. George*, 5 Litt. 198; *Taylor v. Lewis*, 2 J. J. Marsh. 400; *United States v. Gayle*, 45 Fed. R. 107.

to take goods from the receiver of a co-partnership on the ground that his appointment was void. In the collateral action between the sheriff and the receiver, the pleadings showed that the partner plaintiff, Alfred Harrison, went to the clerk's office in vacation and filed a petition against his co-partner, John C. S. Harrison, alleging the insolvency of the firm, and praying for the appointment of a receiver; and that with his petition he also filed a paper reading: "Alfred Harrison v. John C. S. Harrison. The defendant, John C. S. Harrison, admits the allegations of the complaint herein to be true. John C. S. Harrison;" that these papers were immediately presented to the judge at chambers, who made an order placing the firm assets in the hands of the sheriff, and took the question of the appointment of a receiver under advisement; that on the next day, still in vacation, the plaintiff, Alfred, filed a supplemental petition asking that their individual property be also placed in the hands of a receiver, and at the same time filed an answer of consent signed by the defendant, John; that upon these papers alone, without process or service or any other appearance for the defendant, the judge appointed a receiver. On these allegations, the supreme court held that the defendant, John, was never in court, that the appearance entered for him by the plaintiff was null, and that the order appointing a receiver was void, and the judgment in the collateral action was reversed.<sup>1</sup> The pleadings were then amended so as to show that the partners agreed that an amicable suit should be commenced, and a receiver appointed, and that in order to carry out the same, the defendant, John, employed an attorney to commence a suit in the name of Alfred, as plaintiff, against himself as defendant; that the defendant's attorney filed the complaint and prepared the defendant's answer, which he signed and filed, in person, and that thereupon a receiver was appointed. This was decided not to be void, upon the ground, apparently, that the authority of the attorney who filed the complaint to act for the plaintiff, could not be questioned collaterally.<sup>2</sup> The point seems to have been overlooked that the pleadings alleged what was done, in fact, instead of what the record showed, and that they were necessarily bad on their face because of the implied admission that the record was regular on its face. The

1. *Pressley v. Harrison*, 102 Ind. 14, 21 (1 N. E. R. 188).

2. *Pressley v. Lamb*, 105 Ind. 171, 180 (4 N. E. R. 682)—*Mitchell, J., dissenting.*



two opinions show that it appeared by the record that Alfred, by his attorney, filed a complaint against John, and that John appeared in person and filed an answer, and the rule is older than Lord Coke that this record was "absolute verity" when assailed collaterally. No court has enforced the rule more vigorously than the supreme court of Indiana, that the only plea admissible against a record, is one showing not actual facts but what the record itself contains, as is shown in sections 855-857, *infra*.

§ 469. **Attachment proceedings.**—The return of a constable in Michigan that he had attached the goods of the defendant cannot be contradicted in an action of trover for their conversion, by proof that he did not attach at all, but merely took and delivered them to the plaintiff in the attachment, and that the whole proceeding was a fraudulent scheme to get the goods.<sup>1</sup> A writ of attachment in Wisconsin ran against Sturgis and Ellis, upon which the sheriff attached land as the property of Ellis, and it was duly sold as his. The purchaser brought a suit against Sturgis and Ellis to quiet title, and Sturgis offered to show that he owned the land, and claimed that the sale was void. It was held that the court got jurisdiction by the levy, and that the mistake of the sheriff in returning it as belonging to Ellis did not affect the fact, and that the title of Sturgis passed by the sale.<sup>2</sup> A better reason for the decision was that Sturgis and Ellis were both parties, and if Sturgis did or Ellis did not own the land, then was the proper time to make that defense. The attempt of Sturgis was to impeach the judgment collaterally on a question of fact.

**CONCEALED DEBTOR.**—A creditor in South Carolina proceeded against his debtor as a concealed person by domestic attachment, and recovered judgment. This was held void in favor of another creditor who proceeded by foreign attachment, upon proof that the debtor was, in fact, out of the state.<sup>3</sup>

§ 470. **Bankruptcy, insolvency and poor-debtor's proceedings.**—It is held in Maine<sup>4</sup> and Vermont,<sup>5</sup> that a recital in a justice's record of due notice to the creditor of the intention of a poor debtor to apply for a discharge, is conclusive on the creditor, collat-

1. Michels v. Stork, 52 Mich. 260 (17 N. W. R. 833, 835)—Campbell, J., *dissenting*.

2. Robertson v. Kinkhead, 26 Wis. 560.

3. Lindau v. Arnold, 4 Strobb. Law 290.

4. Baker v. Holmes, 27 Me. 153.

5. Raymond v. Southerland, 3 Vt. 494, 504.

erally, while the contrary is held in Massachusetts<sup>1</sup> and Rhode Island.<sup>2</sup>

**CONCEALED DEBTOR.**—Where the defendant was proceeded against as a debtor concealed within the state of New York, on substituted service, and a personal judgment was taken against him, it was held that if he was a resident of the state, an error of the court in regard to the concealment and service, would not make the judgment void.<sup>3</sup> It will be seen that this is a late decision of the court of last resort in New York holding a return of substituted service conclusive collaterally.

§ 471. **Confession.**—Where a justice's record in Vermont showed a judgment by confession, it was held to be incompetent to prove that the defendant was in jail, and that the sole authority of the justice was a letter from him requesting a judgment to be entered.<sup>4</sup> In answer to counsel who contended that evidence was always admissible to show a want of jurisdiction, the court said: "When evidence offered contradicts the record itself, it cannot be received, although the effect of the evidence would be, if admitted, to show that the court held no legal jurisdiction over the party. The record is equally conclusive as to such fact, as any other, when it appears on the record." A justice's judgment in Michigan purported to be rendered upon a written confession of defendant; but the docket gave no copy, and the statute did not so require. In a collateral suit, the judgment was held void because the only paper that could be found on file was a note executed by the defendant to the plaintiff.<sup>5</sup> According to this case, when the complaint is lost, the judgment is void. The defendant was allowed to testify below that he gave no written confession, but the supreme court did not pass upon the admissibility of his evidence. It was held in Pennsylvania, that a confession purporting to be by "A. & J. Withers" could not be shown to have been by A. Withers alone.<sup>6</sup>

§ 472. **Copy of process served, contradicted by return.**—The Kansas statute required the summons from a justice of the peace to state the amount for which judgment would be taken in case of default. A summons correctly stated the amount claimed, but

1. Putnam v. Longley, 11 Pick. 487; Slasson v. Brown, 20 id. 436; Ward v. Clapp, 4 Metc. 455; Young v. Capen, 7 id. 287; Baker v. Moffatt, 7 Cush. 259.

2. Brown v. Foster, 6 R. I. 564, 577.

3. Haswell v. Lincks, 87 N. Y. 637.

4. Farr v. Ladd, 37 Vt. 156, 159.

5. Dodge v. Bird, 19 Mich. 518.

6. Withers v. Livezey, 1 Watts & S.

the copy served gave a less amount, while the return showed that a true copy was served. A judgment was rendered by default for the amount stated in the writ, and it was held that the excess was voidable and not void, and that it could not be restrained.<sup>1</sup> It was also decided in Massachusetts and Texas that where the return on a justice's summons was regular, it could not be contradicted by showing that the copy given to defendant did not state the hour of return,<sup>2</sup> or fixed a day already past.<sup>3</sup> A summons issued by a justice in Kansas was regular, and so was the return showing service by copy. The copy served was signed by the constable instead of the justice, but the indorsement warning defendant that unless he appeared judgment would be taken for a named sum, was signed by the justice. This was held not to affect the judgment collaterally.<sup>4</sup> The court does not notice the real point—namely, that the return could not be contradicted.

§ 473. **Criminal proceedings.**—A defendant in a criminal case cannot contradict the record of the justice and show that he was not present;<sup>5</sup> and where a justice's record recited that the defendant, who was out on bail in a criminal case, did not appear, wherefore his bond was forfeited, it was held that, in an action on the bond, he could not show that he did appear.<sup>6</sup> A few cases hold that a recital of an appearance or of service in a justice's record may be contradicted collaterally by parol.<sup>7</sup> In an early case in New York, a justice's record and commitment showed, that an examination was being held in a criminal case, that a witness refused to answer a question and was committed for contempt. On *habeas corpus* he was allowed to show that no case was really on trial, and that the alleged criminal was not present, and he was discharged from custody.<sup>8</sup> The court says that he could not give himself jurisdiction by the mere assertion of it. But I would suggest that some one must have authority to determine the fact of service on unwilling defendants; and why one court cannot do it as well as another, I cannot understand.

1. Bassett v. Mitchell, 40 Kan. 549 (20 Pac. R. 192).

2. Wood v. Payea, 138 Mass. 61.

3. Hale v. McComas, 59 Tex. 84, 487.

4. Stewart v. Bodley, — Kan. — (26 Pac. R. 719).

5. Holcomb v. Cornish, 8 Conn. 375, 380; accord, *In re Macke*, 31 Kan. 54.

6. State v. Gorley, 2 Iowa 52, 56.

7. *Dictum* in Clark v. Holmes, 1 Doug. (Mich.) 390; Jones v. Terry, 43 Ark. 230, 232; Salladay v. Bainhill, 29 Iowa 555.

8. People v. Cassels, 5 Hill 164.

§ 474. **Eluding service.**—A Texas statute authorized the probate court to remove an administrator, but required notice to be given to him to appear and show cause against it, unless he had removed from the state, or otherwise endeavored to elude the service of process. Where an application was made for such an order, and where, on the same day, the court found that the administrator had eluded the service of process and removed him, and appointed a successor who sued the sureties of his predecessor, it was decided that the removal and appointment were void, and that the suit could not be maintained.<sup>1</sup> But the order of removal was conclusive that he was endeavoring to elude the service of process. The court had to decide that on the evidence.

**IDENTITY OF DEFENDANT.**—One Gorman was sued upon a replevin bond. Service was made on another person of the same name, who let judgment go by default. This was held to be a valid judgment collaterally, and that the one served could not show that he was not the person who signed the bond.<sup>2</sup>

McConnell had a claim against one Ireland and sued him. He believed that one Walley was Ireland and ordered service to be made on him as Ireland. Walley told the officer that it was a mistake. A judgment was taken against Ireland and a commitment duly issued on which Walley was arrested. In trespass for false imprisonment it was shown that McConnell insisted and claimed *bona fide* that Walley was really Ireland, but it was held that McConnell was liable for damages.<sup>3</sup> The opinion cites no case, and seems to be wrong on principle. The record asserted that the person served was Ireland, the defendant. He had an opportunity to show that he was not Ireland, the defendant, and neither the plaintiff nor the court could do any more for him. If he would not come in and make defense, the court was compelled to hear the evidence in his absence.

§ 475. **Infants.**—A judgment against an infant is not void where the record recites that he appeared, and that a guardian *ad litem* was appointed for him, either by the court,<sup>4</sup> or upon his own motion;<sup>5</sup> nor can the recital of notice to him of the presentation of an administrator's petition to sell land be contradicted collaterally.<sup>6</sup> A person in California devised all his property to his

1. Grant v. McKinney, 36 Tex. 62.

2. Gorman's Case, 124 Mass. 190.

3. Walley v. McConnell, 13 'Ad. & Ellis N. S. (Q. B.) 903, 910 (66 E. C. L. 901, 910).

4. McAnear v. Epperson, 54 Tex.

220, 225.

5. Day v. Kerr, 7 Mo. 426.

6. Segee v. Thomas, 3 Blatchford 11, 21.

wife, not mentioning his three children. The will was duly probated, and she sold the land of the decedent to a third person. The probate court, upon a recital that notice had been given to all parties, made a decree of partial distribution, and assigned the land to her vendee. The children then brought an action to recover their share of the land, and it was held that they could show that they had no notice of the proceedings for distribution, and could recover.<sup>1</sup> What effect the probate of the will ought to have had was not considered. A Mississippi record showed that process was issued for infants, and the return showed that service was made on their guardian, but the person served filed an answer denying that he was the guardian. The record then recited that proof of due service of process on the infants was made, and a guardian *ad litem* was appointed for them. In a collateral assault on the judgment rendered, it was held that the recital of service was not overthrown by the other parts of the record, and that it was not void.<sup>2</sup> The court might have held that the return of service on the alleged guardian was not overturned, as it was not found that his answer was true.

**MARRIED WOMAN.**—In an action in New York on a judgment against a married woman, she was permitted to contradict the return of service, and thus defeat the case.<sup>3</sup>

**§ 476. Non-resident contradicting return.**<sup>4</sup>—There is a sharp conflict of authority concerning the right of a non-resident to contradict the return of service in a domestic judgment in a collateral action. That a non-resident or alien should be placed on a more favorable footing in the courts than a resident was a doctrine unheard of at common law. This doctrine, so far as it is recognized in the American courts, seems to be founded on the fourteenth amendment to the constitution of the United States, as construed by the Supreme Court of the United States. But this amendment, which forbids all encroachment upon the rights of persons except upon “due process of law,” added nothing to the law, and “due process of law” was never held to require more favor or consideration to be shown to non-residents than to residents. On the other hand, the maxim of the common law which guaranteed to *all persons* (except alien enemies) the “equal pro-

1. *In re Grider's Estate*, 81 Cal. 571 (21 Pac. R. 532 and 22 id. 908).

2. *Cocks v. Simmons*, 57 Miss. 183, 195.

3. *Baldwin v. Kimmel*, 24 N. Y. Super. (1 Robt.) 109, 116, 121.

4. See section 430, page 437, *supra*.

tection of the law," has been embodied in the same amendment, and clearly forbids any discrimination against residents and citizens; and, as the return of service is conclusive, collaterally, against the resident and citizen, it must be equally conclusive against the non-resident and alien. He is entitled to sue the person who made the false return, and to proceed in equity to open up and set aside the judgment upon the same grounds as if he were a citizen and resident, and that is all that any law authorizes, and all that he ought to ask. It has been decided in Connecticut,<sup>1</sup> Maine,<sup>2</sup> Massachusetts<sup>3</sup> and Ohio,<sup>4</sup> and by the supreme<sup>5</sup> and circuit<sup>6</sup> courts of the United States, that a non-resident could not contradict the return or proof of service in a domestic judgment; but the contrary has been recently held in California<sup>7</sup> and Massachusetts.<sup>8</sup> The Massachusetts case is expressly placed upon the ground that the fourteenth amendment to the constitution of the United States authorized non-residents to come into a state and contradict its records collaterally. The court denied the supposed authority of an earlier case,<sup>9</sup> and overruled it in supposed obedience to the amendment. This part of the decision was clearly right, as the prior case held that a personal judgment against a non-resident on constructive service was valid. The infirmity appeared on its face. But in the later case the record appeared to be regular on its face, and to contradict it by parol involved a different principle. An early case in Connecticut,<sup>10</sup> and two cases in Kansas, and one in Massachusetts, and one in Iowa,<sup>11</sup> held that a person could collaterally contradict the return of substituted service by copy left at his residence, in a domestic record, by showing that he did not reside in the state. Why the court was not as competent to determine where the defendant resided as to determine his identity, or any other question of fact in the cause, the

1. Coit v. Haven, 30 Conn. 190 (79 Am. D. 244).

2. Granger v. Clark, 22 Me. 128; Blaisdell v. Pray, 68 Me. 269.

3. Cook v. Darling, 18 Pick. 393.

4. Lessee of Fowler v. Whiteman, 2 O. St. 270, 284—two judges *dissenting*.

5. Landes v. Brant, 10 How. 348, 371.

6. Walker v. Cronkhite, 40 Fed. R. 133, 135

7. Belcher v. Chambers, 53 Cal. 635.

8. Needham v. Thayer, 147 Mass. 536 (18 N. E. R. 429)—*overruling* McCormick v. Fiske, 138 Mass. 379.

9. McCormick v. Fiske, *supra*.

10. Sears v. Terry, 26 Conn. 273, 282.

11. Mastin v. Gray, 19 Kan. 458 (27 Am. R. 149); McNeil v. Edie, 24 Kan. 108; *accord*, Downs v. Fuller, 2 Metc. 135 (35 Am. D. 393); Schlawig v. De Peyster, — Iowa — (49 N. W. R. 843).

courts did not point out, and I think it cannot be done. The case cited from the Federal Reporter (40-133) holds that substituted service cannot be thus contradicted by a non-resident. In the Ohio case cited, publication for non-residents was ordered, and plaintiff was ordered to mail a copy of the paper containing the notice to them, if their address was known. In a collateral attack on this judgment, by ejectment, they offered to show that they were non-residents and that the plaintiff did know their address and did not mail a copy of the paper to them. The court had found in the original suit that publication had been duly made, and it was held that such finding was conclusive on them. A petition in New York for an inquisition of lunacy alleged that defendant was a resident of Monroe county, having temporarily wandered away, and the court, on this petition, adjudged him to be a lunatic. In fact, he had secretly departed from Monroe county four months before, and had gone to Illinois to reside; but it was held that the adjudication of the court was conclusive as to his residence.<sup>1</sup> This decision was placed upon the ground that the petition alleged his residence to be in New York, and that the court passed on the evidence. But the *issue* in regard to residence tendered in the petition added nothing to the force of the judgment collaterally. To suppose that it did, was to confuse the doctrines of collateral attack and *res judicata*. The return of the sheriff that he was a resident raised the question of fact to be decided. In accord with this last case is a late one from Texas, where a judgment rendered upon service by publication against a person as a resident of the state whose place of residence was unknown, was held to bar him from showing in a collateral action that he was a non-resident.<sup>2</sup>

§ 477. Place, residence or location, contradiction of record concerning.—The return, recital or proof of service is just as conclusive in respect to the place where an event occurred, or where the defendant resided, as it is in respect to any other question of fact. Thus, it was recently decided in Indiana, that the defendant could not show, collaterally, that he signed the answer out of court and gave it to the plaintiff's attorney, who filed it, when the record recited that he did it himself.<sup>3</sup> And where a California record, in

1. Southern Tier Masonic Relief Association v. Laudenbach, 5 N. Y. S. W. R. 1072).  
Supp. 901, 903.

2. Martin v. Burns, 80 Tex. 676 (16  
3. Harmon v. McCore, 112 Ind. 221  
(13 N. E. R. 718).



an administrator's proceeding to sell land, recited that notice had been posted in three public places, this recital was held conclusive in a collateral action.<sup>1</sup>

**CAPIAS.**—A defendant was arrested in a civil cause on a warrant issued by a justice of the peace in New York. The statute required him to be taken before the justice. But at his request he was released and a judgment rendered against him in his absence. The officer made a regular return on his warrant that he had arrested the defendant and had his body in court. The defendant was allowed to contradict the return collaterally, and to show his absence in order to avoid the judgment.<sup>2</sup> It would seem that the court might have held this rogue to his agreement without much strain on the law.

**RESIDENCE OR PLACE OF ABODE.**—In proceedings in Massachusetts by a poor debtor to obtain his discharge, the officer's return that he left a copy of the notice at defendant's "last and usual place of abode" cannot be contradicted collaterally by showing that he did not reside at the place where the copy was left;<sup>3</sup> but the contrary was held in New Hampshire.<sup>4</sup> The Maine statute, in such a proceeding, required notice to be served upon the creditor, if alive and in the state. Notice was served on the creditor's attorney, and a discharge granted by default. It was held to be incompetent to prove collaterally that the creditor resided in the state. The court said: "After the plaintiff had removed into this state, and his residence had been made known to the defendants, the notice was served, not upon the plaintiff, but upon his attorney. Was that a correct notice? That very question was before the justices for their decision. They considered the notice correct. That decision is conclusive. It is not examinable here."<sup>5</sup> That a return of service by copy left at defendant's residence or place of abode, or that he had no residence or place of abode in the state, cannot be contradicted in a collateral proceeding, has been held in Connecticut,<sup>6</sup> Indiana<sup>7</sup>

1. *Richardson v. Butler*, 82 Cal. 174 (23 Pac. R. 9, 11).

2. *Colvin v. Luther*, 9 Cowen 61.

3. *Stewart v. Griswold*, 134 Mass. 391, 393. See section 462, *supra*.

4. *Flanders v. Thompson*, 2 N. H. 421.

5. *Lowe v. Dore*, 32 Me. 27; *accord*, *Agry v. Betts*, 12 id. 415—copy left at wrong place.

6. *Hurlbut v. Thomas*, 55 Conn. 181 (10 Atl. R. 556).

7. *Splahn v. Gillespie*, 48 Ind. 397, 410.

and Missouri,<sup>1</sup> while the contrary was decided in Louisiana,<sup>2</sup> and apparently by the Supreme Court of the United States.<sup>3</sup>

In the Missouri case cited, publication was made upon a false return of the sheriff that defendant could not be found. In the Connecticut case cited the defendant attempted to show that he was absent from the state and received no actual notice; and the case cited from the ninety-first United States' report, was this: The Virginia statute provided that, during the absence of a party and all the members of his family, notice of a suit might be posted upon the front door of his "usual place of abode." The defendant and all his family were absent, but within the state, and had been so absent for seven months, and had, in fact, changed their place of abode. A suit was then begun, in a state court, on a note, and service made by posting notice on the front door. Judgment was taken by default, execution issued, and land was levied upon and advertised to be sold. The defendant then brought a suit in equity to enjoin the collection of the judgment on the ground that his former residence had ceased to be his "usual place of abode," and that he had no notice. This proceeding was sustained below and affirmed on appeal. It does not appear from the report whether the case was a direct attack showing a meritorious defense, actual want of notice and due diligence, so as to call for the interposition of a court of equity to relieve against an unjust judgment taken against him by his excusable neglect, or whether it was a collateral suit to enjoin the judgment simply because it was void for want of service. The latter seems to have been the view of the learned justice (Clifford) who wrote the opinion, for he said: "The judgments founded on such defective notice are absolutely void."

MAILING.—A copy of the summons mailed to a place where the defendant did not reside;<sup>4</sup> or giving a wrong place as the residence of a creditor in a petition in bankruptcy by reason of which he did not get the notice mailed to him,<sup>5</sup> does not make the proceeding void. A Minnesota statute required substituted service to be made by a copy of the writ left at the usual abode of defendant with a "resident therein." The affidavit proving service showed a compliance with the statute, and a judgment by

1. Schmidt v. Niemeyer, 100 Mo. 207 (13 S. W. R. 405).

2. King v. Pickett, 32 La. Ann. 1006.

3. Earle v. McVeigh, 91 U. S. 503.

4. Martin v. Pond, 30 Fed. R. 15.

5. Pattison v. Wilbur, — R. I. — (13 N. B. R. 193).

default was rendered. It was held that the defendant might show collaterally, that the person with whom the copy was left was not a "resident" at his house, and thus avoid the judgment.<sup>1</sup>

§ 478. **Probate proceedings.**—A recital in an administrator's proceeding to sell land, that proof was made "of the service of notice according to the provisions of the statute;"<sup>2</sup> or that "due notice has been given to the defendants,"<sup>3</sup> cannot be contradicted in a collateral action. So, where a probate record of the final settlement of an administrator showed the personal appearance of all the heirs by name, they were not allowed to contradict it, collaterally.<sup>4</sup>

§ 479. **Publication, contradicting.**—Where the record of a board of county commissioners in Indiana showed due notice to a person by posting, he was not allowed to show collaterally that his name was not in the notices posted.<sup>5</sup> So, a recital that publication was made,<sup>6</sup> even though none appears in the record,<sup>7</sup> will shield the judgment from collateral attack, and bars the defendant from showing that the publication was too short,<sup>8</sup> or from reading the publication actually made in order to show defects, where the record gives no copy.<sup>9</sup> Likewise, a recital that "publication had been made according to law;"<sup>10</sup> or that it had been "regularly made;"<sup>11</sup> or that "due proof" of it was made,<sup>12</sup> bars contradiction, collaterally. In tax proceedings, a California statute provided that a recital in the decree that all owners and claimants had been duly summoned, should be evidence of that fact; and where a decree contained such a recital, it was held sufficient as a link in plaintiff's chain of title in ejectment, without his showing any actual service. The decision was based on the statute.<sup>13</sup>

1. *Heffner v. Gunz*, 29 Minn. 108, 110 (12 N. W. R. 342).

2. *Bowen v. Bond*, 80 Ill. 351, 353.

3. *Richards v. Skiff*, 8 O. St. 586, 588; *Harrison v. Hargrove*, 109 N. C. 346 (13 S. E. R. 939)—recital false in fact.

4. *Hardy v. Gholson*, 26 Miss. 70; *Frisby v. Harrison*, 30 id. 452.

5. *Wild v. Deig*, 43 Ind. 455.

6. *Wright v. Marsh*, 2 G. Greene 94, 109.

7. *Sidwell v. Worthington's Heirs*, 8 Dana 74, 77; *Robertson v. Winchester*, 1 Pickle 171 (Tenn.) (1 S.W. R. 781).

8. *Diehl v. Page*, 3 N. J. Eq. (2 H. W. Gr.) 143, 147.

9. *Walker v. Cottrell*, 6 Baxter (65 Tenn.) 257, 276.

10. *Allen v. Gilliland*, 74 Tenn. (6 Lea) 521, 532; *Netherland v. Johnson*, 73 Tenn. (5 Lea) 340—a judgment at law.

11. *Howard v. Jenkins*, 73 Tenn. (5 Lea) 176.

12. *Andrews v. Bernhardt*, 87 Ill. 365; *Lawler v. White*, 27 Tex. 250.

13. *Truman v. Robinson*, 44 Cal. 623, 625; *Branson v. Caruthers*, 49 Cal. 374, 380.

The defendant did not attempt to show that there was no service, but contended that the recital was not sufficient; but in an earlier case, the court had held that the recital barred the owner of the property from showing that his name was omitted from the summons.<sup>1</sup> It will be noticed that this statute was simply declaratory and added nothing to the law. It was decided in Missouri to be incompetent to show that the printer's affidavit making proof of publication, was false in fact.<sup>2</sup>

§ 480. **Recital contradicts return.**—Where the return or proof shows a want of service, it has been held in Indiana, Kansas, Mississippi, Missouri and New York that the judgment was void, notwithstanding a recital of service in the record;<sup>3</sup> and this seems to me to be correct, because the process and return or proof of service is a part of the record and shows conclusively that the recital of service is a mistake. But where the service was by publication and the record contained a recital of service, it has been decided in California, Illinois and Texas that the proof of service cannot be examined to contradict the recital collaterally.<sup>4</sup> The California cases were placed upon the ground that the proof of service was merely evidence given in the cause and was no part of the record, and these were followed in Texas; but the Illinois case was placed upon the ground that the court might have had the printer bring in the papers and read them. The trouble with the proof of publication in *Hahn v. Kelly*, cited above, was that the affidavit failed to show that the affiant was the printer, foreman or chief clerk of the paper, which for the reasons given in section 329, *supra*, I do not think made the decree void. It was decided by the Supreme Court of the United States that a recital of "due and legal notice" could not be contradicted collaterally by a paper found among the files purporting to be a publication of notice, when that paper was not referred to in the record.<sup>5</sup> This is undoubtedly sound.

1. *Reily v. Lancaster*, 39 Cal. 354.

2. *Freeman v. Thompson*, 53 Mo. 183, 192.

3. *Hawkins v. Hawkins*, 28 Ind. 66, 68; *Coan v. Clow*, 83 Ind. 417, 419; *State ex rel. Combs v. Hudson*, 37 Ind. 198; *Mickel v. Hicks*, 19 Kan. 578, 581 (27 Am. R. 161); *Dogan v. Brown*, 44 Miss. 235, 241; *Cloud v. Inhabitants of Pierce City*, 86 Mo. 357, 366; *Laney v. Garbee*, 105 Mo. 355 (16 S.

W. R. 831); *Sibley v. Waffle*, 16 N.Y. 180, 189.

4. *Hahn v. Kelly*, 34 Cal. 391, 402 (94 Am. D. 742); *Vassault v. Austin*, 36 Cal. 691; *Quivey v. Porter*, 37 Cal. 458, 462; *McCauley v. Fulton*, 44 Cal. 355, 361; *Sloan v. Graham*, 85 Ill. 26, 28; *Treadway v. Eastburn*, 57 Tex. 209, 213.

5. *Sargeant v. State Bank*, 12 How. 371, 384.

§ 481. **Replevin.**—In an action of replevin, a Michigan sheriff made return that the plaintiff failed to give a bond, and that he had returned the property to the defendant. This false return was held to bar an action on the bond actually given.<sup>1</sup>

**SCIRE FACIAS.**—It was said in New Jersey, that, “by the common law, a return of ‘nihil’ to two writs of *scire facias* was, in all cases, a valid service of the writ;”<sup>2</sup> and it is held in Pennsylvania that such a return cannot be contradicted collaterally in ejectment,<sup>3</sup> even though the defendant resided on the land.<sup>4</sup>

§ 482. **Time of event or service—Attaching creditors.**—Two attaching creditors in Texas, in separate actions in the same court, recovered judgments against the same tract of land, and each sold it and got a sheriff’s deed. In trespass to try title, the sheriff’s returns, respectively, showed that a levy was made on one writ at 3 o’clock, and on the other at 8.30 o’clock the same day. The party claiming under the junior levy was permitted to show by parol that, at the time the levy was made on his writ, none had then been made on the other, and thus to recover the land on the ground that he was a stranger, and not bound.<sup>5</sup> But each attaching creditor derived title through the debtor, and necessarily stood in his shoes, and was estopped by anything that estopped the debtor, and he could not contradict the return.<sup>6</sup> The record showed that one of these creditors had a junior lien, and that he was a *lis pendens* purchaser and bound to take notice of the prior levy, and that he had had an opportunity to have his rights settled in the prior suit; and to permit him to contradict any of these matters collaterally, was to violate the rule that a record must be tried solely by inspection. Land was sold in Missouri on an execution issued from the circuit court on a justice’s transcript. This transcript was regular on its face, and showed the issuing of an execution returnable in ninety days, as the law required, and its return of *nulla bona*. In ejectment, the plaintiff offered to show that the execution issued was returnable in sixty days, and for that reason void, and that, therefore, the sale was void. But the transcript was held to be conclusive.<sup>7</sup>

1. Green v. Kindy, 43 Mich. 279 (5 N. W. R. 297).

2. Castner v. Styer, 23 N. J. L. (3 Zab.) 236, 250, *relying on* 2 Salk. 599.

3. Blythe v. Richards, 10 Serg. & Rawle 261.

4. Colley v. Latimer, 5 Serg. & Rawle 211.

5. Sanger v. Tramwell, 66 Tex. 361 (1 S. W. R. 378).

6. Castner v. Styer, 23 N. J. L. (3 Zab.) 236, 247.

7. Murray v. Laften, 15 Mo. 621, 624.

**SERVICE TOO SHORT.**—The statute of Maine provided that the justices might examine the notification and return to a creditor of the desire of a debtor to take the oath for relief, etc. The court said: "This necessarily confers the power to decide upon their correctness. They examine with a view to decide. The examination could have no other object; and their decision upon this point is to be made a part of their certificate." It was held incompetent to show by parol that the service was too short.<sup>1</sup>

**SUNDAY.**—A return of service in a Montana record showed that it was made on Saturday, but it was decided to be competent to show by parol, collaterally, in order to avoid the judgment, that the service was actually made on Sunday.<sup>2</sup> The court relied on cases authorizing the contradiction of the return in records from other states, which were not in point; and it never seemed to occur that even if the service was made on Sunday, the judgment was not void. See section 492, *infra*.

## TITLE L.

### PROOF OF SERVICE IN FOREIGN, AND OTHER STATE, COURT—FALSE IN FACT.

#### § 483. Foreign judgments—Other state judgments.

**§ 483. Foreign judgments.**—The proof of service contained in a record from a foreign country, is only *prima facie* correct, and may be contradicted by parol evidence.<sup>3</sup>

**OTHER STATE JUDGMENTS.**—The same rule applies to a judgment from one state in the American Union when sued upon in another state, notwithstanding the fact that the constitution of the United States requires "full faith and credit" to be given to it.<sup>4</sup>

1. Carey v. Osgood, 18 Me. 152, 154.
2. Hauswirth v. Sullivan, 6 Mont. 203 (9 Pac. R. 798).
3. Thorn v. Salmonson, 37 Kan. 441 (15 Pac. R. 588)—a Swedish judgment; Buttrick v. Allen, 8 Mass. 273 (5 Am. D. 105; Addams v. Worden, 6 Lower Canada 237; Ferguson v. Mahon, 11 Ad. & El. 179 (39 E. C. L. 117)—an Irish judgment; Smith v. Scott, 7 Scott 147, 168—a judgment of a British Vice-Admiralty court in Sierra Leone.
4. Kingsbury v. Yniestra, 59 Ala. 320; McCauley v. Hargroves, 48 Ga. 50 (15 Am. R. 660)—a judgment of a federal court in Alabama; Harvey v. Drew, 82 Ill. 606; Brown v. Eaton, 98 Ind. 591, 594; Pollard v. Baldwin, 22 Iowa 328; Lowe v. Lowe, 40 Iowa 220; Amsbaugh v. Exchange Bank, 33 Kan. 100 (5 Pac. R. 384); Wood v. Wood, 78 Ky. 624; Bissell v. Briggs, 9 Mass. 462 (6 Am. D. 88); Carleton v. Bickford, 13 Gray 591 (74 Am. D. 652); Gibson v. Manufacturers Ins. Co., 144 Mass. 81 (10 N. E. R. 729); Harrod v. Barretto, 1 N. Y. Super. (1 Hall) 155 and 2 id. 302 (A. D. 1828); Huntley v. Baker, 40 N. Y. Supr. (33 Hun) 578; Kahn v. Lesser, 16 N. Y. Supp. 154.

A few early cases to the contrary are all overruled.<sup>1</sup> Where a resident of Iowa was there sued upon a Minnesota judgment showing service by copy left at "defendant's last usual place of abode," he was permitted to defeat the action by showing that he was stopping at a hotel in that state as a guest, and that the copy of the summons was left there.<sup>2</sup> So where a person was sued in Massachusetts upon a Tennessee judgment founded on a claim for house rent, where the record showed personal service and an appearance by an attorney, it was held that he might defend by showing that the return was false and the appearance unauthorized, although he did then occupy the house mentioned in the record.<sup>3</sup> But a contrary view was taken by the surrogate court of New York, where it was held that a New Jersey decree of divorce against a woman having her domicile in that state, could not be defeated by showing that the return of service by copy left at her usual place of abode was false, although she was temporarily absent in Connecticut.<sup>4</sup> Of course where a judgment is rendered against a person in the state where he resides upon a false return of service, or a false recital of appearance, or upon an unauthorized appearance where there was no service, and he receives no actual notice of it until he is sued upon it, he may then enjoin it, or defend against it, according to the practice of the court, for any cause recognized by a court of equity. But if he does learn of it while there residing, unless he is prepared to prove that the plaintiff knew of the want of service or authority to appear, good faith requires that he should proceed at once to have it set aside; and any unreasonable delay will bar his right to do so. On principle, it can make no difference whether the suit is brought in the state where the judgment was rendered, or

and 18 id. 98; *Guthrie v. Lowry*, 84 Pa. St. 533; (*contra*, *Lance v. Dugan* (Pa.), 13 Atl. R. 942); *Barrett v. Oppenheimer*, 59 Tenn. — (12 Heisk.) 298; *Norwood v. Cobb*, 15 Tex. 500, and 24 Tex. 551; *Chunn v. Gray*, 51 Tex. 112; *Redus v. Burnett*, 59 Tex. 576, 581; *Warren Mfg. Co. v. Aetna Ins. Co.*, 2 Paine C. C. 501, 515—foreign Ins. Co. allowed to show that person served was not its agent. *Arnott v. Webb*, 1 Dill. 362.

1. *May v. Jameson*, 11 Ark. (6 Eng.) 368; *Zepp v. Hager*, 70 Ill. 223, 225; *Westcott v. Brown*, 13 Ind. 83; *Wilcox v. Kassick*, 2 Mich. 165; *Wetherill v. Stillman*, 65 Pa. St. 105; *Lincoln v. Tower*, 2 McLean 473; *Westerwelt v. Lewis*, id. 511; *Todd v. Crumb*, 5 id. 172, 174.

2. *O'Rourke v. Chicago M. & St. P. R. Co.*, 55 Iowa 332 (7 N. W. R. 582).

3. *McDermott v. Clary*, 107 Mass. 501.

4. *Black v. Black*, 4 Bradf. 174, 209 (4 Abb. Pr. 162).



in some other. If the suit is in another state or country, anything which would bar any relief against the judgment in the court where it was rendered, ought to have the same effect in the court where suit is brought.

## TITLE M.

## PROOF OF SERVICE, INSUFFICIENT IN LAW.

§ 484. Affidavit proving publication, bad in form or substance—Verification.

485. Person making proof of service, improper—Age, color and sex—"Clerk"—"Editor"—"Foreman"—"Printer"—"Proprietor"—"Publisher."

486. Recital showing service, defective—Absence—Ambiguous—Dates, blank—"Forego-

ing defendants"—General recital of "due notice"—Want of service shown by recital.

§ 487. Return showing service, defective—Attachment return failing to show ownership—Delivery to defendant—Member of family—Name omitted from copy—Signature of officer, wanting—Too late.

§ 484. Affidavit proving publication, bad in form or substance.—Where an affidavit showing publication was not *entitled* in the cause, but was attached to and referred to the order for publication which was duly entitled, the judgment was held valid collaterally.<sup>1</sup> But where the proof of publication had a copy of the summons attached, to which it did not refer, and the defendant was called "John Doe" in the complaint, and an "unknown person" in the summons, the decree was held void.<sup>2</sup> The probate of a will is not void because of the failure to make proof of publication until after a continuance was had on the return day;<sup>3</sup> and where the affidavit showing publication had no *venue*, and was sworn to before a court commissioner of the county in which the court sat, the judgment is not void.<sup>4</sup>

VERIFICATION.—Where the proof of publication was verified before a master in chancery, who had power to administer oaths, but none in that kind of a proceeding, the judgment was held void;<sup>5</sup> but the contrary was held in Kentucky, where the person who administered the oath did not appear to be an officer,<sup>6</sup> or

1. King v. Harrington, 14 Mich. 532, 539.

2. People v. Greene, 74 Cal. 400 (16 Pac. R. 197).

3. Roberts v. Flanagan, 21 Neb. 503 (32 N. W. R. 563).

4. Wood v. Blythe, 46 Wis. 650 (1 N. W. R. 341).

5. Stanton v. Ellis, 16 Barb. 319, 322.

6. Hart v. Grigsby, 14 Bush. 542, 549.

where the proof was not verified at all.<sup>1</sup> In the last case the court said: "In case of publication as required by the act . . . the jurisdiction attaches instantly, and the failure to file in the action the proof of such publication would simply be error, but not of such a character as to justify it as being treated as a nullity in a collateral proceeding."

The only proof of publication of the notice by the collector that he would apply for judgment for delinquent taxes in Illinois, was the certificate of the publisher printed at the conclusion of the list of delinquent property, and as a continuation of the same advertisement. The court found that due notice had been given, but the judgment was held void.<sup>2</sup>

§ 485. **Person making proof of service, improper.**—Where the service is by publication or posting, the statutes generally require the proof thereof to be made by certain designated persons. Of course it is error to receive the testimony of other persons to make such proof, but that no more affects the jurisdiction than does the receiving of improper evidence to prove the claim. Thus, it was held in a late case in Arkansas, that the failure to make the proof of publication by the person, or in the form prescribed by law, would be a mere irregularity which would not defeat the jurisdiction of a justice of the peace, and which could not be taken advantage of in a collateral proceeding;<sup>3</sup> and the same ruling was made in Iowa concerning the collateral validity of a decree where the proof of publication was made by an unauthorized person, because the validity of such proof was necessarily passed upon by the trial court.<sup>4</sup> So a certificate indorsed on a will by the witnesses thereto that the heirs had been notified of the intended application for probate, held sufficient by the judge of probate—the statute being silent—is not subject to collateral attack by the heirs;<sup>5</sup> and the same was ruled in Michigan where an affidavit to show publication began by reciting that "Fred B. Lee, being duly sworn," but was signed by "Charles H. Lee."<sup>6</sup>

**AGE, COLOR AND SEX.**—The statute of California authorized a private person who was a "white male citizen of the United

1. Mann v. Martin, 14 Bush 763, 767.

2. Senichka v. Lowe, 74 Ill. 274.

3. Webster v. Daniel, 47 Ark. 131 (14 S. W. R. 551); *contra*, Cross v. Wilson, 52 Ark. 312 (12 S. W. R. 576).

4. Fanning v. Krapfl, 68 Iowa 244, 248 (26 N. W. R. 133).

5. Marcy v. Marcy, 6 Metc. 360, 368.

6. Torrans v. Hicks, 32 Mich. 307.

States over twenty-one years of age" to make service of process, and to prove the same by his affidavit; but where the affidavit failed to show that the person making service had these qualifications,<sup>1</sup> or that he was twenty-one years of age,<sup>2</sup> the judgment was held to be valid collaterally.

"CLERK."—The California statute required proof of publication to be made by the "principal clerk." The affidavit read, "H. W. F. Hoffman, principal clerk, . . . deposes and says,—"reciting that he was such clerk, but not swearing to it—and for this defect the judgment was held void;<sup>3</sup> but in Michigan, where the affidavit failed to show that the affiant was a clerk, and simply stated that he was employed in the office and knew the fact of publication, the decree (of divorce) was decided not to be void.<sup>4</sup>

"EDITOR," "FOREMAN," "PRINTER," "PROPRIETOR," "PUBLISHER."—Where the proof of publication was made by the "editor" instead of the "printer,"<sup>5</sup> or "publisher;"<sup>6</sup> or by "a foreman of" the paper instead of by "the foreman of the printer,"<sup>7</sup> the judgment was not void. In the Arkansas case, it was said to be one of the clearest prerogatives of the law for the court to pass upon that proof, and that if it erred, the only remedy was a review in the supreme court. But where the statute of Michigan required an affidavit of publication to show, among other things, that it was made by *the* printer of the paper, the name thereof, and a copy of the notice, an affidavit made by *a* printer, and not giving the name of the paper nor a copy of the notice, was held to be no legal proof of notice to heirs of an application for the appointment of an administrator; and that as the record showed that this affidavit was the only proof before the court, the appointment was void.<sup>8</sup> Where the proof of publication was made by the "proprietor," instead of the "publisher;"<sup>9</sup> or the admission of service indorsed on the

1. Vassault v. Austin, 36 Cal. 691; *contra*, McMillan v. Reynolds, 11 Cal. 372, 378.

2. Peck v. Strauss, 33 Cal. 678, 685.

3. Steinbach v. Leese, 27 Cal. 295, 298.

4. Pettiford v. Zoellner, 45 Mich. 358 (8 N. W. R. 57).

5. Hardin v. Strader, 1 B. Mon. 286.

6. Scott v. Pleasants, 21 Ark. 364, 367.

7. Dexter v. Cranston, 41 Mich. 448, 453 (2 N. W. R. 574).

8. Gillett v. Needham, 37 Mich. 143,

146.

9. Palmer v. McCormick, 28 Fed. R. 541, 544—Shiras, J.

summons was proved by the affidavit of the *plaintiff*,<sup>1</sup> the judgment was held to be collaterally valid. So where the affidavit showing publication failed to state that the affiant was the printer, foreman or chief clerk of the paper, as required by the statute, the judgment was held not void in California;<sup>2</sup> and the same was decided in an early case in Illinois,<sup>3</sup> but the contrary was afterwards ruled.<sup>4</sup> So, where the proof of a tax collector's notice that he would apply for judgment was signed "John Wentworth, publisher, by Reed," the judgment was decided to be void;<sup>5</sup> and the same ruling was made in Minnesota in respect to an insolvent's discharge, where the affidavit showing publication of notice was not made by the person designated by the statute, had no venue, and did not allege that it was published once in each week, as required.<sup>6</sup> The Arkansas statute provided that the court, "before any other proceeding be had, shall require proof of the publication of the notice as herein directed," and the supreme court seemed to think that this statute placed a special duty on the trial court. An order was made by a county court in that state canceling county warrants on constructive notice to the holders, which was defective in failing to show that either of the two papers in which it was given was published in the county, or had a *bona fide* circulation therein; and the return of the sheriff was defective in not stating that he posted up a true copy on the courthouse door; and the affidavits making proof of publication did not show that they were made by the proper persons. For these defects the order was held void.<sup>7</sup>

§ 486. *Recital showing service, defective.*—Where the record recited that an affidavit to authorize publication, and one to prove publication were filed, the *absence* of those papers does not make the judgment void.<sup>8</sup>

AMBIGUOUS.—In a proceeding by an administrator in Indiana to sell land, the record showed the filing of the petition, and then recited: "Thereupon, *on motion*, the court appointed a guardian

1. White v. Bogart, 73 N. Y. 256, 259.

2. Hahn v. Kelly, 34 Cal. 391, 419 (94 Am. D. 742); *contra*, Gray v. Larimore, 2 Abb. (U. S.) 542, 551.

3. Pierce v. Carleton, 12 Ill. 358 (54 Am. D. 405).

4. Haywood v. Collins, 60 Ill. 328, 331.

5. Fox v. Turtle, 55 Ill. 377, 379.

6. Ullman v. Lion, 8 Minn. 381 (83 Am. D. 783).

7. Thompson v. Scanlan, — Ark. — (16 S. W. R. 197).

8. Ogden v. Walters, 12 Kan. 282, 292.

*ad litem*” for the minor heirs, who appeared, waived notice and answered. The presumption was held to be that the minors were present in court, and that the guardian was appointed on their motion, which shielded the order of sale from collateral attack.<sup>1</sup>

DATES, BLANK.—A probate record in Wisconsin recited that notice had been properly published, but left the dates and numbers of publication blank, for which the decree was held void.<sup>2</sup>

“FOREGOING DEFENDANTS.”—A recital of service upon the “foregoing defendants” means all the defendants named in the petition, although the entry containing the recital names but two, and uses the words “*et al.*”<sup>3</sup>

GENERAL RECITAL—“DUE NOTICE.”—The record, in a ditch proceeding in Ohio before trustees, recited that “due and legal notice” had been given to all parties. It was held that the proceeding was not void because the record failed to show the facts constituting the notice.<sup>4</sup> A justice’s record in foreign attachment in North Carolina recited that, “Plaintiff prays an attachment, which is granted; due advertisement being made for thirty days. Defendant fails to appear and answer according to law. Judgment final granted and property condemned to use of plaintiff.” This judgment was held to be impervious to collateral attack.<sup>5</sup> The Kansas statute, in case of service by publication, provided that “No judgment by default shall be entered on such service until proof thereof be made, and approved by the court, and filed.” In such a case, the record recited that “due and legal notice” had been given by publication. In a collateral attack the plaintiff showed by parol evidence that the court did not examine or approve the service—which was, in fact, regular—but the judgment was decided not to be void.<sup>6</sup> A Florida statute required citation to be both published and posted for six weeks. A record reciting that “citation having been published for six weeks as required by law,” was held to be an adjudication of both publication and posting, and to shield the judgment from collateral attack;<sup>7</sup> and the same ruling was made in Mississippi, where

1. *Gerrard v. Johnson*, 12 Ind. 636.

2. *Gibbs v. Shaw*, 17 Wis 197. (84 Am. D. 737).

3. *Toliver v. Morgan*, 75 Iowa 619 483. (34 N. W. R. 858).

4. *Keys v. Williamson*, 31 O. St. 561; *acc.* *Logan v. Williams*, 76 Ill. 175, 182—a probate record; *Kissinger*

*v. Hanselman*, 33 Ind. 80—a record of the board of county commissioners.

5. *Spillman v. Williams*, 91 N. C. 483.

6. *Williams v. Moorehead*, 33 Kan. 609, 617 (7 Pac. R. 226, 231).

7. *Robinson v. Epping*, 24 Fla. 237 (4 S. R. 812, 819).

a probate record recited that "proof of publication had been made according to law, and that legal notice had been given to the heirs and all concerned."<sup>1</sup> No attempt was made to show that notice was not, in fact, properly given. A Michigan statute provided that an administrator's sale should not be avoided collaterally if certain things appeared, among which was that notice of the time and place of sale was given as provided by statute. On such an attack by the heirs, the record did not show any notices posted, nor recite that they had been posted, but the administrator stated in his report of sale that he had posted them, and the court confirmed the sale. This was held to be presumptive proof of such posting.<sup>2</sup> A California case held that where a judgment recited that defendants were "regularly served with process as required by law," it was not void;<sup>3</sup> but the same court made a contrary ruling where the recital in a justice's record was "September 17—Return served summons;"<sup>4</sup> and in accord with this, is a case in New York, where the justice's recital was "Sept. 1. Sums 2 pers. by S. B. Ward Const. 11 plff. appears."<sup>5</sup>

**WANT OF SERVICE—WHEN SHOWN BY RECITAL.**—Upon the presentation of an administrator's petition in Indiana to sell land, the court appointed a guardian for the minor heirs and ordered a summons for him, and that the names of the minor heirs should be inserted therein when discovered. Service was made on the guardian, who failed to appear, and an order of sale was made. It was held that the record showed that no service was made on the heirs, and that the sale was void.<sup>6</sup> In a later case in that state, the record showed that, on a petition by an administrator to sell land, a guardian *ad litem* was at once appointed, in his absence, for the minor heirs, and that notice was ordered to be served on him; and that afterwards the guardian filed his answer; and it also recited that the heirs had been duly notified. It was held that the presumption was that the heirs were notified only by the notice to the guardian, and the order of sale was decided to be void.<sup>7</sup>

**§ 487. Return showing service, defective—Attachment return failing**

1. *Monk v. Horne*, 38 Miss. 100 (75 Am. D. 94).

2. *Woods v. Monroe*, 17 Mich. 238, 242.

3. *People v. Harrison*, 84 Cal. 607 (24 Pac. R. 311).

4. *Kane v. Desmond*, 63 Cal. 464, 466.

5. *Manning v. Johnson*, 7 Barb. 457, 461.

6. *Babbitt v. Doe*, 4 Ind. 355.

7. *Guy v. Pierson*, 21 Ind. 18.

to show ownership.—A Kansas sheriff seized goods on a writ of attachment, and was sued therefor by a subsequent purchaser, and attempted to justify under the writ; but it was held that he could not do so, and that the proceedings were void, because the return did not allege that the property attached belonged to the defendant.<sup>1</sup> But it was decided in Iowa that this defect in the return did not make the order of sale void,<sup>2</sup> and I think the Iowa case sound.

DELIVERY TO DEFENDANT.—A judgment is not void in New Hampshire where the return was, "I made service on the within-named defendant by delivering a summons in hand for his appearance at court," because it failed to show that it was delivered into the hand of the defendant.<sup>3</sup>

"MEMBER OF FAMILY."—Where a return in Iowa showed service on "Wm. Dohms, in Maine township, in Linn county, Iowa, by delivering to Mary Hays a true copy of this notice, that being her home and place of residence," failing to show that Mary Hays was a member of his family, or that it was at his usual place of residence, the decree was held void.<sup>4</sup> But it seems to me that the presumption was conclusive, collaterally, that the officer did his duty. In all such cases the defendant ought to be compelled to show that he received no actual notice in time to defend, and he ought to show an excuse for not appearing in the original court and moving to vacate the judgment. In other words, he ought not to be allowed to attack the judgment collaterally to the injury of *bona fide* purchasers on easier terms than he could attack it directly by a proceeding in equity. A Mississippi statute authorized substituted service to be made by copy left at the defendant's usual place of abode with some free white person above the age of sixteen years, being a member of his family. The return was that service was made "by leaving a true copy thereof with ———, a free white person, found at his usual place of residence in this county," and the judgment rendered thereon in Mississippi was held void in Tennessee.<sup>5</sup> Peter Rape and William Rape were sued in Pennsylvania, and the return

1. Repine v. McPherson, 2 Kan. 340.

2. Rowan v. Lamb, 4 G. Greene 468, 473, overruling Tiffany v. Glover, 3 id. 387.

3. Pendexter v. Cole, — N. H. — (20 Atl. R. 331).

4. Dohms v. Mann, 76 Iowa 723 (39 N. W. R. 823).

5. Barrett v. Oppenheimer, 59 Tenn. (12 Heisk.) 298.



was, "I have served this writ on defendant Peter Rape and William Rape, by leaving a certified copy with his family in their residence, on the 15th day of April." A judgment was rendered by default, and suit brought thereon in Wisconsin, where it was held void for defective service.<sup>1</sup> But that was a question for the Pennsylvania and not for the Wisconsin court to decide.

NAME OF PERSON, OMITTED. — The Wisconsin statute authorized service to be made by leaving a copy at the usual place of abode of defendant with some person of the age of ten years or upwards, etc. A return in a divorce suit was that a copy was left at the last and usual place of residence, but it did not state that it was left with any person, and the decree was held void.<sup>2</sup> So where the statute required substituted service to be made by leaving a copy of the writ at the defendant's residence with one of certain designated persons, a judgment is void upon a return showing that a copy was left at defendant's residence but not showing that it was left with any person.<sup>3</sup>

OCCUPANT OR POSSESSOR.—Where a statute authorized a writ of attachment to be served on real property by leaving a copy with the occupant, "or if there be no occupant," by leaving such copy "in a conspicuous place thereon," and the return showed such posting, but failed to show that the premises were not occupied, the judgment was held void.<sup>4</sup> The New York statute, in cases of attachment before a justice of the peace against non-residents, required the constable to leave a copy of the writ and inventory with the person, if any, in possession of the goods; and where the return failed to show that such service had been made, the proceeding was held to be void;<sup>5</sup> and the same ruling was made on the same statute where the return showed that a copy of the writ of attachment (but not of the inventory) was left with the defendant's wife.<sup>6</sup>

SIGNATURE TO RETURN, WANTING.—That the failure of the officer to sign his return makes the judgment void, is held in Kansas, New York and South Carolina,<sup>7</sup> but the contrary is held

1. Rape v. Heaton, 9 Wis. 328 (76 Am. D. 269).

2. Pollard v. Wegener, 13 Wis. 569, 575.

3. *Dictum* in Harris v. Hardeman, 14 How. 334—a direct proceeding to vacate the judgment.

4. Mickey v. Stratton, 5 Sawyer 475, 483.

5. Stone v. Miller, 62 Barb. 430, 438.

6. Williams v. Barnaman, 28 How. Pr. 59, 64.

7. Wilkins v. Tourtelott, 28 Kan. 825, 833; Reno v. Pinder, 24 Barb. 423; Barron v. Dent, 17 S. C. 75, 78.

in North Carolina.<sup>1</sup> The three last cited cases concerned justice's judgments.

TOO LATE.—Process before a justice in Rhode Island was made returnable at 10 o'clock, but although duly served, it was not returned until after 11, as the record showed, and the judgment by default was decided to be void.<sup>2</sup> The same ruling was made in Connecticut, where a private person to whom a writ of attachment was issued, did not swear to his return until one day after judgment.<sup>3</sup> And where a writ of attachment in Iowa was returnable on the 9th, and was returned as levied on certain property, and where a default was entered on the 10th after service by publication, and where, on the 11th, the sheriff took the original writ of attachment and levied it on other property and made a return thereof, upon which, on the 12th, judgment was entered ordering the sale of all the attached property, it was held void as to the property attached on the 11th.<sup>4</sup> But this was a mere error in practice. The service being valid, the defendant could obtain no greater rights by remaining absent than by appearing; and if he had appeared and moved to quash and his motion had been overruled, no one would claim that he could still treat the proceeding as void. If the return of service, on a citation of a poor debtor to his creditor, does not show the hour of service, it will not be presumed to have been made before a certain hour, although that is necessary in order to shield the judgment of discharge from collateral assault.<sup>5</sup>

1. McElrath v. Butler, 7 Ired. 398.

4. Osborn v. Cloud, 23 Iowa 104,

2. Brown v. Carroll, 16 R. I. 604 (18 Atl. R. 283).

107.

5. Park v. Johnston, 7 Cush. 265.

3. Edmonds v. Buel, 23 Conn. 242.

## TITLE N.

## TIME OF MAKING SERVICE, IMPROPER.

§ 488. Inferior courts—Constructive service, too short.

489. Inferior courts—Personal service, too short.

490. Superior courts—Constructive service, too short.

§ 491. Superior courts—Personal service, too short.

492. Time of service, wrong, indefinite, too late, or on Sunday.

493. Comments on sections 488 to 492.

§ 488. Inferior courts—Constructive service, too short.—It is held in Alabama,<sup>1</sup> Georgia,<sup>2</sup> Indiana,<sup>3</sup> Iowa,<sup>4</sup> New York,<sup>5</sup> North Carolina<sup>6</sup> and Texas,<sup>7</sup> that a judgment of an inferior court is not void because rendered on constructive service which was too short, while the contrary is held in California,<sup>8</sup> Kansas,<sup>9</sup> Minnesota,<sup>10</sup> Missouri,<sup>11</sup> New York<sup>12</sup> and Wisconsin.<sup>13</sup> The cases cited from Alabama, California, Kansas, Missouri, North Carolina and 5 New York were all concerning notices given by administrators of petitions for license to sell land; and the Georgia case was a *dictum* in respect to the appointment of an administrator on a citation published for an insufficient length of time. In the Alabama case, the notice was published thirty-seven instead of forty days, and the 5th New York case was this: The statute required such a notice to be published “for four weeks successively.” A notice was published for four successive weeks within the time, but not for four full weeks before the day set for the hearing. This notice was adjudged sufficient on default and a sale ordered, which was held not void. The North Carolina case was the same, and the one from Texas was the same also, except that the

1. Arnett v. Bailey, 60 Ala. 435, 440.

2. *Dictum* in Barclay v. Kimsey, 72 Ga. 725, 735.

3. Muncey v. Joest, 74 Ind. 409, 411; Jackson v. State, 104 Ind. 516 (3 N. E. R. 863); Pickering v. State, 106 Ind. 228 (6 N. E. R. 611); *contra*, Andrews v. Powell, 27 Ind. 303.

4. State v. Kinney, 39 Iowa 226.

5. Sheldon v. Wright, 5 N. Y. 497, 501, 517.

6. McGlawhorn v. Worthington, 98 N. C. 199 (3 S. E. R. 633).

7. Davis v. Robinson, 70 Tex. 394 (7 S. W. R. 749, 753); *contra*, Collins v. Miller, 64 Tex. 118.

8. Townsend v. Tallant, 33 Cal. 45, 51 (91 Am. D. 617).

9. Mickel v. Hicks, 19 Kan. 578, 582 (27 Am. R. 161).

10. Curran v. Board of County Com'rs, — Minn. — (50 N. W. R. 237).

11. Valle v. Fleming, 19 Mo. 454 (61 Am. D. 566).

12. Wheeler v. Mills, 40 Barb. 644, 647; Havens v. Sherman, 42 Barb. 636, 640; Sibley v. Waffle, 16 N. Y. 180, 189.

13. McCrubb v. Bray, 36 Wis. 333, 339; Mohr v. Tulip, 40 Wis. 66, 76.

proceeding was against a non-resident before a justice of the peace. The New York case from 40 Barbour was a proceeding to assess taxes where the notice was given for five instead of twenty days ; and that from 42 Barbour was an administrator's proceeding for leave to sell land, where the notice was given for four instead of six weeks ; and the one from 16 New York was the same, except that the notice was published for five weeks. The first Wisconsin case was also a proceeding by an administrator for leave to sell land, where the notice was given for fifteen instead of twenty-one days, and the one from California was the same, except that the notice was given for three weeks instead of four, which was caused by the discontinuance of the paper after three insertions. The administrator caused a fourth insertion to be published in another paper, but this did not help the matter. In the case from 74 Indiana, the statute required notice of the pendency of the petition for a ditch before the board of county commissioners to be published four weeks, but it was only published twenty-seven days, and on this a judgment establishing the ditch was rendered. In a collateral assault on the proceeding, the court said : " Did the defect in the notice render the decision void ? The board of commissioners had jurisdiction over the subject-matter, and there was some notice, but not such a notice as the statute required. It is important to keep in mind the fact that there was some notice, although a defective one. It will not do to assume that there was no notice at all, for the reverse is true. It is also true that the commissioners had authority to determine whether they had acquired jurisdiction ; this we think would be so independently of any express statutory provision, but there is here an express provision requiring the commissioners to determine all preliminary questions. . . . All questions respecting the sufficiency of the notice are thus expressly submitted to the judgment and decision of the board. Whether there was or was not notice, was, of course, a jurisdictional question, and this question having been considered and determined by the commissioners' court, that decision cannot be subjected to review and overthrow by a collateral attack, such as the present." The board of county commissioners in Indiana is a body of very limited judicial powers. Its functions are largely legislative, and it resembles a city council more than a court. The case from 39 Iowa was one where the statute, in proceedings before the board of supervisors

to change a road, required notices of the time and place of hearing to be posted for sixty days, but where a change was ordered on forty-nine days' notice. In a collateral assault on the proceeding the court said: "We hold that the presentation of the petition for the change of the road, the appointment of a commissioner, and the *posting* of the notices, as required by law, gave to the auditor and board jurisdiction to order the change; and that the failure to fix the day for final hearing sixty days from the coming in of the report, is simply an irregularity which does not avoid the proceedings or render them vulnerable to a collateral attack."

§ 489. **Inferior courts—Personal service, too short.**—That a judgment of an inferior court on personal service which is too short is not void is held in Indiana,<sup>1</sup> Iowa,<sup>2</sup> Kansas,<sup>3</sup> South Carolina,<sup>4</sup> Tennessee<sup>5</sup> and Vermont,<sup>6</sup> while the contrary is held in Colorado,<sup>7</sup> Georgia,<sup>8</sup> Illinois,<sup>9</sup> Kansas,<sup>10</sup> Massachusetts,<sup>11</sup> Missouri,<sup>12</sup> New York<sup>13</sup> and England.<sup>14</sup> The citations from 10 Colorado, 76 Indiana, 16 Kansas, 41 Barbour and 50 Tennessee, were cases in which the time of service was regular, but the court rendered judgment before the time fixed for appearance, and possibly the courts may draw a distinction between such cases of premature judgments and those where the service is too short, but I can see no reason for doing so. In the Vermont case, which was a collateral assault on a justice's judgment because service was made only six days before return day when the statute required twelve, the court, by Mr. Chief Justice Redfield, said: "We think it must be admitted by every lawyer that this is matter of abatement, and abatement only, when the defendant does appear. It could

1. McAlpine v. Sweetser, 76 Ind. 78, 82. See section 482<sup>4</sup>, *supra*.

2. Ballinger v. Tarbell, 16 Iowa 491; Shea v. Quintin, 30 Iowa 58.

3. Nelson v. Becker, 14 Kan. 509.

4. Benson v. Carrier, 28 S. C. 119 (5 S. E. R. 272).

5. Glover v. Holman, 50 Tenn. (3 Heisk.) 519.

6. Hammond v. Wilder, 25 Vt. 342, 346.

7. Gentzer v. Thayer, 10 Colo. 63 (14 Pac. R. 53).

8. Reid v. Jordan, 56 Ga. 282; Thurston v. Wilkerson, 65 Ga. 557.

9. Johnson v. Johnson, 30 Ill. 215, 233; Johnson v. Baker, 38 Ill. 98 (87 Am. D. 293); Ledford v. Weber, 7 Ill. App. 87, 90.

10. Briggs v. Tye, 16 Kan. 285, 292.

11. Park v. Johnston, 7 Cush. 265; Smith v. Randall, 1 Allen 456.

12. Howard v. Clark, 43 Mo. 344, 348; France v. Evans, 90 Mo. 74 (2 S. W. R. 141).

13. Sagendorph v. Shult, 41 Barb. 102.

14. Doe *ex dem.* Allen v. Allen, 12 Ad. & El. 472 (40 E. C. L. 238).

not be pleaded in bar of the action. It is no ground of a writ of error. If not pleaded strictly in abatement, it would no doubt be regarded as waived. Is there any such case, where the defect has been held fatal to the proceeding, when the defendant does not appear? So far from this, it is true, that even matters of error, and which, on error, would be held fatal to the proceeding when fully apparent upon the record, do not render the judgment void. . . . It was never supposed before, that because the proper time was not given to a defendant to prepare for trial, the whole proceedings were rendered utterly void. . . . If we extend such a doctrine to one case, we must to all; and if it apply to justices' courts, it must to the county court, and to this court. And, to be consistent, we shall have to extend it to all omissions of the statute requisites, either in the writ or service, if apparent on the face of the proceedings. If a writ of summons is served by reading, the party may disregard it, and the judgment is void. This would certainly work a very important change upon this subject."

EXTRA HOUR NOT GIVEN.—In some states, a custom has grown up before justices of the peace to allow a whole hour after the time fixed in the notice for the defendant to appear, and the failure to observe this custom has caused some trouble collaterally. Thus, in Massachusetts, a notice was served on a creditor that the debtor would apply to two magistrates to take the poor debtor's oath at 2 o'clock. The debtor and magistrates met and waited until 2.15, and the creditor not appearing, the oath was administered and the debtor released. At 2.30, the creditor appeared, but the debtor had gone. The proceeding was held void, because the justice did not wait an hour, in accordance with usage.<sup>1</sup> But in Michigan, where the same custom prevails, the failure of the justice to wait an hour after the time fixed was held to be merely an irregularity in practice not making the judgment void,<sup>2</sup> which seems to me to be the better rule. In a summary proceeding in New York to recover land before a justice of the peace, the summons was returnable on the tenth, but by mistake of the officer the return day in the copy served was fixed on the ninth, on which day the parties appeared and tried the case

1. *Hobbs v. Fogg*, 6 Gray 251; *accord*, *Downer v. Hollister*, 14 N. H. 122.

2. *Smith v. Brown*, 34 Mich. 455, 458; *Grand Rapids Chair Co. v. Runnels*, 77 Mich. 104 (43 N. W. R. 1006, 1009).

on the merits. On account of this original defect in the copy of the summons, a collateral suit was carried to the court of last resort, but it was held not void.<sup>1</sup> It seems incredible that any lawyer would insist upon such a point in the court of appeals of New York. The case in 30 Illinois was this: The statute in respect to administrator's proceedings to sell land provided that "thirty days' notice of the time and place of presenting such petition shall be given by serving a written notice of the same, together with a copy of the account on each of the heirs or their guardians." A copy of the summons was served, but for less than thirty days, and no copy of the account. The decree was held void.

§ 490. **Superior courts — Constructive service, too short.**—The courts of last resort in California,<sup>2</sup> Indiana,<sup>3</sup> Iowa,<sup>4</sup> Kansas<sup>5</sup> and Pennsylvania,<sup>6</sup> and two circuit courts of the United States,<sup>7</sup> have held that a judgment of a superior court is not void because founded on constructive service which was too short, while the opposite view has been taken by the courts of last resort in California,<sup>8</sup> Illinois,<sup>9</sup> Kentucky,<sup>10</sup> Minnesota,<sup>11</sup> Montana,<sup>12</sup> Nebraska,<sup>13</sup> Oregon,<sup>14</sup> Tennessee,<sup>15</sup> Texas<sup>16</sup> and Wisconsin,<sup>17</sup> and by an intermediate court in New York.<sup>18</sup> Only a few of

1. *Nemetty v. Naylor*, 100 N. Y. 562, 568 (3 N. E. R. 497).

2. *In re Newman's Estate*, 75 Cal. 213 (16 Pac. R. 887).

3. *Essig v. Lower*, 120 Ind. 239, 246 (21 N. E. R. 1090).

4. *Smiths v. Dubuque County*, 1 Iowa 492, 495.

5. *Havens v. Drake*, 43 Kan. 484 (23 Pac. R. 621, 623).

6. *Delaney v. Gault*, 30 Pa. St. 63; *Hering v. Chambers*, 103 Pa. St. 172.

7. *Bigg's Heirs v. Blue*, 5 McLean 148, 150; *Berrian v. Rogers*, 43 Fed. R. 467.

8. *Jordan v. Giblin*, 12 Cal. 100, 102; *McDonald v. Katz*, 31 Cal. 167; *Townsend v. Tallant*, 33 Cal. 45, 51 (91 Am. D. 617).

9. *Pickett v. Hartsock*, 15 Ill. 279, 282; *Wallahan v. Ingersoll*, 117 Ill. 123 (7 N. E. R. 519, 522).

10. *Dictum* in *Hart v. Grigsby*, 14 Bush 542, 549; *dictum* in *Dunn's Ex'rs v. Shearer*, 14 Bush 574, 579.

11. *Morey v. Morey*, 27 Minn. 265 (6 N. W. R. 783); *West v. St. Paul and N. P. Ry. Co.*, 40 Minn. 189 (41 N. W. R. 1031), *relying* on *Stearns v. Smith*, 25 Minn. 132.

12. *Palmer v. McMaster*, 8 Mont. 186 (19 Pac. R. 585, 588).

13. *Hull v. Chicago, B. & Q. R. Co.*, 21 Neb. 371 (32 N. W. R. 162, 169).

14. *Northcutt v. Lemery*, 8 Or. 316, 320.

15. *Davis v. Reaves*, 75 Tenn. (7 Lea) 585, 587.

16. *Edrington v. Allsbrooks*, 21 Tex. 186, 189; *Fowler v. Simpson*, 79 Tex. 611 (15 S. W. R. 682).

17. *Fladland v. Delaplaine*, 19 Wis. 459; *Mecklem v. Blake*, 19 Wis. 397, 399.

18. *Hallett v. Righters*, 13 How. Pr. 43; *People v. Gray*, 19 id. 238.



these cases need any special notice. Thus, the Nebraska statute required publication for non-residents to be made "four consecutive weeks in some newspaper published in the county." There was a daily and weekly edition of a paper, having different subscribers, and the first publication was made in the daily, and the other three in the weekly. For this defect, the judgment was held void (21 Neb. 371). The Tennessee statute, as a preliminary to publication for non-residents, required a summons to be issued and returned not found, and then required four weeks' publication. An order for publication was made September 21, but the summons was not returned until October 30. On November 15 a decree was entered reciting due service by publication. It was said that the record showed that the four weeks' service was impossible, and that the judgment was void (75 Tenn. 585). In the Texas case of *Fowler v. Simpson*, the record recited that due proof of service was made by the return of the sheriff, which return showed that publication was made for four weeks only when the statute required eight, for which defect the judgment was held void. The court distinguished the case of *Treadway v. Eastburn*,<sup>1</sup> by saying that there the record did not show that the court relied on the return, and that the presumption was that the court heard other evidence.

§ 491. **Superior courts—Personal service too short.**—The cases, so far as I can find, are unanimous, that a judgment of a superior court founded on personal service, is not void because such service was too short. It has been so held in California,<sup>2</sup> Georgia,<sup>3</sup> Indiana,<sup>4</sup> Iowa,<sup>5</sup> Kansas,<sup>6</sup> Kentucky,<sup>7</sup> Michigan,<sup>8</sup> New Hampshire,<sup>9</sup> New Jersey,<sup>10</sup> Ohio,<sup>11</sup> Oregon,<sup>12</sup> Pennsylvania<sup>13</sup> and Wisconsin.<sup>14</sup> Where such a judgment was assailed collaterally in

1. *Treadway v. Eastburn*, 57 Tex. 209.

2. *Whitwell v. Barbier*, 7 Cal. 54; *Alderson v. Bell*, 9 Cal. 315, 321.

3. *Solomon v. Newell*, 67 Ga. 572.

4. *Dictum* in *Helphenstine v. Vincennes N. Bank*, 65 Ind. 582, 590 (32 Am. R. 86).

5. *Darrah v. Watson*, 36 Iowa 116, 119.

6. *Armstrong v. Grant*, 7 Kan. 285, 292; *dictum* in *Dutton v. Hobson*, 7 Kan. 196, 198.

7. *Carr's Adm'r v. Carr*, — Ky. — (18 S. W. R. 453).

8. *Granger v. Judge Superior Court*, 44 Mich. 384 (6 N. W. R. 848).

9. *Kimball v. Fisk*, 39 N. H. 110, 116 (75 Am. D. 213).

10. *Louis v. Kaskel*, 51 N. J. L. 236 (17 Atl. R. 120).

11. *Meisse v. McCoy*, 17 O. St. 225.

12. *Woodward v. Baker*, 10 Or. 491.

13. *Miltimore v. Miltimore*, 40 Pa. St. 151.

14. *Cole v. Mitchell*, 77 Wis. 131 (45 N. W. R. 948).

the Michigan case cited, the court said: "The party having been legally served within the jurisdiction, is personally informed that proceedings will be urged against him. He has a right to expect that in due time the plaintiff will discover the error and take steps to rectify it. . . . But . . . it would be unjust to allow a party to attack such proceedings collaterally after long lapse of time, when the plaintiff has lost any other remedy, and thus avoid what was probably a just liability. If he does not see fit to sue out a writ of error, *when he knows where the proceedings are pending* and has had full opportunity to examine into the action of the court, he should not, in fairness, be allowed the advantage of what is a merely formal objection."

§ 492. **Time of service, wrong, indefinite, too late, or on Sunday.**—A justice's summons in Mississippi was returnable on the 7th, and on that day the record showed a continuance to the 20th for want of service, and on the 20th it showed due service made on the 12th, but failed to show that it was not made on the original process *after the return day*, and for this defect the judgment was held void.<sup>1</sup> The same ruling was made in Kentucky, where the proof of publication against unknown heirs did not show that it was completed before the return day.<sup>2</sup> So, an order establishing a highway was decided to be void in Iowa, because the proof of the posting of notices did not show when it was done.<sup>3</sup> Likewise, in Kentucky, a judgment and sale were decided to be void thirty years afterwards, where the record showed that an order for publication was made at the March term requiring an appearance at the June term, and that proof of publication was made at the September term which failed to show that it, the publication, was made before the June term, although the judgment was not rendered until the next year;<sup>4</sup> and the same ruling was made in Michigan because the proof failed to show the year in which the publication was made;<sup>5</sup> but a judgment was decided not to be void because the proof showed that publication was made for "four successive weeks" without giving the days on which it was made.<sup>6</sup> So, in Illinois, where the proof showed a publication

1. *Weems v. Ralford*, — Miss. — (8 S. R. 260).

2. *Tervis' Representatives v. Richardson's Heirs*, 7 T. B. Mon. 654, 658.

3. *State v. Waterman*, 79 Iowa 360 (44 N. W. R. 677, 678).

4. *Berryman v. Mullins*, 8 B. Mon. 152.

5. *King v. Harrington*, 14 Mich. 532, 540.

6. *Oswald v. Kampman*, 28 Fed. R. 36, 40—Turner, J.

“for four successive weeks, the first publication having been made on the 8th day of March, 1850, and the last on the 26th day of April, 1850,” the presumption was, collaterally, that four successive publications were made, as required by law, beginning March 8th.<sup>1</sup> The New York statute required a copy of the complaint and summons to be mailed to non-residents “forthwith.” It was held that a delay of four days did not make the judgment void;<sup>2</sup> but the opposite was ruled where the delay was for fifteen days;<sup>3</sup> while, in another case, a delay in publishing for thirty days was decided to have no effect upon the validity of the judgment collaterally.<sup>4</sup> It seems difficult to extract any principle from these New York cases. A statute of Minnesota required a tax list and notice of application for judgment to be published for two weeks, the first publication to be made on a certain day. The first publication was made one week later, but was made for the requisite time, and the judgment was decided not to be void.<sup>5</sup>

SUNDAY.—A statute of Vermont enacted that service made on Sunday “shall be null and void in every respect.” In such a case, Mr. Chief Justice Redfield said that such service would be merely matter in abatement, and would not make the judgment void;<sup>6</sup> and the supreme court of Alabama held that such a defect was not cause even for reversal on appeal.<sup>7</sup>

§ 493. **Comments on sections 488 to 492.**—It will be seen from the sections now under consideration that some courts draw a distinction between the collateral force of judgments laboring under the infirmity of too short service, depending upon the fact whether the service was personal or constructive. Just why the court is not as competent to deal with the question of law involved in defective constructive service as in defective personal service, or why an error concerning the one should be more serious than an error concerning the other, no court has very clearly pointed out, and I cannot. So, it will be seen that while the cases are unanimous in holding that judgments of superior courts are not void because personal service was too short, many hold to the contrary

1. *Pile v. McBratney*, 15 Ill. 314, 318.

2. *Van Wyck v. Hardy*, 39 How. Pr. 392 (11 Abb. Pr. 475)—N. Y. Ct. of Appeals, *affirming* 20 How. Pr. 222.

3. *Back v. Crussell*, 2 Abb. Pr. 386.

4. *Simpson v. Burch*, 11 N. Y. Supr. (4 Hun 315).

5. *Kipp v. Dawson*, 31 Minn. 373, 380 (17 N. W. R. 961).

6. *Dictum* in *Hammond v. Wilder*, 25 Vt. 342, 349. See section 482, page 486, *supra*.

7. *Comer v. Jackson*, 50 Ala. 384.

in respect to inferior courts. But when the plaintiff offers to make proof of service in *any* court, he must be heard. His proofs must be inspected and compared with the law, and the court must determine whether he is entitled to a default. If the proofs do not establish all the facts required by the statute, the court must decide whether the omissions are essential, or whether the statute is merely directory. If the statutes are doubtful, confused, or not perfectly clear, they must be construed. The command of the law that the court *shall and must* hear and decide these questions, applies to all courts alike. If a superior court can safely grant a default on certain service, why may not a justice of the peace do the same?

# TITLE O.

## SERVICE WANTING IN PROCEEDINGS NOT IN REM.

§ 494. Principle involved in title O— Absent person—Appeal bond —Contempt—Crime.	§ 497. Heirship—Highway vacated— Lien declared—Lost note or record.
495. Cross-complaint — Want of service upon.	498. Partition — Prisoner of war— Revivor — Sheriff—Vacating and reinstating.
496. Garnishment—Gravel road.	

§ 494. Principle involved in title O.—When the record of a court of superior or general jurisdiction shows a want of both appearance and service in a proceeding not *in rem*, or the record of a court of inferior or limited jurisdiction fails to show an appearance or service in such a proceeding, it is void collaterally, because it appears that no opportunity was given to the defendant to assert his rights. That a right or title derived through such a proceeding has no validity, has been held almost universally.<sup>1</sup> So, where an action before a justice was against the “Fairburn Academy,” a corporation, a judgment rendered against the trustees in their individual names was held void;<sup>2</sup> and the same ruling was

1. Barkman v. Hopkins, 11 Ark. (6 Eng.) 157; Dennison v. Hyde, 6 Conn. 508, 518—a want of parties; Packard v. Mendenhall, 42 Ind. 598; Seely v. Reid, 3 G. Greene 374; Gerrish v. Seaton, 73 Iowa 15 (34 N. W. R. 485); Bienvenu v. Parker, 30 La. Ann. 160; Hobson v. Peake, 44 id.—(10 S. R. 762) Penobscot R. R. Co. v. Weeks, 52 Me. 456; Buttrick v. Allen, 8 Mass. 273—a foreign judgment; Frasier v. Miles, 10 Neb. 109 (4 N. W. R. 930); Whittier

v. Wendell, 7 N. H. 257; Rangely v Webster, 11 N. H. 299, 304; Condry v. Cheshire, 88 N. C. 375, 378; Littlefield v. Tinsley, 26 Tex. 353; Ogden v. Davidson, 81 Va. 757; *citing* Cronise v. Carper, 80 Va. 678—a want of parties; *contra*, Kittredge v. Martin, 141 Mass. 410 (6 N. E. R. 95); *citing* McCormick v. Fiske, 138 Mass. 379; Weyer v. Zane, 3 O. 305. See section 499, page 511.

2. Chapman v. Floyd, 68 Ga. 455, 457.

made in New Hampshire in respect to a personal judgment against a non-resident without service, after service on a trustee who was discharged.<sup>1</sup>

**ABSENT PERSON.**—A Pennsylvania statute authorized the orphans' court to sell the land of persons absent and unheard of for seven years, but required notice to all persons interested. An order to sell made without any notice was held void in ejectment by the absent person.<sup>2</sup>

**APPEAL BOND.**—An appeal was taken from a mayor's court to the county court, and an appeal bond given. The appellant failing to appear in the county court, a judgment was rendered against him and his sureties on the bond—no statute so providing—on which land of the surety was sold. This sale was held void.<sup>3</sup>

**CONTEMPT.**—In replevin proceeding in Kansas, a statute provided that "whenever it shall be made to appear, to the satisfaction of the justice by the affidavit of the plaintiff or otherwise, that the defendant, or any other person, knowingly conceals the property sought to be recovered, . . . the justice may commit such defendant or other person until he or they disclose where such property is, or deliver the same to the officer." In an action against the wife, an affidavit against the husband was made and a warrant issued ordering his commitment, without previous notice or trial, which was done. This was held void.<sup>4</sup> And in California, where a person was guilty of contempt in the presence of the court, but was not arrested, a fine and commitment entered in his absence fifty days afterwards was decided to be void, and he was discharged on *habeas corpus*.<sup>5</sup>

**CRIME.**—A conviction for an offense committed in the view of the justice, without bringing the accused into court, is void.<sup>6</sup>

**§ 495. Cross complaint—Want of service upon.**—It is held by the Supreme Court of the United States that a decree between co-defendants on a cross bill, without notice, is void.<sup>7</sup> So, it was decided in Indiana that a judgment of suretyship, based on a cross complaint filed by a defendant against his co-defendant, without service, and after a default of his co-defendant by

1. *Eaton v. Badger*, 33 N. H. 228.

2. *Taylor v. Hoyt*, — Pa. St.— (15 Atl. R. 892).

3. *Wooldridge v. Griffith*, 59 Tex. 290.

4. *Wheeler & Wilson Mfg. Co. v. Boyce*, 36 Kan. 350 (13 Pac. R. 609, 611).

5. *In re Foote*, 76 Cal. 543 (18 Pac. R. 678).

6. *Logan v. Siggerson*, 2 Blackford (Ind.) 266.

7. *Smith v. Woolfolk*, 115 U. S. 143, 149 (5 S. C. R. 1177).

the plaintiff, is void;<sup>1</sup> but the same court holds that when the complaint shows the adverse interest of the defendants as between themselves, no service is necessary on a cross-complaint setting up the same matters.<sup>2</sup> So also, the supreme court of Louisiana held a decree against the plaintiff on a crossbill without notice, void;<sup>3</sup> but the supreme court of Pennsylvania took a different view of this question, holding that whether or not, on the filing of a cross bill in equity on a matter entirely independent of the original bill, the court could require the plaintiff to answer the cross bill, was a question of law for the trial court to decide, and that a decree erroneously entered on the cross bill without notice to the plaintiff, was not void.<sup>4</sup> A citizen of New York sued a citizen of Vermont in the United States court sitting in Vermont, on the law side, on two notes. The defendant filed a bill on the equity side of the court to rescind a sale of land, to recover back the purchase money paid and to cancel the two notes sued upon in the law court, and served process on the attorney of the plaintiff, whereupon he dismissed his action; but the equity court proceeded without further service, to enter a decree *pro confesso*, canceling the notes and awarding damages. This decree was held to be void in New York.<sup>5</sup>

§ 496. **Garnishment.**—A garnishment judgment rendered by a justice of the peace, without service on the garnishee,<sup>6</sup> or the principal debtor,<sup>7</sup> is void; and the same ruling was made in New York in respect to a Vermont judgment where summons was served upon the garnishee for the non-resident principal debtor, in accordance with a statute of that state.<sup>8</sup> So, where an Alabama statute enacted that, when a garnishee alleged in his answer that he had notice that another person claimed title to or an interest in the debt or property in his hands, notice must be served on such person to appear and contest with the plaintiff, a judgment against the garnishee in such a case without notice to the claimant was held void.<sup>9</sup>

1. State *ex rel.* Kolb v. Ennis, 74 Ind. 17, 20; Joyce v. Whitney, 57 Ind. 550, 556.

2. Bevier v. Kahn, 111 Ind. 200 (12 N. E. R. 169)—*approving* Pattison v. Vaughan, 40 Ind. 253.

3. Morris v. Bailey, 15 La. Ann. 2.

4. Guthrie v. Lowry, 84 Pa. St. 533.

5. Bates v. Delavan, 5 Paige Ch. 299.

6. Wood *Ex parte*, 3 Ark. 532.

7. Bryant v. Bank of California, — Cal. — (8 Pac. R. 644); Atchison v. Rosalip, 3 Pinney 288 (4 Chandler 12).

8. Martin v. Central Vermont R. Co. 3 N. Y. Supp. (20 N. Y. St. Repr. 375).

9. Edwards v. Levisohn, 80 Ala. 447 (2 S. R. 161).

GRAVEL ROAD.—A gravel road assessment made in Indiana, by the board of county commissioners two years after the final termination of the proceeding, without any new notice, is void.<sup>1</sup>

§ 497. **Heirship.**—An *ex parte* order made in Kentucky recognizing a person as the sole heir of an estate and putting him in possession, without notice to other alleged heirs in Louisiana, is void in the latter state.<sup>2</sup>

HIGHWAY VACATED.—A Kansas statute authorized the county commissioners to vacate highways upon petition, but required notice of its presentation to be given by posting in the clerk's office, and by publication. An order made in such a proceeding without any notice was held void.<sup>3</sup>

LIEN DECLARED.—A and B jointly owned a farm, and certain persons had an equitable lien on the share of A, and certain other persons had an equitable lien on the share of B. A and B divided the land between them, amicably, without suit. Afterwards, A became bankrupt, and the bankrupt court adjusted and settled the liens, and fixed the amount not only on the land of A, but also on the land of B, who was not a party to the proceeding. This was held void as to the land of B.<sup>4</sup>

LOST NOTE OR RECORD.—A judgment establishing a lost note, without notice to the maker,<sup>5</sup> or lost parts of a record, without notice to the adverse party,<sup>6</sup> is void.

§ 498. **Partition.**—A decree in partition is void as to a tenant in common not notified.<sup>7</sup> So, where a tenant in common had conveyed his interest to a stranger who went into possession, and partition proceedings were then begun by another co-tenant, who made all the original co-tenant's parties, but not the stranger in possession, the decree awarding sixty-five acres to the plaintiff was held void as to the stranger.<sup>8</sup>

PRISONER OF WAR.—A bill showed that the defendant had joined the insurgent forces, and that he was then held as a prisoner of war by the government at Johnson's Island, in Lake Erie.

1. Board of Com'rs v. Fahlor, 114 Ind. 176 (15 N. E. R. 830).

2. Succession of Lampton, 35 La. Ann. 418.

3. Troy v. Com'rs of Doniphan Co., 32 Kan. 507; Crawford v. Com'rs of Elk Co., 32 Kan. 555.

4. Richardson v. Seevers' Adm'r, 84 Va. 259 (4 S. E. R. 712).

5. Foster v. Glazener, 27 Ala. 391—a Georgia judgment.

6. Harris v. Lester, 80 Ill. 307, 313.

7. Proctor v. Newhall, 17 Mass. 81, 91; Jackson v. Hoag, 6 Johns. 59.

8. Jackson *ex dem.* Antell v. Brown, 3 Johns. 459.



On these allegations a decree was taken against him without issuing process, which was decided to be void.<sup>1</sup>

REVIVOR.—A cause was pending in the supreme court when the plaintiff in error died. This fact was suggested to the court by the defendant in error, and the case was revived in the name of the administrator of the plaintiff in error, without any notice to him, and afterwards, and without any notice to the administrator, the case was dismissed for want of prosecution. This dismissal was held void and to leave the case still pending in the supreme court.<sup>2</sup>

SHERIFF.—A sheriff failed to return an execution. On motion, and without notice, a judgment therefor was taken against him, which was held void.<sup>3</sup>

VACATING AND REINSTATING.—A judgment vacating a judgment at a subsequent term, without notice, is void.<sup>4</sup> A North Carolina statute authorized justices to vacate judgments by default, after notice to the plaintiff. An order vacating a judgment without notice to the plaintiff was held void and to leave the judgment in force.<sup>5</sup> An appeal from a justice was dismissed by the court and judgment rendered for appellee for costs. At the next term of court, without notice to the appellee, the court reinstated the cause, and rendered a judgment against him, which was held void.<sup>6</sup>

## TITLE P.

### SERVICE WANTING IN PROCEEDINGS WHERE IT IS DISPENSED WITH BY STATUTE.

§ 499. Appeal bond — Bail bonds — Corporate contributor—Cost bond—Delivery or forthcom-		ing bond—Replevin bond— Stayor of execution. § 500. Surety in judgment.
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§ 499. **Appeal bond.**—Where the statute so provides, a judgment may be rendered against the sureties on a bond given in a judicial proceeding when a forfeiture is adjudged, without notice to the sureties, and such a judgment is not even erroneous, much less, void.<sup>7</sup> Such a judgment against a surety on an *appeal bond* in

1. Railroad Company v. Trimble, 10 Wall. 367, 371, 377.

2. Tarleton v. Cox, 45 Miss. 430.

3. Caruthers v. Hartsfield, 3 Yerger. 366 (24 Am. D. 580).

4. McComb v. Ellett, 16 Miss. (8 Sm. & M.) 505, 518; Bell v. Tombigbee R. R. Co., 12 Miss. (4 Sm. & M.) 549.

5. Sloan v. McLean, 12 Ired. Law. 260.

6. Byars v. Justin, 2 Tex. App. Civil Cases, § 688.

7. Welch v. McCane, 55 Conn. 25 (100 Atl. R. 168, 170).

Michigan is not wanting in "due process of law;"<sup>1</sup> but in a later case, the same court was equally divided concerning the validity of a statute authorizing judgment to be entered on a recognizance two days after forfeiture, without notice, unless cause to the contrary should be shown.<sup>2</sup> But as the effect of the statute is to make the surety a party to the proceeding, I am unable to see any ground to doubt its validity.

**BAIL BONDS.**—A statute of North Carolina provided that the surety in a bail bond should be bound by the judgment rendered against the principal, and it was the law of that state that a personal judgment could be rendered against the surety after two returns of "*nihil*." A person became bail for a debtor, and then removed from the state. A judgment was rendered against the debtor, and, after two "*nihils*," it was made personal against the bail. He was sued thereon in Massachusetts, and the judgment was held to be valid.<sup>3</sup>

**CORPORATION CONTRIBUTOR.**—When persons became contributors to a corporation in Scotland by signing the memorandum of association, the statute provided that judgment therefor might be rendered against them without notice; and a judgment so rendered in Scotland, after the contributor had removed to the Australian province of Victoria, was held to be valid there, upon the ground that he had agreed to it in advance.<sup>4</sup> But precisely the contrary was held by the supreme court of New York in respect to a Scotch judgment rendered under the same statute against a contributor, without notice, after he had become a resident of that state.<sup>5</sup> The decision was put upon the ground that the proceeding was not in accordance with the common law. But as no reason occurs to me why the courts of one country should aid a person in defeating his valid contracts made in another, I think the Australian case is right.

**COST BOND.**—An Illinois statute authorized the clerk to tax costs against the surety on a cost bond, requiring no formal judgment against him. Such taxation, without notice or judgment, was held valid.<sup>6</sup>

1. *Chappee v. Thomas*, 5 Mich. 53, 59.

2. *Lang v. People*, 14 Mich. 439.

3. *McRae v. Mattoon*, 13 Pick. 53; *accord*, *Delano v. Jopling*, 1 Litt. 117 and 417.

4. *Jamieson v. Robb*, 7 Victorian Law Report 170.

5. *Anderson v. Haddon*, 40 N. Y. Supr. (33 Hun) 435.

6. *Whitehurst v. Coleen*, 53 Ill. 247.

**DELIVERY OR FORTHCOMING BOND.**—Judgments rendered on delivery or forthcoming bonds against the signers, without notice, in accordance with a statute, are universally held valid.<sup>1</sup> But it was decided in New York, that the defendant, when sued upon such a judgment founded on a bond given to procure the release of a vessel in an admiralty court, might defeat it by showing that he never signed the bond;<sup>2</sup> and the same ruling was made in Kentucky in respect to a judgment against an alleged surety on a replevin bond.<sup>3</sup> But these cases seem to me to be wrong. The court had the same power to determine that he had signed the bond when he did not, as to determine that he appeared personally when he did not. Where a judgment was rendered against a sheriff in Ohio for failing to make the money on a writ, a judgment which was then rendered in his favor on a forthcoming bond, without notice to the execution defendant or his surety, was decided not to be void, although no statute provided for such practice.<sup>4</sup> The decision was put upon the ground that the judgment of a court of general jurisdiction is not void for want of service, which is clearly untenable. But in Mississippi, where a forthcoming bond was taken in a void proceeding, and forfeited, and judgment rendered thereon, it was held void.<sup>5</sup>

**REPLEVIN BOND.**—A Wisconsin statute provided that, when the plaintiff in replevin was defeated, judgment should be rendered against him and his surety on the bond. This was held to be a valid statute, and that the surety was not entitled to notice because he made himself a party to the suit by signing the bond.<sup>6</sup>

**STAYOR OF EXECUTION.**—A Pennsylvania statute authorized a judgment defendant to obtain a stay of execution by giving “security, to be approved by the court, or a judge thereof, for the sum recovered, together with interest and costs.” It also authorized a personal judgment to be rendered on such recognizance after two returns of *nihil habet*. Where an action was brought in New Jersey on a judgment rendered against the surety in such

1. Wright v. Yell, 13 Ark. 503 (58 Am. D. 336); Craig v. Herring, 80 Ga. 709 (6 S. E. R. 283); Burton v. Miller, 14 Tex. 299, 301.

2. Gardner v. Tyler, 25 How. Pr. 215, 219 (16 Abb. Pr. 17).

3. Patterson v. Smith, 4 Dana 153.

4. Weyer v. Zane, 3 O. 305.

5. Buckingham v. Bailey, 12 Miss. (4 Sm. & M.) 538, 545.

6. Pratt v. Donovan, 10 Wis. 378, 381; *adhered to*, Booth v. Ableman, 20 Wis. 602, 613; Ketchum v. Zeilsdorff, 26 Wis. 514.

a case, on such service, it was decided to be valid and not wanting in "due process of law."<sup>1</sup>

§ 500. **Surety in judgment.**—A Tennessee statute authorized a joint judgment-debtor, who was a surety, and had paid the debt, to obtain a judgment against the principal on motion and without notice, in any court of the county where the original judgment was rendered, on the finding of a jury convened to try the fact of suretyship. A judgment in such a case rendered against a non-resident principal without notice was held void in Louisiana.<sup>2</sup> Such a judgment was also held void in Tennessee because the record failed to show in what county the original judgment was rendered.<sup>3</sup>

1. *Elasser v. Haines*, 52 N. J. L. 10 (18 Atl. R. 1095)—*Depue, J., dissenting*.

2. *McNairy v. Bell*, 5 Rob. (La.) 418.

3. *Anderson v. Binford*, 61 Tenn. (2 Baxter) 310.

## CHAPTER X.

### JURISDICTION EXERCISED BY VIRTUE OF A LAW REPEALED BY IMPLICATION.

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| <p>§ 501. Principle involved in Chapter X.</p> <p>502. Bankruptcy statutes—Confession.</p> <p>503. Confiscation statute repealed by treaty.</p> <p>504. Court exercising jurisdiction, abolished.</p> <p>505. Crime—Jurisdiction over, transferred to another court by implication.</p> <p>506. Crime—Law creating, repealed by implication.</p> <p>507. Liquor license—Right to, repealed by implication.</p> | <p>§ 508. Ordinance repealing statute by implication.</p> <p>509. Probate license to mortgage land issued from wrong court—Probate license to sell land.</p> <p>510. Procedure under statute repealed by implication.</p> <p>511. Punishment by virtue of a statute repealed by implication.</p> <p>512. <i>Quo warranto</i>.</p> <p>513. Removal of cause from State to United States court by virtue of a statute repealed by implication.</p> |
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§ 501. Principle involved in Chapter X.—Whether or not a law has been repealed by implication is one of the most troublesome questions that courts are called upon to decide. The fact that there *is* a question of that kind conclusively shows that an erroneous decision concerning it is not void. The question may assume three forms, namely: 1. Has the court itself been abolished? 2. Has the power to grant relief sought been abolished? 3. Has the power to act upon the particular cause of action sued upon been abolished? Some courts draw a distinction between these three questions, and hold that an erroneous negative decision of the first question is void, while the same kind of a decision in reference to the other two is not void. But there is no solid reason for this distinction. When a court convenes after it has been abolished by implication, it is a *de facto* organization with actual power. It must determine from the law whether it still exists and has power to hear the motions made before it and grant the relief sought. It cannot refer the matter to any other tribunal. Where the question is one of construction, the principles considered in Chapter VI, *supra*, will apply; and where the repealing act concerns a different subject, and is obscure and

difficult to find, the principles considered in Chapter VII, *supra*, will apply. The cases from which the above principle is deduced will be found in sections 506, 507, 508, 511, 512 and 513, *infra*.

§ 502. **Bankruptcy statutes.**—The United States bankruptcy statute suspended the state insolvent laws by implication, and for that reason a discharge subsequently granted to an insolvent was held void.<sup>1</sup>

CONFESSION.—The Indiana statute organizing the court of common pleas gave it concurrent jurisdiction with the circuit court in all civil cases, with five exceptions, where the demand did not exceed one thousand dollars. But the next section provided that in relation to judgments confessed its jurisdiction was unlimited. Eighteen days later a new act was passed giving the circuit court exclusive jurisdiction in “all civil actions where the amount involved is one thousand dollars or upwards.” After that a judgment for six thousand and seventy-two dollars was confessed in the court of common pleas, and it was decided to be void.<sup>2</sup> I think both of these cases unsound.

§ 503. **Confiscation statute repealed by treaty.**—The treaty of peace between the United States and Great Britain was signed on the 30th day of November, 1782, and provided that there should be “no future confiscations,” which repealed the confiscation statutes by implication. But the supreme court of Massachusetts decided that a judgment of confiscation afterwards rendered was not void,<sup>3</sup> while exactly the reverse was held by a circuit court of the United States.<sup>4</sup> It seems to me that the prohibition contained in the treaty was a defense in the nature of an exception to be brought to the attention of the court.

§ 504. **Court exercising jurisdiction, abolished.**—In 1874, in Missouri, a common pleas judge was elected for four years, and qualified. The court had exclusive criminal jurisdiction. In November, 1875, a new constitution went into force providing that “the courts of common pleas shall cease to exist at the expiration of the present terms of office of the several judges thereof.” In March, 1875, a statute was passed abolishing the court of common pleas above referred to and creating a probate and criminal court to take its place. This act was to go into force January 1, 1876. At that time, the governor appointed

1. *Shears v. Solhinger*, 10 Abb. Pr. N. S. 282.

2. *Marsh v. Sherman*, 12 Ind. 358.

3. *M'Neil v. Bright*, 4 Mass. 282, 302.

4. *Denn ex dem. Fisher v. Harnden*,

1 Paine C. C. 55, 58.

and commissioned a judge for the new court, and it was organized, and in the fall a new judge was elected, commissioned and qualified, and held the court and convicted a person and imprisoned him. On *habeas corpus* the judgment was held void. It was decided that the constitution, by implication, repealed the law of March, 1875, before it went into force, and, consequently, there was no law for the organization of the court. It was said that the constitution which provided that the court of common pleas "shall cease to exist" at a certain time, took from the legislature the power to abolish it before that time.<sup>1</sup> But these were questions which the trial court was compelled to decide. A California statute of 1866 established a police court in the city of Oakland. A statute of 1885 established a different police court in cities having a certain specified population. On this latter statute two questions arose: namely, (1) whether it applied to the city of Oakland, and thus, by implication, abolished the old police court; and (2) was it constitutional? On these questions the judges differed, the majority holding the statute valid and that it did apply to that city and abolished the old police court.<sup>2</sup> And a person having been convicted in that court after the new law came into force, it was held the conviction was void, and he was released on *habeas corpus*.<sup>3</sup> One judge dissented on the ground that, as the new and old courts had the same jurisdiction, the new one was a continuation of the old, and that the justice of the old court was simply an intruder by holding over. The fact that one judge dissented showed that the question was debatable, and that there was a question for the police court to decide concerning its own legal existence; and that being the case, its decision was necessarily binding until reversed.

§ 505. **Crime—Jurisdiction over, transferred to another court by implication.**—A statute of Indiana organized the court of common pleas and gave it jurisdiction over felonies when the person so charged was in custody, or voluntarily submitted to its jurisdiction. Eighteen days later, at the same session, the circuit court was organized with "original, exclusive jurisdiction in all felonies." In construing these statutes, the court first decided, on appeal, one judge dissenting vigorously, that the entire juris-

1. *Ex parte Snyder*, 64 Mo. 58, 61.

3. *Ah You Ex parte*, 82 Cal. 339 (22

2. *People v. Henshaw*, 76 Cal. 436 Pac. R. 929)—Fox, J., *dissenting*.  
(18 Pac. R. 413).



diction of the common pleas over felonies was repealed by the later statute, by implication;<sup>1</sup> and then it held that a conviction by it in such a case was void, and the prisoner was discharged from the penitentiary on *habeas corpus*.<sup>2</sup> So, where the Kentucky statute giving to a county judge authority to try causes for breach of the peace had been repealed by implication, it was held that his judgment in such a case was void and no protection to him.<sup>3</sup> It seems to me that the Indiana and Kentucky cases above cited are wrong on principle, because the questions therein considered were for the *nisi prius* courts to decide. In the Indiana cases, the two statutes being passed at the same session, it certainly was a debatable question whether or not the same legislature meant to undo its own work so soon, and that was a question for the court of common pleas to decide. A Texas statute authorizing a justice of the peace to try certain criminal causes, was repealed by implication, and he was left only with power to examine and bind over; and a conviction by a justice in such a case was held void on *habeas corpus*, although it took considerable construction to reach that result.<sup>4</sup> But the justice had all the statutes spread out before him, and was compelled to construe them, and was just as competent to do so as the supreme court. A person was convicted in a state court of Vermont, under a statute of that state, for passing counterfeited national bank notes. On *habeas corpus* in the federal court, he was released on the ground that the federal court had exclusive jurisdiction over such cases, and that the Vermont statute was void. The court reached this conclusion after much comparison of cases and statutes.<sup>5</sup>

§ 506. **Crime—Law creating, repealed by implication.**—A circuit court had convicted and imprisoned a person for violating a statute of the United States. On *habeas corpus* it was claimed that the statute under which he had been convicted had been repealed by implication. But it was held that the trial court had jurisdiction to determine whether or not the matters charged constituted an offense, and that if it erred, its decision was not void.<sup>6</sup> A justice of the peace in Nevada fined and committed a person for a crime. He applied for a writ of *habeas corpus* on the ground

1. *Spencer v. State*, 5 Ind. 41.

2. *Miller v. Snyder*, 6 Ind. 1.

3. *Scott v. West*, 1 Bush 23.

4. *Ex parte Velasquez*, 26 Tex. 178. 91.

5. *Ex parte Houghton*, 7 Fed. R. 657 and 8 id. 897—Wheeler, J.

6. *In re Callicot*, 8 Blatchford 89.

that the law under which he had been convicted was repealed by implication. The court said: "By the express provisions of the statute, the justice of the peace has original jurisdiction of the subject-matter. It was his duty to decide whether or not the law of 1861 had been repealed by implication or otherwise. In no other way could the question be raised. Such was the subject-matter with which he had to deal. That he had jurisdiction to determine the question cannot be denied. Such being the fact, his judgment may be erroneous, but it cannot be void. If the justice erred, petitioner has his remedy by appeal to the district court. The judgment of the justice is conclusive until reversed. It cannot be reviewed upon *habeas corpus*." <sup>1</sup>

§ 507. **Liquor license—Right to, repealed by implication.**—Under a statute of Missouri, a person applied to the county court for a dramshop license. An older statute prohibited a license in that place. As the county court construed the two statutes, the later did not repeal the earlier on this point, and it refused the license. The petitioner applied to the circuit court for a *mandamus* to compel the county court to grant the license, and that court, construing the law differently, ordered the county court to grant the license. A third party then applied to the supreme court for a prohibition against the circuit court's enforcing its judgment against the county court. In reference to this, the supreme court said: "The county court of Boone county, under the law, could have issued to the applicant a dramshop license if the three-mile act was repealed by the 'Downing law,' and this was a question for judicial determination. The circuit court possesses a superintending control over the county court. And that superintending control may be exercised by means of a *mandamus* or prohibition. Whether the county court was authorized to grant a dramshop license for a saloon within three miles of the State University, depended upon the effect of the 'Downing law' upon the three-mile act. If the 'Downing law' repealed it the county court had, and, if not, it had not authority to grant the license. The circuit court in the *mandamus* proceeding had jurisdiction to determine that question, and that it erroneously decided it, if such should be our opinion, does not affect the jurisdiction of the court. Whenever a court errs in expounding a statute, it gives or denies a right, which it is not, strictly speaking, authorized to do; and in every case, with as much propriety as in this, it might be said

1. *Ex parte Winston*, 9 Nev. 71, 78

that the court had no right to render the judgment entered. The question is not whether the court was authorized to render the judgment entered, but whether it had jurisdiction to enter any judgment at all. . . . Does the jurisdiction of a court depend upon the correctness or incorrectness of its decisions? And, if it properly decides a question is it to be held that it had jurisdiction, but if it errs that the jurisdiction is to be denied? If it has jurisdiction to decide right, it has jurisdiction to decide wrong, and the only remedy for the party aggrieved in the latter case is an appeal or writ of error. . . . On the theory that the three-mile act was still in force, the county court was not authorized to grant a license for a dramshop within three miles of the State University, but whether that act was in force or not was a judicial question which the county court, in the first instance, necessarily had jurisdiction to and must pass upon. And . . . the circuit court by *mandamus* could review its action. If the circuit court, in its judgment against the county court, erred, an appeal or writ of error might have been prosecuted to reverse it; and it is no answer to this that the judges of the county court refused to prosecute an appeal or writ of error.”<sup>1</sup>

§ 508. Ordinance repealing statute by implication.—A person was acting under a city ordinance, but was arrested, fined and imprisoned under a state statute. It was held that he could not be released on *habeas corpus* because the ordinance lawfully superseded the statute, as that was a mere error in construing conflicting laws.<sup>2</sup>

§ 509. Probate license to mortgage land issued from wrong court.—A statute of Pennsylvania required an administrator appointed in one county, who desired a license to mortgage land lying in another county, to file a petition in the court of his appointment showing the necessity of such mortgage, and to obtain an order in that court, and then to file a copy of the order in the probate court of the county where the land lay, and to obtain an order there as to the amount of land to be mortgaged, terms of mortgage, etc. Afterwards another statute was passed concerning the mortgaging and conveying of decedents' estates, trust estates, etc. Assuming to act under this later statute as repealing a part of the former, an administrator appointed in one county filed his petition to mortgage land in another county, in the pro-

1. State *ex rel.* Morse v. Burckhardt, 87 Mo. 533, 537.

2. *Ex parte* Lemkuhl, 72 Cal. 53 (13 Pac. R. 148).

bate court of the latter county, instead of in the court of the county where he was appointed. The probate court construing the new statute as a repeal of the former one on the point, and holding that it gave the right to file the petition in the court of the county where the land was, granted the relief sought, and a mortgage was made and money obtained. Afterwards the heirs brought ejectment. The supreme court, after much construction and refined distinctions, declared that the new law did not change the old one on the subject, and that the wrong probate court had made the order, and that it was void collaterally.<sup>1</sup> The probate court construed the statute, and its construction was binding until reversed. The heirs ought to have appealed from its decision.

**PROBATE LICENSE TO SELL LAND.**—Where an Ohio statute authorizing probate courts to sell the land of decedents was repealed by implication, an order to sell, subsequently granted, was held void;<sup>2</sup> and the same ruling was made where, after administration was granted, a statute set off the land of the decedent into a new county and gave its court jurisdiction to sell the lands therein, and the court of the old county ordered the sale.<sup>3</sup> It was a question for the court to decide whether or not the new statute affected pending causes.

§ 510. **Procedure under statute repealed by implication.**—A person was arrested in a civil case founded upon an affidavit in which was inserted a bill in equity according to a statute, and committed for want of bail. On *habeas corpus*, after much discussion, it was held that the case was governed by a later statute, perfect in itself and not supplemental to the earlier, and that it did not authorize an arrest in such a case, and the defendant was discharged.<sup>4</sup>

§ 511. **Punishment by virtue of a statute repealed by implication.**—A person was convicted of burglary in Alabama and sentenced to three years of hard labor for the county. On a petition for a release on *habeas corpus* because the sentence was beyond the power of the court, the supreme court said: "The circuit court had jurisdiction of the indictment against the petitioner, and jurisdiction to proceed to a final trial. The statute defining the

1. *Spencer, v. Jennings*, 123 Pa. St. 184 (16 Atl. R. 426).

2. *Ludlow v. Johnson*, 3 O. 553 (17 Am. D. 609).

3. *Davis v. Livingston*, 6 O. 225.

4. *Com. v. Sumner*, 5 Pick. 360.

offense declares the punishment shall be imprisonment in the penitentiary, or hard labor for the county, for not less than one nor more than twenty years.—Code of 1876, § 4343. The term of imprisonment, or of hard labor, it is the province of the court, not of the jury, to fix.—Code of 1876, §§ 4484–4506. Another section of the code provides that, when the term of imprisonment, or of hard labor for the county, exceeds two years, the sentence must be to imprisonment in the penitentiary.—Code of 1876, § 5450. With these statutes in force, it is obvious, it was a question the court had full jurisdiction to determine, and was bound to determine, whether they were inconsistent, and whether the later statute, § 4450, operated a repeal of so much of § 4343 as authorized the sentence of the petitioner to either imprisonment in the penitentiary, or to hard labor for the county, the term exceeding two years. Having jurisdiction to determine the question, it is also obvious that though the court may have erred in its determination, its judgment is merely voidable, not void. It is the want of power to hear and determine, or an excess of power which will render a judgment void, not error or irregularity in the exercise of the power. The sentence pronounced against the petitioner is erroneous, and if the cause was before us on error, it would be reversed and remanded, that sentence should be pronounced for his imprisonment in the penitentiary, instead of hard labor for the county. If the writ of *habeas corpus* was awarded, his discharge would be the only judgment which could be pronounced. That result could be reached only by an inquiry into the *legality*, or to speak more accurately, the *regularity*, of the judgment of the court legally constituted—an inquiry forbidden by the statute.”<sup>1</sup> A person was convicted of petit larceny in Ohio and sentenced to six months in jail under a statute which, as to the amount of punishment, had been impliedly repealed by another which fixed the limit at thirty days in jail. The excess over thirty days was held erroneous, but not void.<sup>2</sup> A Pennsylvania court fined a person and ordered that the fine should be paid to the treasurer of a certain school in accordance with a statute. The sheriff collected the fine and paid it over as directed. The court was held competent to decide whether or not the statute was repealed, and its judgment was

1. *Ex parte Simmons*, 62 Ala. 416.

2. *Ex parte Van Hagan*, 25 O. St. 426, 432.

held conclusive, collaterally.<sup>1</sup> Contrary to these cases, and wrong, as it seems to me, is a case in Indiana. The statute of 1843 provided that the imprisonment on a second conviction should begin at the expiration of the first. In 1852 the criminal code was revised, and all inconsistent laws were repealed, and this feature in regard to successive imprisonments was omitted. After that, a person, upon a second conviction, was sentenced to an imprisonment to begin at the expiration of the first. On *habeas corpus* the second sentence was held to be void.<sup>2</sup> But whether or not this feature of the old statute was "inconsistent" with the new, which made no provision concerning the commencement of second sentences, was a question the trial court was compelled to decide.

§ 512. *Quo warranto*.—A California court having jurisdiction in *quo warranto* proceedings, its judgment ousting a police judge from office on the ground that the statute creating his office had been repealed by implication, is not void because the statute was not repealed. The court said: "In deciding properly or erroneously that a statute purporting to create an office has been or has not been repealed, it neither abrogates nor does it create *the office*. It construes the law; and a mistake of law in that regard no more invalidates its judgment than does a mistake of law in any other particular. It decides the question of law because its grant of jurisdiction authorizes it to decide all questions of law involved in the issues it has power to try. Except with respect to statutory limitation of the powers of the *court itself*, a court is authorized to treat statutes as but a part of the law, and an erroneous interpretation of a statute, or an erroneous ruling as to the operative force of one of two statutes, apparently conflicting, no more affects the jurisdictional power to render a judgment than does an erroneous interpretation of the unwritten law.<sup>3</sup> In this case, if the law was not repealed, the complaint showed affirmatively that no cause of action existed.

§ 513. *Removal of cause from state to United States court by virtue of a statute repealed by implication*.—A cause was removed from a Georgia court to the United States court under the act of 1866. In the latter court a motion to remand was made and overruled. After that it was discovered that the clause of the act of 1866

1. *Jefferson Co. v. Reitz*, 56 Pa. St. 44.

2. *Miller v. Allen*, 11 Ind. 389.

3. *Ex parte Henshaw*, 73 Cal. 486, 490 (15 Pac. R. 110).

under which the removal was made had been repealed by another act. It was held that the order of removal was not void, and that the cause was not still pending in the state court. The supreme court said that each court had jurisdiction over the removal of causes, and had to decide upon the question when raised.<sup>1</sup>

<sup>1</sup> *L. Girardey v. Bessman*, 77 Ga. 483, 486.



## CHAPTER XI.

### JURISDICTION EXERCISED OVER THE SUBJECT-MATTER WITHOUT COLOR OF AUTHORITY.

SCOPE OF, AND PRINCIPLE INVOLVED IN, CHAPTER XI,	§ 514
PART I.—EXECUTIVE OR LEGISLATIVE FUNCTIONS, OR THE FUNCTIONS OF ANOTHER GOVERNMENT, USURPED,	515
PART II.—RELIEF DEMANDED EXCEEDS THE POSSIBLE POWER OF THE COURT IN ANY CASE,	516-520
PART III.—SUBJECT-MATTER OUTSIDE OF LIMITS OF STATE,	521-523
PART IV.—SUBJECT-MATTER WITHIN THE STATE BUT NOT WITHIN THE COUNTY OR DISTRICT—ADMINISTRATOR'S OR- DER TO SELL OR MORTGAGE—MOTION IN WRONG COUNTY,	524
PART V.—STATUTE CONFERRING JURISDICTION, DIRECTLY RE- PEALED—ADMINISTRATOR'S ORDER TO SELL LAND —BANKRUPTCY—CONFESSION—CONVICTION—POOR DEBTOR,	525

§ 514. **Scope of, and principle involved in, Chapter XI.**—This chapter includes all those cases where the courts have usurped the power belonging to other governments, or to other departments of their own government, or where the *res* was outside of the territorial jurisdiction of the court, or where the relief demanded exceeded the possible power of the court. In all such cases, where the law is too plain for debate or construction, the court has no color of authority, all its proceedings are void, all rights and titles based on its action are invalid, and all persons concerned are trespassers.

#### PART I AND SECTION 515.

##### EXECUTIVE OR LEGISLATIVE FUNCTIONS, OR THE FUNCTIONS OF ANOTHER GOVERNMENT, USURPED.

§ 515. **Executive or legislative functions, or the functions of another government, usurped.**—A judgment declaring a certain person to be elected to an office when the constitution gave exclusive jurisdiction to the senate; <sup>1</sup> or a decree restraining the common council of

1. *Dalton v. State*, 43 O. St. 652.

a city from removing an officer,<sup>1</sup> or from canvassing election returns,<sup>2</sup> is void.

An order issued by a court of the United States sitting in bankruptcy enjoining the sheriff from obeying the process of a state court, was held to be void.<sup>3</sup> The same ruling was made in respect to a judgment of a state court imprisoning an officer of the United States for acts done in his official capacity.<sup>4</sup> So a commitment of the canvassers of the votes of the United States electoral college;<sup>5</sup> or the imprisonment of a person for perjury committed before a United States commissioner,<sup>6</sup> or in an election contest between members of the congress of the United States,<sup>7</sup> by a state court, is void. A state court has no jurisdiction to enjoin or control, in any manner, process from the federal court. Hence an injunction from a state court forbidding a city to levy a tax to pay bonds is void as to a judgment upon those bonds in the federal court, as it infringes the power of the federal court to issue process for its collection.<sup>8</sup> So where an act of congress gave exclusive jurisdiction to a board of commissioners to determine the validity of inchoate Spanish titles, a judgment of a state court declaring the validity of such a title was held to be "merely void."<sup>9</sup> A court of the Island of Jersey imprisoned a person for serving a writ of an English court on a resident of the island. On *habeas corpus*, it was held to be "outside of all law," and he was discharged.<sup>10</sup> A statute of New York authorized the appointment of commissioners to assess and fix the damages for lands taken by railroads, but gave the courts no power to set aside their acts, and a judgment so doing was held void.<sup>11</sup>

1. *In re Sawyer*, 124 U. S. 200, 212.

2. *Dickey v. Reed*, 78 Ill. 261.

3. *Tenth National Bank v. Sanger*, 42 How. Pr. 179.

4. *Ex parte Robinson*, 6 McLean, 355; *Ex parte Jenkins*, 2 Wall. Jr. 521; *Ex parte Turner*, 3 Woods 603.

5. *Electoral College of South Carolina*, 1 Hughes 571.

6. *Ex parte Bridges* 2 Woods 428.

7. *In re Loney*, 134 U. S. 372 (10 S. C. R. 584).

8. *Riggs v. Johnson County*, 6 Wall. 166; *United States v. Council of Keokuk*, 6 Wall. 514 and 518.

9. *Hickey v. Stewart*, 3 How. 750.

10. *Dodd's Case*, 2 De Gex & Jones, 510, 523 (59 E. Ch. 509, 522).

11. *Vischer v. Hudson River R. R. Co.*, 15 Barb. 37, 45.

## PART II.

## RELIEF DEMANDED EXCEEDS THE POSSIBLE POWER OF THE COURT IN ANY CASE.

§ 516. Amount too large.

517. Amount too small.

518. Civil proceedings, generally—

Accounting—Bastardy—For-

eign Attachment—Legacy

—Married Woman—Natural-

ization—Setting aside judg-

ments—Tax assessments—Ti-

tle to land—Validity of rate.

§ 519. Criminal proceedings.

520. Comments on sections 518 and

519.

§ 516. Amount too large.—Where the demand is simply and solely to recover money, does the fact that the amount exceeds the highest jurisdictional limit of the court render the judgment wholly void? Although nearly all the cases so hold,<sup>1</sup> still, on principle, it seems to me that the excess above the limit ought to be regarded collaterally as mere surplusage. Thus, where a note was filed as a complaint before a justice of the peace in Iowa, upon which \$274 were due, to which the justice added \$27.40 for attorney's fees, and rendered a judgment for \$301.40, being \$1.40 in excess of his jurisdiction, in a contest with other creditors in respect to priority of liens, this excess of \$1.40 only was held to be void.<sup>2</sup> To hold that the plaintiff should lose a just claim of \$300 because of the innocent mistake of including \$1.40 more, as many courts would have done, looks to me like sacrificing justice to a bald technicality, which tends to bring the courts into disrepute. So, in Indiana, where the statute provided that judgments should draw six per cent. interest, and a justice, by consent of parties, rendered a judgment to draw ten per cent., the extra four per cent. only was decided to be void.<sup>3</sup> Of course, where the alleged value of the goods in replevin exceeds the highest limit of the jurisdiction of the court,<sup>4</sup> the proceeding will

1. *Hanna v. Morrow*, 43 Ark. 107, 111; *Ferlett v. Engler*, 8 Cal. 76; *Wilson v. Sparkman*, 17 Fla. 871 (35 Am. R. 110); *Beach v. Atkinson*, 87 Ga. 288 (13 S. E. R. 91); *Reading v. Price*, 3 J. J. Marsh. 61 (19 Am. D. 162); *Ladd v. Kimball*, 12 Gray, 139; *Ashuelot Bank v. Pearson*, 14 Gray 521; *Bishop v. Freeman*, 42 Mich. 533 (4 N. W. R. 290); *McFadden v. Whitney*, 51 N. J. L. 391 (18 Atl. R. 62); *Covey v. Noggle*, 13 Barb. 330; *Griswold v.*

*Sheldon*, 4 N. Y. 581, 585; *Jones v. Jones*, 3 Dev. L. 360; *Allen v. Morgan*, *Tappan (O.)* 200; *Phillips' Appeal*, 34 Pa. St. 489; *Zylstra v. Charleston*, 1 Bay 382; *Walker v. Wynne*, 11 Tenn. (3 Yerger) 61, 72; *Houser v. McKennon*, 60 Tenn. (1 Baxter) 287.

2. *Reed v. Shum*, 63 Iowa, 378 (19 N. W. R. 254).

3. *Berry v. Makepeace*, 3 Ind. 154.

4. *Caffrey v. Dudgeon*, 38 Ind. 512 (10 Am. R. 126).

be void, although there is an alternative prayer for a sum in damages within the limit in case a recovery of the goods cannot be had.<sup>1</sup> So, in Michigan, where the statute gave police justices jurisdiction over crimes where the punishment could not exceed one hundred dollars, a fine of fifty dollars, in a case where the highest limit was five hundred dollars, was held void.<sup>2</sup> As the defendant was not harmed, and as the state voluntarily brought the case before the police court, if the court had held both parties estopped, no one could have pointed out any serious departure from principle.

§ 517. **Amount too small.**—The statutes frequently fix some amount as the lowest limit of jurisdiction of courts, but, on principle, a judgment in disregard of the statute would not seem to be void. There is no want of power, because the greater always includes the less. There is simply a misuse of power on a small matter. An English statute provided that no judgment should be rendered in the court of common pleas for less than forty shillings, and that, if rendered, it should be "void." A judgment was rendered for five shillings upon which the defendant was arrested. In trespass for false imprisonment, the court of king's bench said: "Upon demurrer, the question was, whether the judgment was so far void that the party should take advantage of it in this collateral action? And the court held that it was not; but that it was only voidable by plea of error; as where one is taken on outlawry and hath no addition."<sup>3</sup> A statute of Pennsylvania permitted a reference to arbitrators in causes before justices where the amount in controversy exceeded ten dollars. A reference in a cause where the amount in controversy was four dollars, and the judgment thereon, were held not void.<sup>4</sup> It is also held in Vermont that a suit brought in the county court, in good faith, will not be dismissed because the claim is too small;<sup>5</sup> but there may be some special statute in such cases in that state. On the contrary, it has been held in Louisiana, Michigan, New Hampshire and Virginia, and by a circuit court of the United States, that such judgments were void.<sup>6</sup> All these decisions

1. *Shealor v. Superior Court*, 70 Cal. 564 (11 Pac. R. 653).

2. *Matter of Berry*, 7 Mich. 467.

3. *Prigg v. Adams*, 2 Salkeld, 674.

4. *Emery v. Nelson*, 9 Serg. & R. 12.

5. *Brainerd v. Austin*, 17 Vt. 650; *Powers v. Thayer*, 30 Vt. 361; *Scott v. Moore*, 41 Vt. 205 (98 Am. D. 581).

6. *Dictum* in *Cross v. Parent*, 26 La. Ann. 591—an appeal. *Raymond v. Hinkson*, 15 Mich. 113; *Smith v.*

seem to have been made in ignorance of the original English case. In the Virginia case cited, the county court had jurisdiction to try certain cases of larceny where the value of the property stolen exceeded twenty dollars; below that sum, the jurisdiction was given to justices; and conviction in the county court where the value was less than twenty dollars was held void.

§ 518. **Civil proceedings, generally.**—Proceedings before a justice of the peace for an accounting between a guardian and ward,<sup>1</sup> or in cases of bastardy,<sup>2</sup> or foreign attachment,<sup>3</sup> where the statute gave no jurisdiction in such cases, are void. So, a decree in a probate court in Maine concerning a legacy, was held void—the court saying: “The question to whom and at what time a legacy is to be paid by an executor is one of which the judge of probate has no jurisdiction.”<sup>4</sup> A deed executed by a married woman was void because the certificate showed no private examination. The county court ordered the clerk to amend his certificate so as to show that fact. As there was no law authorizing the court to take jurisdiction of such a proceeding, the order was held void.<sup>5</sup> So, where the statute authorized judgments of naturalization to be rendered by courts “having common law jurisdiction,” a judgment rendered by a court having no such power, is void.<sup>6</sup>

**SETTING ASIDE JUDGMENTS.**—An order of the board of county commissioners setting aside a previous order on the ground of fraud;<sup>7</sup> or of a justice of the peace setting aside a judgment;<sup>8</sup> or of a board of supervisors for the equalization of taxes setting aside a prior order,<sup>9</sup> is void where no statute authorizes such action.

**TAX ASSESSMENT.**—The statutes of New York gave assessors no power to determine what property was taxable; and where

Knowlton, 11 N. H. 191, 198; Cropper v. Com., 2 Rob. (Va.) 842; Moore v. Town Council of Edgefield, 32 Fed. R. 498—Simonton, J.

1. Green v. Clawson, 5 Houston (Del.) 159.

2. Renew v. State, 79 Ga. 162 (4 S. E. R. 19).

3. Vansyckel's Appeal, 13 Pa. St. 128.

4. Smith v. Lambert, 30 Me. 137, 145, relying on Cowdin v. Perry, 11 Pick. 503.

5. Elliott v. Peirsol, 1 Peters 328, 340.

6. *Ex parte Tweedy*, 22 Fed. R. 84—Hammond, J.

7. Board of Com'rs v. State, *ex rel.* Lewis, 61 Ind. 75, 83.

8. Shaw v. Rowland, 32 Kan. 154 (4 Pac. R. 146).

9. People v. Supervisors, 35 Barb. 408.

they assessed the capital stock of a bank in violation of the statute, the assessment was held void.<sup>1</sup> The statute was said to be too plain to call for any construction, and that the act of the assessors was without the *slightest color* to warrant it. So, where the statute of Wisconsin gave the board of equalization of taxes no power to increase the valuation placed upon a merchant's stock in his sworn statement, an order of increase was held void.<sup>2</sup>

**TITLE TO LAND.**—The statutes concerning justices quite generally forbid them to try any case where the title to land is in dispute, and a judgment where the record shows such a case, is necessarily void.<sup>3</sup>

**VALIDITY OF RATE.**—An English statute, in regard to the collection of church rates before justices, provided "that if the validity of the rate, or the liability to pay it, be disputed, and the party disputing it give notice thereof to the justices, they shall forbear giving judgment thereon." It was held that a dispute and notice to the justices destroyed their jurisdiction and made subsequent proceedings void, and that the justices could not adjudge that the objection was not *bona fide*.<sup>4</sup> So, a decree of a probate court establishing a lost will, when the statute gave it no such power, is void.<sup>5</sup> A witness may lawfully refuse to obey a subpoena in a cause where the court has no jurisdiction over the subject-matter, and a person instigating his arrest for contempt is liable for false imprisonment.<sup>6</sup> A *dictum* of a very distinguished Pennsylvania judge is to the contrary. He said that it would be no actual contempt, but that the party must make that defense.<sup>7</sup> It seems to me that he was right. The jurisdiction over the subject-matter depends upon the allegations made in the affidavit or order reciting the alleged contempt, and the arrest gives jurisdiction over the person. The record in the void proceeding is simply evidence in the proceeding for contempt, and a judgment is never void because not supported by the evidence.

§ 519. **Criminal Proceedings.**—If a court has no jurisdiction

1. National Bank v. City of Elmira, 53 N. Y. 49; the same was held in Buffalo v. Supervisors, 48 N. Y. 93, 99.

2. White v. City of Appleton, 22 Wis. 639.

3. Gage v. Hill, 43 Barb. 44; Lang-

ford v. Monteith, 102 U. S. 145. See section 233, *supra*.

4. Pease v. Chaytor 9, Jur. N. S. 664.

5. Waggoner v. Lyles, 29 Ark. 47.

6. In Matter of Bradner, 87 N. Y. 171.

7. Black J. *arguendo* in Passmore Williamson's Case, 26 Pa. St. 9, 20.

over criminal proceedings of any kind, a sentence by it in such a case would be void. In an old English case it was said: "If the court of common pleas holds plea in an appeal of death, robbery or any other appeal, and the defendant is attainted, it is *coram non judice*."<sup>1</sup> It was decided by a federal circuit court that a judgment of a United States commissioner committing a person for contempt was void for want of authority.<sup>2</sup> So a conviction by a justice of the peace in a case of felony,<sup>3</sup> or of unlawful liquor selling,<sup>4</sup> or where the lowest fine exceeded his possible power<sup>5</sup> is void. So where the statute required warrants issued by justices of the peace to be made returnable before the police court, a warrant issued by a justice returnable before another justice was held void and no protection.<sup>6</sup>

§ 520. **Comments on sections 518 and 519.**—Where the court has power to grant the relief sought in a proper case, but no right to use such power in the particular case under consideration, for reasons given in sections 213–224, *supra*, I do not think that the proceeding is void. In the Texas cases cited in section 519, a person was convicted and fined by a justice of the peace for assault and battery, but that was decided to be no bar to a prosecution for an aggravated assault over which the justice had no jurisdiction. These cases seem to me to be wrong on principle. The justice having jurisdiction over the offense charged was compelled to hear the evidence and to decide whether the defendant was guilty or not. Surely a mistake would not make his decision void. According to the principle established in those cases, if the district court had no power to try cases of assault and battery, such cases could never be determined in that state. The same rule which denies the power of the justice to decide that the offense was not an aggravated assault would bar the district court from deciding that it was not an assault and battery. Hence a conviction or acquittal on the merits in one court would be no bar to a prosecution in the other.

1. Case of the Marshalsea, 10 Coke 68, 76.

2. *Ex parte Perkins*, 29 Fed. R. 900—Gresham, J.

3. *State v. Nichols*, 38 Ark. 550; *Alford v. State*, 25 Fla. 852 (6 S. R. 857); *State v. Odell*, 4 Blackford 156; *State v. Morgan*, 62 Ind. 35, 39; *Pat-*

*zack v. Von Gerichten*, 10 Mo. App. 424; *Norton v. State*, 14 Tex. 387; *Flournoy v. State*, 16 Tex. 30.

4. *Piper v. Pearson*, 2 Gray 120 (61 Am. D. 438).

5. *Hersom's Case*, 39 Me. 476.

6. *Batchelder v. Currier*, 45 N. H. 460, 464.



## PART III.

## SUBJECT-MATTER OUTSIDE OF LIMITS OF STATE.

§ 521. Administrator's order to sell  
land—Divorce, grounds of—  
Lien—Partition—Receiver—  
Will.

§ 522. *De facto* possession of foreign  
state.

523. Crime committed outside of  
state.

§ 521. An administrator's order to sell land situated in another state;<sup>1</sup> or an order to a *commissioner* to convey such land;<sup>2</sup> or a decree holding a deed for it to be fraudulent,<sup>3</sup> is void. A court in New York ordered a defendant to convey land in Texas to the plaintiff, but before the order was complied with, the defendant became insane, and the court appointed a committee for him and ordered him to make a conveyance, which he did. This conveyance was held void in Texas, on the ground that the court had no power to order one acting in a fiduciary capacity to convey land.<sup>4</sup> I can readily understand why a probate court has no power to order its administrator to sell land situate in a foreign state, but when a court has the owner of land personally before it, and when his conveyance of such land under the compulsion of the court is valid and binding, I cannot understand why the conveyance is not valid when his name is signed by a commissioner duly authorized by the court.

DIVORCE—GROUNDS OF.—A plaintiff obtained a divorce in Iowa on the ground of cruel treatment. The supreme court of New York held that, as the cruel treatment took place in New York, the subject-matter or *res* was outside of the territorial jurisdiction of the Iowa court, and that therefore its decree was void.<sup>5</sup> This case places the blows and harsh treatment inflicted upon the plaintiff in New York in the same category with real estate, and is new doctrine to me. An Ohio decree declaring a *lien* on land in Kentucky;<sup>6</sup> or a decree in *partition* made in North Carolina of land in Tennessee;<sup>7</sup> or any judgment attempting to pass title to

1. Nowler v. Coit, 1 O. 519, 522; Salmond v. Price, 13 O. 368, 400 (42 Am. D. 204); Watkins v. Helman, 16 Peters 25.

2. McLawrin v. Salmons, 11 B. Mon. 96 (52 Am. D. 563); Burnley v. Stevenson, 24 O. St. 478; Watts v. Waddle, 1 McLean 200, 204; Tardy v. Morgan, 3 id. 358.

3. Carpenter v. Strange, 141 U. S. 87, 105 (— S. C. R. —).

4. Morris v. Hand, 70 Tex. 481 (8 S. W. R. 210).

5. Holmes v. Holmes, 4 Lans. 388.

6. Short v. Galway, 83 Ky. 501.

7. Johnson v. Kimbro, — Tenn. (3 Head) 557 (75 Am. D. 781).

land in another state from one *party* to another,<sup>1</sup> or to a *receiver*,<sup>2</sup> is void. A court of competent jurisdiction in Pennsylvania construed a *will* and fixed the *quantum* of interest of the devisees in the real estate of the testator. In a suit to partition the land of the testator in Illinois, the Pennsylvania decree was denied any force.<sup>3</sup> The supreme court of Illinois admitted that if the question of the sanity of the testator had been litigated in the Pennsylvania court, its decision on that question would have been conclusive in Illinois, but it insisted and decided that in a suit in partition in that state the construction placed upon the will in Pennsylvania was not binding because the Pennsylvania court had no jurisdiction over land in another state. On the same reasoning, if the instrument sued upon in Pennsylvania had been a title bond, and the court had construed it as obligating the defendant to convey land in Illinois to the plaintiff, and had compelled him to execute a deed, the decree and deed would have been void because the subject-matter was the title to land in Illinois. The case put by the court—namely, the question in respect to the sanity of the testator—seems to show the fallacy in the decision; for if the testator was found to be sane the title of the Illinois land would be vested in the devisees—if insane, in the heirs.

§ 522. *De facto* possession of foreign state.—The boundary line between Michigan and Ohio was in dispute, but Michigan was exercising a *de facto* sovereignty over the disputed territory. While that condition of things existed, an Ohio court decreed a conveyance of land situate within that territory. Afterwards that land was placed within the lawful and actual jurisdiction of Ohio; but the decree was nevertheless decided to be void.<sup>4</sup>

§ 523. Crime committed outside of state.—A justice of the peace in South Carolina issued a warrant for a person on account of a crime committed in North Carolina, as the justice well knew, and this was held to be void and to make the justice liable for damages.<sup>5</sup> So, a warrant issued by order of one district court of the United States for the arrest of a person for a crime committed in another district, was held void, and the prisoner was released on *habeas*

1. Page v. McKee, 3 Bush 135 (96 (9 N. E. R. 210); Pittsburgh & S. L. Am. D. 201). R. Co's Appeal (Pa.), 4 Atl. R. 385.

2. City Ins. Co. v. Commercial Bank, 68 Ill. 348.

4. Daniels v. Stevens' Lessee, 19 O. 222, 238.

3. McCartney v. Osburn, 118 Ill. 403

5. Miller v. Grice, 2 Rich. 27.

## CHAPTER XII.

### JURISDICTION TAKEN OVER THE SUBJECT-MATTER BY REASON OF A MISTAKE OF FACT, OR THE RIGHT TO CONTRADICT THE RECORD ON THAT POINT.

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| <p>§ 526. Scope of, and principle involved in, Chapter XII—Commissioners exercising judicial powers—Justices and other inferior courts—Other state judgment.</p> <p>527. Administrator, appointment of, under a mistake of fact—(Assets — Debts — General illegality of appointment—Necessity of appointment—Prior appointment by another court—Temporary administrator—Will, but administrator appointed)—Bond of administrator—Final settlement — Order — Petition to sell — Resignation — Suit on bond.</p> <p>528. Administrator's sale to pay barred claims—(Sales, but no debts — Sale, description of land).</p> <p>529. Administrator's sale, not necessary.</p> <p>530. Administrator's sale—(Title to land adjudicated — Widow's claim.)</p> <p>531. Amounts and values—(Bankrupt's discharge — Distribution — Justice's judgment — Gravel roads—Guardian's petition—Larceny—Newly discovered evidence—Payments wrongfully credited—Rental value — Replevin — Streets —</p> | <p>Tax assessments—Widow's right to whole estate—Wife — Will, probate of).</p> <p>§ 532. Attachment and garnishment—Bankruptcy and insolvency—Bond for appeal.</p> <p>533. Collusion—(Agent—Attorney—Divorce — Garnishee — Guardian—Insolvent—Public officer).</p> <p>534. Condition of property—(Abandoned—Built—Deserted—Foreign or Domestic—Indivisibility—Occupied).</p> <p>535. Section 534, continued—(Platted lands—Possession—Public or private property).</p> <p>536. Consideration wanting — Constable appointed.</p> <p>537. Contempt proceedings.</p> <p>538. Contract made—Contract upon condition.</p> <p>539. Crime—Bum boat case—Same crime — Simony — Contrary cases.</p> <p>540. Dates and time—contradicting record, concerning—Day wrong.</p> <p>541. Section 540, continued—Hour wrong.</p> <p>542. Section 540, continued—Term or vacation.</p> <p>543. Default set aside—Defense made—Dismissal on merits — Distribution of funds — Ditch—Division of damages.</p> |
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- § 544. Divorce—Election—Equity.
- 545. Exemptions, generally—Exemption of homestead.
- 546. Exemption from taxation.
- 547. Exempt wages.
- 548. Expense of street improvement—Ferry—Filing of answer—Forfeiture.
- 549. Forged claim—Forged entries—(Attorney—Clerk's entries—Justice's entries—Subsequent alterations).
- 550. Fraud in domestic judgments—(Principle involved—Divorce Insurance—Naturalization—Negligence—Partition—Sheriff's deed).
- 551. Section 550, continued—Administrator's appointment or final settlement, obtained by fraud.
- 552. Section 550, continued—Administrator's order to sell land obtained by fraud.
- 553. Section 550, continued—Administrator's or guardian's purchase at his own sale.
- 554. Section 550, continued—Bankruptcy, insolvency and poor debtors' proceedings—Fraud in.
- 555. Section 550, continued—Crime, fraudulent acquittal of.
- 556. Section 550, continued—Justice's fraudulent conduct.
- 557. Section 550, continued—(*Lis pendens* agreement violated—Partition—Petitioners—Trustee).
- 558. Fraud in foreign and other state judgments—Will.
- 559. Gambling debt—Highway.
- 560. Identity of causes—Injunction violated.
- 561. Insolvent's discharge.
- 562. Judge—Errors of fact, concerning—Jury impaneled.
- 563. Levy—License to sell liquor—Limitation or lapse of time.
- 564. *Lis pendens* agreement—*Mandamus*—"Manifest injury to service."
- § 565. Maps, plans and surveys.
- 566. Maturity of claim.
- 567. Naturalization.
- 568. Newly discovered evidence—Non-suit—Ordinance.
- 569. Payment before suit or judgment—(Allowance—Award—Foreclosure—Note—Street assessment—Tax lien—Tax judgment in Minnesota).
- 570. Perjury.
- 571. Place of occurrence of event in civil causes.
- 572. Place of occurrence of event in criminal causes.
- 573. Place of existence of thing—Assets of decedent in county—Assets, none in state.
- 574. Section 573, continued—Court, place of holding.
- 575. Section 573, continued—Highway, location of.
- 576. Section 573, continued—Land or sea?
- 577. Section 573, continued—Railroad, location of.
- 578. Section 573, continued—Spring, location of—Taxable property, location of.
- 579. Preemption—Priority.
- 580. Revivor—"Settled as per agreement filed."
- 581. Specific performance—Splitting causes of action.
- 582. Tax judgments.
- 583. Title to land before justice of the peace—Title to land before superior court—Quieting title—Replevin.
- 584. Tort or contract—Unfounded—Unconscionable—Unlawful preference—Unreasonable—Usury.
- 585. Wills—Codicils—Forged Wills—Revocation.
- 586. Comments on sections 526 to 585.

§ 526. **Scope of, and principle involved in, Chapter XII.**—This chapter treats of the validity of rights and titles derived through a judicial proceeding where jurisdiction was taken over the subject-matter by reason of a mistake of fact; or, which is the same thing, it treats of the right to contradict the record in such a proceeding on that point. On principle, such rights and titles are never invalid, for two reasons—namely, 1. Jurisdiction depends upon the allegations and not upon their truth;<sup>1</sup> and, 2. The only plea admissible against a record is *nul tiel record*, and the only way to try the issue thus raised is by an inspection of the record or a certified copy. In other words, the record cannot be contradicted on a question of fact in order to show a want of jurisdiction. Lord Coke said: “The rolls being the records or memorials of the judges of the courts of record, import in them such uncontrollable credit and verity, as they admit of no averment, plea or proof to the contrary. And, if such a record be alleged, and it be pleaded that there is no such record, it shall be tried only by itself; and the reason thereof is apparent, for otherwise (as our old authors say, and that truly) there would never be any end of controversies, which would be inconvenient.”<sup>2</sup> Mr. Chitty says: “It is a maxim in law that there can be no averment in pleading against the validity of a record, . . . therefore no matter of defense can be pleaded which existed anterior to the recovery of the judgment.”<sup>3</sup> The supreme court of Illinois said: “The record of a court can never be contradicted, varied or explained by evidence beyond or outside of the record itself. Any other rule would be most disastrous in its results. A judicial record contains evidence of its own validity, and should testimony *dehors* the record itself be admitted to contradict or vary its recitals, it would render such records of no avail, and definitive sentences would afford but slight protection to the rights of parties once solemnly adjudicated. Hence all records must be tried and construed by themselves.”<sup>4</sup> The supreme court of Louisiana said: “Absolute nullities in judicial proceedings are such as result from radical defects, omissions and irregularities, appearing on the face of the record, and are not depend-

1. See section 60, *supra*.

2. 1 Coke's Inst. 260.

3. 1 Chitty's Pl. 512.

4. Harris v. Lester, 80 Ill. 307, 314. Ralston v. Wood, 15 Ill. 159 (58 Am. D. 604), held that no error of fact made a judgment void.

ent on matters *en pais* to be established by evidence *aliunde*;"<sup>1</sup> and the same point, that a judgment appearing to be valid on its face cannot be contradicted by evidence *aliunde*, or outside of the record, has been expressly decided in Colorado,<sup>2</sup> Indiana,<sup>3</sup> Missouri,<sup>4</sup> Tennessee,<sup>5</sup> Vermont<sup>6</sup> and Wyoming;<sup>7</sup> and the supreme courts of Illinois<sup>8</sup> and Vermont<sup>9</sup> have ruled that it cannot be controverted by plea. In other words, if any *possible* state of facts will support it, it is not void. Thus, a person was imprisoned in Wisconsin for failing to give security for the payment of alimony. On *habeas corpus*, it was said that the trial court did have such power under some circumstances, and that the judgment was not void because not warranted by the evidence.<sup>10</sup> So, where the probate court in Illinois had power to authorize a guardian to mortgage the ward's land in order to prevent irreparable injury, such an order was held to be conclusive collaterally that such a state of facts existed;<sup>11</sup> and where the statute of South Carolina forbidding married women from making wills had certain exceptions, the probate of such a will is conclusive that the testatrix was within the exceptions, and bars an application for letters of administration.<sup>12</sup> The same principle was recognized in Iowa, where it was held that an erroneous order to sell land without right of redemption, was not void, because the court had power to make such an order in a few excepted cases.<sup>13</sup> So, where the statute of Michigan limited the period of the administration of estates to four and one-half years, with a few exceptions, it was held that the validity of a mortgage ordered by the probate court five years after the issuing of letters could not be assailed collaterally, because the decision was conclusive that the estate was within one of the exceptions.<sup>14</sup>

1. *Stackhouse v. Zuntz*, 36 La. Ann. 529, 533.

2. *Hughes v. Cummings*, 7 Colo. 203 (2 Pac. R. 289)—a county court judgment.

3. *Earle v. Earle*, 91 Ind. 27, 42; *Phillips v. Lewis*, 109 Ind. 62, 68 (9 N. E. R. 395); *Kingman v. Paulsen*, — Ind. — (26 N. E. R. 393).

4. *Scott v. Crews*, 72 Mo. 261, 263.

5. *Byram v. McDowell*, 83 Tenn. (15 Lea) 581, 585; *Stanley v. Sharp*, 48 Tenn. (1 Heisk.) 417—a county court judgment.

6. *Beech v. Rich*, 13 Vt. 595.

7. *Ex parte Bergman*, — Wyo. — (26 Pac. R. 914, 919).

8. *Wellborn v. People*, 76 Ill. 516.

9. *Beech v. Rich*, *supra*.

10. *Wright v. Wright*, 74 Wis. 439 (43 N. W. R. 145).

11. *Kingsbury v. Powers*, 131 Ill. 182 (20 N. E. R. 3, 9, and 22 id. 479).

12. *Ward v. Glenn*, 9 Rich. 127.

13. *Traer v. Whitman*, 56 Iowa 443 (9 N. W. R. 339).

14. *Church v. Holcomb*, 45 Mich. 29 (7 N. W. R. 167, 172).

COMMISSIONERS EXERCISING JUDICIAL POWERS.—In the year 1669, commissioners of excise who adjudged low wines to be strong wines perfectly made,<sup>1</sup> or brandies imported to be strong waters,<sup>2</sup> were held liable in trespass upon the ground that no appeal lay from their decisions; and in later cases, where the commissioners of sewers, a judicial body, were authorized by statute to assess benefits to lands, it was held that persons assessed might show, in order to avoid the assessment, collaterally, that the lands assessed were not benefited.<sup>3</sup> So, it is held in New York, that, while arbitrators, assessors and canal land appraisers exercise judicial functions, they do not constitute a court, and that they cannot obtain jurisdiction by determining that they have it; but that they must, in fact, have jurisdiction before their decisions can have any validity, and that such facts are always open to inquiry.<sup>4</sup> But no reason occurs to me why a tribunal, which sits and hears both sides, and is sworn to determine the facts and the law, cannot determine the facts which constitute its own jurisdiction just as well when no appeal is allowed from its decision as when there is, or when it is not a technical court as when it is. In either case, the law clothes it with complete power to hear and decide, and the court of last resort possesses no more. It will be seen, hereafter, that a majority of the states hold the decisions of boards and commissioners exercising judicial powers just as invulnerable, collaterally, as those of the superior courts; and, on principle, this seems to me the better view.

JUSTICES AND OTHER INFERIOR COURTS.—The records of justices of the peace and other inferior courts are just as proof against collateral attacks as those of superior courts.<sup>5</sup> Thus, where a justice's record was legal on its face, it was held to be inadmissible to show, collaterally, that the cause of action was one over which the justice had no jurisdiction;<sup>6</sup> or that the decision made was not true in fact;<sup>7</sup> or that the case had been

1. *Terry v. Huntington*, Hardres 480.

2. *Papillon v. Buckner*, Hardres 478.

3. *Stafford v. Hamston*, 2 Brod. & Bing. 691; *Masters v. Scroggs*, 3 M. & S. 447.

4. *People v. Schuyler*, 69 N. Y. 242, 247.

5. *Spaulding v. Chamberlin*, 12 Vt. 538 (36 Am. D. 358).

6. *Witt v. Russey*, — Tenn. (10 Humph.) 208 (51 Am. D. 701); *Mason v. Westmoreland*, 38 Tenn. (1 Head) 554.

7. *Mather v. Hood*, 8 Johns. 44.



dismissed when the record showed a judgment on the merits for the defendant.<sup>1</sup>

**OTHER STATE JUDGMENT.**—A judgment from another state cannot be contradicted so as to show that the judgment was rendered after a dismissal, and after the plaintiff was out of court;<sup>2</sup> nor can it be shown that it was based on a claim for relinquishment of dower, when it purports to be for rent of land.<sup>3</sup> So, whether a final judgment has been rendered by a justice, or an appeal taken, must be determined from the record, and parol evidence to contradict it is not admissible;<sup>4</sup> and where the statute made the transcript from a justice evidence on appeal, it was held that it could not be contradicted by the record and papers in the case.<sup>5</sup> A person died in New York, testate, appointing one daughter executrix and devising certain property to another daughter. The devisee sued the executrix in that state, and, after a trial on proper issues, it was adjudged that the plaintiff had not accepted the provision made for her in the will, and that she was entitled to recover a certain amount which her father held in trust for her. A part of the estate of the testator being in Tennessee, in a suit between the sisters in that state, as devisee and executrix, respectively, the court refused to acknowledge the validity of the New York judgment, and found and adjudicated both points to the contrary. For this, the Tennessee decision was reversed by the Supreme Court of the United States.<sup>6</sup> These cases are merely used here for illustration; and similar ones will be found throughout the entire chapter.

**§ 527. Administrator, appointment of, under a mistake of fact.**—It is laid down in Bacon's Abridgment, that, where the archbishop had the right to appoint an administrator when the decedent left goods of the value of five pounds in his diocese, an appointment was not void because no goods were left in the diocese.<sup>7</sup> In other words, the determination of this jurisdictional fact by the archbishop was conclusive in a collateral action. The same view has been taken in the American states, and such an

1. *Pilcher v. Ligon*, — Ky. — (15 S. W. R. 513).

2. *Caughran v. Gilman*, 72 Iowa 570 (34 N. W. R. 423).

3. *Guttermann v. Schroeder*, 40 Kan. 507 (20 Pac. R. 230).

4. *Gammon v. Chandler*, 30 Me. 152.

5. *Holden v. Barrows*, 39 Me. 135.

6. *Carpenter v. Strange*, 141 U. S. 87, 101 (11 S. C. R. 960).

7. 4 Bac. Abr. 46, *citing* (5 Co. 30; Hob. 185; 8 Co. 135; Lev. 305, and 7 Mod. 146).

appointment has been decided not to be void because the decedent left no *assets*,<sup>1</sup> nor *debts*.<sup>2</sup> So, where it was contended in Louisiana, in opposition to the account of an executrix, that her appointment arose from a misconstruction of the will, and was unnecessary because there were no debts, the court said: "As to the legality of the appointment of the executrix, it is only necessary to say that that question cannot be raised in this indirect and collateral way. Whether legally or illegally done, she was appointed and qualified, and must be treated as the lawful executrix until her appointment is revoked in a direct action."<sup>3</sup> But in Texas, where there were no debts and the estate had been taken into the possession of the heirs under a statute, the appointment of an administrator was decided to be void.<sup>4</sup> These facts would have constituted a defense to the petition for the appointment which the heirs had an opportunity to make; but having failed to do so, it was necessarily barred.

GENERAL ILLEGALITY OF APPOINTMENT.—A person was appointed public administrator of a succession in Louisiana, and sold land. In a contest over the title, the defendants attempted to show that the appointment of a public administrator was unauthorized, and that, therefore, the sale was void. The court said: "Vaughn's appointment was made by a court of competent jurisdiction. The validity of his appointment cannot be inquired into collaterally."<sup>5</sup> So, where a New Hampshire guardian obtained an order to sell lands in Minnesota from the proper court in the latter state, evidence to show, in a collateral suit, that he was not lawfully appointed in New Hampshire, is inadmissible.<sup>6</sup> An administrator of one estate in Massachusetts was duly ordered to pay a sum of money to an administrator of another estate, which he refused to do, and suit was brought on his bond, to which he answered that the plaintiff was never lawfully appointed administrator of the other estate. But this was held to be an attempt, collaterally, to impeach the order of distribution, and bad for that reason.<sup>7</sup> So, while mere errors and irregularities in the appointment of a special administrator do

1. *Brawford v. Wolfe*, 103 Mo. 391 (15 S. W. R. 426); *Weir v. Monahan*, 67 Miss. 434 (7 S. R. 291, 294).

2. *Cloutier v. Lernée*, 33 La. Ann. 305, 307; *Brawford v. Wolfe*, *supra*.

3. *Succession of Dougart*, 30 La. Ann. 268, 269.

4. *Francis v. Hall*, 13 Tex. 189, 193.

5. *Morgan v. Locke*, 28 La. Ann. 806; *accord*, *Hogan v. Thompson*, 2 id. 538.

6. *Menage v. Jones*, 40 Minn. 254 (41 N. W. R. 972).

7. *White v. Weatherbee*, 126 Mass. 450.

not make the appointment void,<sup>1</sup> it was said by the supreme court of Florida, that, where the records of a probate court affirmatively showed a want of jurisdiction to appoint an administrator, the appointment was void;<sup>2</sup> but what the defect was, the case does not show. In a suit by a guardian in Vermont, it was held that the defendant could not plead in abatement that the appointment of the plaintiff was void.<sup>3</sup> So, the appointment of a tutor in Louisiana, without first having an abstract of the minor's estate made and recorded and a certificate of that fact presented to the court, in violation of the statute, is not void;<sup>4</sup> and the same ruling was made in New York, where an order granting ancillary letters of administration on the estate of a foreigner was made upon improperly authenticated papers,<sup>5</sup> and in Kansas, where an administrator was appointed on insufficient and illegal evidence.<sup>6</sup> See sections 588-591, *infra*.

NECESSITY FOR APPOINTMENT.—The appointment of an administrator is not void because not necessary.<sup>7</sup> Thus, where a decree of a district court in Texas had fully adjusted all the rights and interests of all persons in an estate, thereby rendering administration unnecessary and useless, yet where letters were afterwards taken out and land sold, the sale was held valid in a collateral action of trespass to try title;<sup>8</sup> and it was said by the supreme court of Louisiana that “neither the validity nor the necessity of the proceedings in the court of probates for the appointment of an administrator can be drawn into question collaterally by a debtor of the succession.”<sup>9</sup>

PRIOR APPOINTMENT BY ANOTHER COURT.—Letters of administration in California were granted, and two days later, in ignorance of that fact, letters were granted in another county, which were said to be void.<sup>10</sup> But this *dictum* seems to me to be wrong.

1. Lehman, Succession of, 41 La. Ann. 987 (7 S. R. 33); Cook v. Stevenson, 30 Mich. 242, 245; Naylor's Adm'r v. Moffatt, 29 Mo. 126—appointment of an administrator; Fitts v. Fitts, 21 Tex. 511—appointment of guardian.

2. Epping v. Robinson, 21 Fla. 36, 49.

3. Farrar v. Olmstead, 24 Vt. 123, 127.

4. Stackhouse v. Zuntz, 36 La. Ann. 529, 532.

5. Brown v. Landon, 37 N. Y. Supr. (30 Hun) 57; *affirmed*, 98 N. Y. 634.

6. Brubaker v. Reeves, 23 Kan. 411.

7. Stewart v. Smiley, 46 Ark. 373, 375.

8. Edwards v. Halbert, 64 Tex. 667, 669.

9. Succession of McNeil, 9 La. Ann. 113.

10. *Dictum* in Griffith, Estate of, 84 Cal. 107 (23 Pac. R. 528); *accord*, Oh Chow v. Brockway, — Or. — (28 Pac. R. 384, 387). See section 580.

All persons being called upon in the second case to show cause against the appointment, it was the duty of the first appointee to plead his adjudication in bar; but, this having been neglected, the second appointment necessarily adjudged that no other valid appointment existed in the state. In *scire facias* in the year 1589, to revive a judgment recovered by an administrator in England, it was decided to be no answer that the decedent resided in another diocese and that another administrator had been appointed there.<sup>1</sup>

SETTLED ESTATES.—A case in Texas holds that the appointment of an administrator after a former administrator had settled the estate, is void;<sup>2</sup> and in another case in the same state, an administrator had rendered a final account which had been approved and an order for distribution made. After that, an administrator *pendente lite* was appointed, who brought an action against the heirs to recover land, but it was held that he could not succeed because his appointment was void;<sup>3</sup> and in still another case, an administrator made a final report showing \$3.83 his due, and that all the debts were paid, upon which he was discharged. At the next term of court, another administrator was appointed and sold land. This sale was held void on the ground that the record showed that there was no occasion to make the appointment.<sup>4</sup> A new administrator was appointed in Indiana on the discovery of new assets, without setting aside the final discharge of the former administrator. In a direct proceeding to set aside the new appointment, the court said it was "*coram non judice* and void."<sup>5</sup> I think all these cases wrong. A petition to have an administrator appointed which shows that there is no occasion for it, like any other complaint which shows that no cause of action exists, is subject to demurrer; but that does not make the judgment granting relief void.

TEMPORARY ADMINISTRATOR.—A statute of Mississippi authorized the appointment of an administrator *ad colligendum* in case there was a will, or a contest over one, to collect debts and preserve the estate until the executor could qualify. Such an administrator was appointed in a case where there was no will and no

1. Allens v. Andrews, Cro. Eliz. 283.

2. Hurt v. Horton, 12 Tex. 285, 288.

3. Fisk v. Norvel, 9 Tex. 13 (58 Am. D. 128).

4. Withers v. Patterson, 27 Tex. 491 (86 Am. D. 643).

5. Croxton v. Renner, 103 Ind. 283.

226 (2 N. E. R. 601).

contest over one, and this appointment was decided to be void.<sup>1</sup> The counsel for appellee<sup>2</sup> said: "In the exercise of this jurisdiction, the court in every case has to decide whether letters testamentary, letters of administration with the will annexed, letters *ad colligendum*, or letters of administration in chief, shall be granted in the given case; and to hold that an erroneous decision of the court in this particular would make the grant absolutely void, would be stripping the acts of the court of all faith and credit, and make them inquirable into, collaterally, and be productive of the greatest mischief. No one could safely deal with an administrator or executor. His letters of administration issuing from the proper court would not be even *prima facie* evidence of authority. Such is not the doctrine; the grant of letters may have been wrong, but not void. Thus it is wrong to grant letters of administration, as in the case of intestacy, when the deceased died testate; but yet the acts of the administrator will be valid until the will is probated and an executor qualified." The court did not attempt to answer this argument. The decision was wrong on another ground, not noticed, under all the authorities, namely: The suit was against the surety of the administrator who had collected the debt and squandered it. Both the administrator and his surety were estopped to deny a legal appointment in such a case.

**WILL—ADMINISTRATOR APPOINTED.**—The appointment and acts of an administrator are not void because a will is afterwards found.<sup>3</sup> The grant of general letters of administration after the probate of a will, was held valid collaterally, in Alabama and Arkansas;<sup>4</sup> and the appointment of an administrator in Pennsylvania after the erroneous rejection of a will,<sup>5</sup> or in Mississippi, after the erroneous vacation of the probate of a will,<sup>6</sup> is not void. But, in North Carolina, the appointment of a general administrator pending a contest over a will,<sup>7</sup> or of an administrator with the will annexed without showing the renunciation of

1. *Boyd v. Swing*, 38 Miss. 182, 196.

2. Mr. J. Winchester, on page 192 of *Boyd v. Swing*, *supra*.

3. *Shephard v. Rhodes*, 60 Ill. 301; *Kittredge v. Folsom*, 8 N. H. 98, 108; *Schluter v. Bowery Savings Bank*, 117 N. Y. 125 (22 N. E. R. 572).

4. *Broughton v. Bradley*, 34 Ala. 557.

694 (73 Am. D. 474, 479); *Brock's Adm'r v. Frank*, 51 Ala. 85, 93; *Jackson v. Reeve*, 44 Ark. 496, 500.

5. *Patton's Appeal*, 31 Pa. St. 465.

6. *Ragland v. Green*, 22 Miss. (14 Sm. & M.) 194, 200.

7. *Slade v. Washburn*, 3 Ired. L.

the executor,<sup>1</sup> was held void ; and it was decided in New Jersey that the grant of letters testamentary exhausted the power of the court, and that a subsequent grant of letters of administration was void ;<sup>2</sup> but the supreme court of Tennessee held that an executor had no title in that state by virtue of the will, until he qualified and gave bond ; and that, because he had no title, the appointment of an administrator was not void.<sup>3</sup> The granting of general letters of administration in Kentucky after a will had been probated, instead of letters with the will annexed, was held void ;<sup>4</sup> while precisely the contrary was ruled in Arkansas and Alabama.<sup>5</sup> But in Wisconsin, where an administrator with the will annexed had sold land, the sale was held void in ejectment because the defendant could not prove that the will had ever been probated.<sup>6</sup> It seems to me that all these cases which hold sales void for defects in the appointment or qualification of the administrator, stick in the bark. The heirs had their day in court to show cause why the petitioner should not be granted an order to sell as prayed for. If *he* had no right to the order for any cause whatever, then was the proper time to make it known. It is refreshing to find the supreme court of Illinois deciding that the appointment of an administrator with the will annexed is not void because the will was not duly proven.<sup>7</sup> Of course it was not. The court had power to probate alleged wills ; and if anything was wrong with the one propounded, those interested had an opportunity to object.

**BOND OF ADMINISTRATOR.**—The appointment of an administrator is not void because the surety on his bond was insolvent when taken,<sup>8</sup> and he cannot be restrained from acting for that reason.<sup>9</sup> So, where the court had power, under certain circumstances, to require an administrator to give a new bond, such a bond is not void because the facts did not warrant the court in

1. *Springs v. Irwin*, 6 Ired. L. 27 ; *contra*, *Peebles v. Watt's Adm'r*, 9 Dana 102, which holds that the presumption was that the executor refused to act.

2. *Ryno v. Ryno*, 27 N. J. Eq. (12 C. E. Green) 522, 525.

3. *Baldwin v. Buford*, 12 Tenn. (4 Yerger) 16, 20.

4. *Ewing v. Sneed*, 5 J. J. Marsh. 26, 29.

5. *Broughton v. Bradley*, 34 Ala. 694 (73 Am. D. 474, 479) ; *Jackson v. Reeve*, 44 Ark. 496, 500.

6. *Chase v. Ross*, 36 Wis. 267, 272.

7. *Wight v. Wallbaum*, 39 Ill. 554.

8. *Heirs of Herriman v. Janney*, 31 La. Ann. 276, 280.

9. *Lawrence v. Parsons*, 27 How. Pr.

ordering it;<sup>1</sup> and where the sole surety on a guardian's bond died, a sale of land made afterwards, is not void.<sup>2</sup> Errors of fact in the final settlement of an administrator<sup>3</sup> (or any other trustee), or in his order,<sup>4</sup> or petition,<sup>5</sup> to sell land, or in the acceptance of his resignation,<sup>6</sup> or in an order to bring suit on his bond,<sup>7</sup> do not make the order or proceeding void and liable to be overhauled collaterally.

A California statute declared that, "in case of a judgment or order against a specific thing, or in respect to the probate of a will, or the administration of the estate of a decedent, . . . the judgment or order is conclusive upon the title to the thing, the will or administration." Under this statute (which added nothing to the law) the court held that if the question of kinship was put in issue and decided on an application for letters of administration, it would be conclusive in the distribution.<sup>8</sup> See section 17, *supra*, sub-head "Incidentally Cognizable."

§ 528. **Administrator's sale to pay barred claims.**—It does not seem possible that an order or license granted to an administrator or executor to sell land to pay alleged claims should be held void because the claims were all barred by lapse of time, or unfounded in fact, as the heirs have an opportunity to defend against the granting of the order. The petition, perhaps, never shows that the claims are actually barred, that being a matter of fact to be pleaded by way of answer. That such a license is void, and that the purchaser gets no title, has always been maintained in

1. Ward v. State, 40 Miss. 108, 112.

2. Prime v. Mapp, 80 Ga. 137 (5 S. E. R. 66).

3. Shoemaker v. Brown, 10 Kan. 383, 393; Potter v. Webb, 2 Me. (2 Greenleaf) 257; Arnold v. Mower, 49 Me. 561; Parcher v. Bussell, 11 Cush. 107; Stubblefield v. McRaven, 13 Miss. (5 Sm. & M.) 130 (43 Am. D. 502); Williams v. Heirs of Petticrew, 62 Mo. 460, 467; App v. Dreisbach, 2 Rawle 287; M'Fadden v. Geddis, 17 Serg. & R. 336; Franks v. Groff, 14 Serg. & R. 181, 184; Tate v. Norton, 94 U. S. 746, *relying upon* Clark v. Shelton, 16 Ark. 480 and Dooley v. Dooley, 14 Ark. 124.

4. Succession of Hebrard, 18 La. Ann. 485; Webb v. Keller, 39 id. 55 (1

S. R. 423, 431); Linman v. Riggins, 40 id. 761 (5 S. R. 49, 52); Grevemburg v. Bradford, 44 id. — (10 S. R. 786); Durrett v. Davis, 24 Gratt. 302, 308—a guardian's order to sell. Thompson v. Tolmie, 2 Peters. 157, 168—mistake as to debts and children.

5. Lynch v. Kirby, 36 Mich. 238—a guardian's petition to sell; Griffin v. Johnson, 37 Mich. 87, 90; Wolf v. Robinson, 20 Mo. 459; Woodruff v. Cook, 2 Edw. Ch. 259, 261.

6. Luco v. Commercial Bank, 70 Cal. 339 (11 Pac. R. 650).

7. Ordinary v. Poulson, 43 N. J. L. (14 Vroom) 33.

8. Howell v. Budd, 91 Cal. 342 (27 Pac. R. 747).



Massachusetts.<sup>1</sup> In *Heath v. Wells*, the court said that the debts being barred, the land ceased to be subject to the right of the administrator to sell, and that it ceased to be assets in his hands, and that, therefore, "the court had no cognizance of the case, and the license was merely void. It was not a case for deliberation or decision. The license could give no authority to the administrator, who might as well have been licensed to sell the lands of a stranger." The same reasoning was reiterated in *Tarbell v. Parker*. The early Massachusetts cases were followed in Michigan,<sup>2</sup> but the contrary was held in Florida, Missouri, New Hampshire, New York and Texas.<sup>3</sup> The cases cited from Missouri and Texas held that a judgment by default against an administrator on a barred claim was not void. I know of no rule of law which will sustain the Massachusetts and Michigan cases.

SALE — NO DEBTS.—That a sale of land by an administrator to pay debts when there were none, is not void, has been held in California, Georgia, Illinois, Louisiana, Minnesota, Missouri, New Hampshire and Texas,<sup>4</sup> while the contrary has been held in Alabama;<sup>5</sup> but even in Alabama, it was held that an error of the probate court in deciding that certain claims were debts against the estate, in a proceeding to sell land, did not make the sale void.<sup>6</sup> In the case first cited, the supreme court of Alabama seems to have confused the doctrines of *res judicata* and collateral attack. In that case the heirs had the same opportunity to show that there were no debts as in the other; but because they tried to do so in the case last cited, and failed, made the proceeding no stronger, collaterally. In an old English case, a certificate was given by commissioners, stating that a certain

1. *Thompson v. Brown*, 16 Mass. 172; *Heath v. Wells*, 5 Pick. 140, 145 (16 Am. D. 383); *Tarbell v. Parker*, 106 Mass. 347.

2. *Campau v. Gillett*, 1 Mich. 416 (53 Am. D. 73).

3. *Deans v. Wilcoxon*, 25 Fla. 980 (7 S. R. 163, 172); *Postlethwaite v. Ghiselin*, 97 Mo. 420 (10 S. W. R. 482); *Hall v. Woodman*, 49 N. H. 295, 304; *Jackson v. Robinson*, 4 Wend. 436; *Giddings v. Steele*, 28 Tex. 733 (91 Am. D. 336, 345).

4. *McCauley v. Harvey*, 49 Cal. 497; *Bailey v. Ross*, 68 Ga. 735; *Deyton v.*

*Bell*, 81 Ga. 370 (8 S. E. R. 620); *Stow v. Kimball*, 28 Ill. 93, 108, 111; *Bowen v. Bond*, 80 Ill. 351, 358; *Succession of Theze*, 44 La. Ann. — (10 S. R. 412); *Curraw v. Kuby*, 37 Minn. 330 (33 N. W. R. 907); *Lamothe v. Lippott*, 40 Mo. 142; *Murphy v. De France*, 105 Mo. 53 (15 S. W. R. 949)—a paid claim; *Merrill v. Harris*, 26 N. H. (6 Foster) 142 (57 Am. D. 359); *McNally v. Haynes*, 59 Tex. 583, 585.

5. *Woods v. Legg*, 90 Ala. — (8 S. R. 342).

6. *Chardavoyne v. Lynch*, 82 Ala. 376 (3 S. R. 98).

sum was due from one army officer to another. In a suit upon it, evidence to show that there was nothing due was held to be inadmissible;<sup>1</sup> and in a recent case in Illinois, it was decided that a confession on a warrant of attorney was not void because there was no indebtedness.<sup>2</sup> In the case cited from Texas, it was also held that it did not change the rule because the whole record taken together contradicted the application and showed that there were no debts.

**SALE—DESCRIPTION OF LAND.**—An administrator, by virtue of a land certificate, sold land in Texas, alleged to be located in Navarro county. In fact, the land was not located until eight months afterwards, and the certificate was not sold. The sale was held void.<sup>3</sup> This case seems to me to be wrong. As soon as it was located in Navarro county, the record would estop all parties from alleging that it was not so located at the time of the presentation of the petition to sell. Such a sale is not void because a will is subsequently admitted to probate.<sup>4</sup>

§ 529. **Administrator's sale—not necessary.**—It is error to order a sale of the land of a decedent unless necessary, but as the heirs have an opportunity to contest that question, such an order is not void, and it cannot be shown in a collateral action that no necessity existed.<sup>5</sup> The failure of an administrator to file an account of the personal estate and debts of the decedent, as required by the statute of Mississippi—no petition being required—does not make an order to sell land void.<sup>6</sup> In deciding the same point in an earlier case, the court said that “the parties have the opportunity at the time appointed for taking essential action upon the matter, to appear and show that the personal estate is sufficient, and that a sale of real estate is not necessary to pay debts.”<sup>7</sup> The statute of Illinois authorized the sale of the lands of an insane person by his conservator whenever necessary to pay debts, support his family, educate his children, or proper for reinvestment. In a collateral attack on such a sale, the court

1. *Moody v. Thurston*, 1 *Strange* Am. D. 407; *Beale v. Walden*, 11 *Rob.* 481. (La.) 67, 72; *Rhodes v. Union Bank*, 7

2. *Hawley v. Simons*, — *Ill.* — (14 *id.* 63, 66; *Webb v. Keller*, 26 *La. Ann.* N. E. R. 7). 596; *Posey v. Eaton*, 77 *Tenn.* (9 *Lea.*)

3. *Harwood v. Wylie*, 70 *Tex.* 538 (7 *S. W. R.* 789). 500, 502.

4. *Turner v. Nesbit*, 1 *Hill's Ch.* (S. 210, 224. C.) 445, 461. 6. *Learned v. Matthews*, 40 *Miss.*

5. *McDade v. Burch*, 7 *Ga.* 559 (50 72, 75. 7. *Eldridge v. McMackin*, 37 *Miss.*

sold the undivided one-fourth. This was held to pass the title to the one-fourth as against a collateral attack.<sup>1</sup>

NEWLY-DISCOVERED EVIDENCE furnishes no ground to attack a judgment collaterally by showing that the amount was too large.<sup>2</sup>

PAYMENTS WRONGFULLY CREDITED.—An English statute gave a court jurisdiction where the amount involved did not exceed twenty pounds. The plaint was on two bills, amounting to twenty-three pounds, and claimed that a balance of only four pounds and nineteen shillings remained unpaid. The defendant's wife, in his absence, had delivered to the payee of the bills some jewelry, and the payee had indorsed the bills to the plaintiff, and delivered to him the jewelry, which he had sold and applied the proceeds on the bills, thus reducing the amount to four pounds and nineteen shillings. The defendant showed, by uncontradicted evidence, that the jewelry was delivered by his wife *as security*, and *without authority*, and thus that no payment had ever been made, and that the amount due was beyond the jurisdiction of the magistrate; nevertheless, the magistrate, mistaking the law, held the delivery of the jewelry a payment, and rendered a judgment for four pounds and nineteen shillings. On an application for a writ of prohibition, the foregoing facts were established. But the court held that, although the decision of the magistrate was erroneous on a point of law in regard to the payment, and that he thus wrongfully sustained his jurisdiction, yet it was a point he had to decide, and that the erroneous decision did not destroy his jurisdiction.<sup>3</sup>

RENTAL VALUE.—The county court judge had jurisdiction for the recovery of possession by a landlord against a tenant, only in cases where the rent reserved did not exceed twenty pounds per year. It was held that the decision of the judge that the annual value did not exceed twenty pounds was conclusive and could not be reviewed on prohibition.<sup>4</sup>

REPLEVIN.—The New York statute gave justices jurisdiction in replevin for personal property where "the value of which, as stated in the affidavit, . . . shall not exceed the sum of one hundred dollars." It was held that the affidavit gave jurisdiction

1. *Randall v. Lower*, 98 Ind. 255, 262.

2. *Pease v. Whitten*, 31 Me. 117.

3. *Joseph v. Henry*, 1 L. M. & P. 388 (19 L. J., Q. B. 369; 15 Jur. 104).

4. *Brown v. Cocking*, L. R., 3 Q. B. 672, 675.

which was not ousted by proof and a finding that the value was two hundred dollars.<sup>1</sup>

**STREETS.**—The statute prohibited the laying out of a street requiring the removal of a building at a cost exceeding one hundred dollars. Such a matter was tried and a verdict returned and a judgment rendered that it would cost less than one hundred dollars. In a suit by a property owner to recover from the town the damages assessed, it was held that the town could not show in defense that the opening of the street would require the removal of a building at a cost exceeding one hundred dollars.<sup>2</sup> The county court of Arkansas had no authority to make contracts for the support of paupers in excess of the appropriations for that purpose; but such a contract is simply erroneous, and not void.<sup>3</sup>

**TAX ASSESSMENTS**, being judicial, the supreme court of New York said: "The essential thing to be done by assessors is to determine who are to be taxed and what property is taxable. This is a matter within their jurisdiction. In making the determination they act judicially, and though they may proceed irregularly, yet, having jurisdiction of the subject-matter, their unreversed decisions cannot be questioned collaterally. If, for example, some other rule of valuation than that prescribed by the statute should be adopted . . . it might, perhaps, furnish ground for reversing the proceedings, but it would not be ground for holding the assessment void upon a collateral question."<sup>4</sup> Such an assessment is not void because property was valued too highly;<sup>5</sup> nor because the state board of equalization erred in fixing the values of a county,<sup>6</sup> nor because a person was assessed for more land than he owned.<sup>7</sup> So, where the assessors held that a bank was assessable at the full amount of the capital stock, differing from the highest courts of the state and the Nation, the assessment was held valid collaterally.<sup>8</sup>

**WIDOW'S RIGHT TO WHOLE ESTATE.**—A statute of Indiana authorized the court to set off the entire estate of a decedent to

1. *Dennis v. Crittenden*, 42 N. Y. 542, 547.

2. *Buell v. Town of Lockport*, 11 Barb. 602, 609.

3. *Lawrence v. Coffman*, 36 Ark. 641, 648.

4. *Van Rensselaer v. Witbeck*, 7 Barb. 133, 138.

5. *Livingston v. Hollenbeck*, 4 Barb. 9, 14; *Weaver v. Devendorf*, 3 Denio 117, 119.

6. *Mayor v. Davenport*, 92 N. Y. 604, 613.

7. *Martin v. Carron*, 26 N. J. L. (2 Dutcher) 228, 231, 234.

8. *Genessee Valley N. Bk. v. Supervisors*, 53 Barb. 223, 232.

the widow when its value did not exceed three hundred dollars. Such an order is not void because the actual value of the estate exceeded that amount.<sup>1</sup> A wife recovered a judgment against the husband in Louisiana. It was decided that his simple heirs, who stood in his shoes, could not show in a collateral proceeding that the amount was wrong.<sup>2</sup>

WILL, PROBATE OF.—The prerogative court had power to probate a will only in case the testator left *bona notabilia*—that is, property sufficient in value to be noted in an account; but it was held that a probate in a case where there was not that much property, was not void.<sup>3</sup>

§ 532. Attachment and garnishment.—Attachment proceedings are not void because the affidavit is false in fact;<sup>4</sup> nor can one attaching creditor, after the proceeds are brought into court, show that another who has a judgment was not, in fact, a creditor.<sup>5</sup> So, a judgment against a garnishee for more than he owes the principal debtor is not void for the excess, and he cannot be relieved, even in equity, from paying it.<sup>6</sup> And an adjudication that a case in attachment was filed under another case in attachment, and entitled to share *pro rata* with it, is conclusive collaterally.<sup>7</sup>

BANKRUPTCY AND INSOLVENCY.—It cannot be shown, collaterally, that the facts did not warrant an adjudication in bankruptcy;<sup>8</sup> nor is the discharge of an insolvent void because the court adjudged that the party was a debtor to the insolvent, when, in fact, he was a creditor,<sup>9</sup> nor because the insolvent had assets which he did not disclose;<sup>10</sup> and the discharge of a defendant in bankruptcy pending a suit against him on a note, does not make the judgment afterwards taken against him void,<sup>11</sup> and it will protect the party and officer who try to enforce it.<sup>12</sup>

BOND FOR APPEAL.—A justice's record in Maine recited that defendant appealed, but that he gave no recognizance. In the

1. Downes v. Downes, 17 Ind. 95.

2. Dejan, Succession of, 40 La. Am. 437 (4 S. R. 89).

3. Rex v. Loggen, 1 Strange 73.

4. Lovier v. Gilpin, 6 Dana, 321.

5. Harrison v. Pender, Busbee, Law, 78 (57 Am. D. 573).

6. Burlington and M. R. Ry. Co. v. Hall, 37 Iowa 620, 622.

7. Fee v. Moore, 74 Ind. 319, 324.

8. Chapman v. Brewer, 114 U. S. 158, 169 (5 S. C. R. 799)—citing Michaels v. Post, 21 Wall. 398.

9. Lester v. Thompson, 1 Johns. 300.

10. Cannon v. Seveno, 78 Me. 307 (4 Atl. R. 789).

11. Hollister v. Abbott, 31 N. H. (11 Foster) 442.

12. Cogburn v. Spence, 15 Ala. 549 (50 Am. D. 140).

appellate court, the plaintiff moved to dismiss the appeal for want of a bond, whereupon the defendant offered to show that the justice's record was untrue, but it was held that he could not do so, and the appeal was dismissed.<sup>1</sup>

§ 533. **Collusion.**—AGENT—A judgment rendered,<sup>2</sup> or promoted,<sup>3</sup> against a corporation by collusion between its agents and the plaintiff, is not void. A petition against husband and wife alleged that the husband and the plaintiff held certain land as partners. The wife intrusted her defense to her husband, who fraudulently filed a disclaimer for her, and judgment was rendered accordingly. It was decided that she could not overhaul the judgment collaterally, on account of the fraud of the husband.<sup>4</sup>

ATTORNEY.—A decree in a divorce,<sup>5</sup> or partition suit,<sup>6</sup> obtained by collusion between the plaintiff and the attorney for defendant, is not void as to him.

DIVORCE proceedings carried on by collusion between the parties, are not void.<sup>7</sup> But where a *garnishee* procured exempt wages in his hands to be garnished in Iowa and failed to set up the exemption or to notify the defendant, the judgment was held to be no defense to a suit against him for the wages.<sup>8</sup> But such an allegation could always be made, and it contradicts the record and the case seems to me to be wrong.

GUARDIAN.—In an action by a former ward against a railway company to quiet his title to land sold by his guardian to the company, it cannot be shown that the guardian was appointed by collusion between him and agents of the company for the purpose of cheating the ward out of his land by a collusive sale.<sup>9</sup>

INSOLVENT.—Collusion between the assignor and assignee in proceedings of insolvency,<sup>10</sup> or between two contestants for a *public office*,<sup>11</sup> do not make the proceedings void.

§ 534. **Condition of property.**—The decision of a Spanish judge that certain lands in Florida, then under the dominion of Spain,

1. Dolloff v. Hartwell, 38 Me. 54.

2. Wyoming Mfg. Co. v. Mohler — Pa. St. — (17 Atl. R. 31).

3. Union Trust Co. v. Rochester and P. R. Co., 29 Fed. R. 609.

4. Keith v. Keith, 26 Kan. 26.

5. Amory v. Amory, 3 Biss. 266, 271 — Miller, J.

6. Morrill v. Morrill, 20 Or. 96 (25 Pac. R. 362).

7. Davis v. Davis, 61 Me. 395; Mil-  
timore v. Miltimore, 40 Pa. St. 151.

8. Smith v. Dickson, 58 Iowa 444  
(10 N. W. R. 850).

9. Hodgdon v. Southern Pac. R. Co.,  
75 Cal. 642 (17 Pac. R. 928).

10. Bennett v. Denny, 33 Minn. 530,  
533 (24 N. W. R. 193).

11. Mannix v. State, 115 Ind. 245 (17  
N. E. R. 565).

had been *abandoned* by the Indians and were subject to be granted, cannot be controverted collaterally.<sup>1</sup> A statute of Indiana authorized the board of county commissioners to levy a tax to aid in *building* railroads in certain cases. The fact that the railroad had already been built when the petition was filed, and that the tax was levied to pay the contractor who built it, was a defense against the petition but no ground to enjoin the collection of the tax.<sup>2</sup> An English statute authorized the magistrate to make an order in favor of a landlord for the restitution of *deserted* premises. In such an alleged case a magistrate went to view the premises and found the wife and children of the tenant there, but there was no furniture in the house except three or four chairs belonging to a neighbor. He adjudged the premises to be deserted, and made an order for restitution, which was held to be erroneous, but not void.<sup>3</sup> So an erroneous order accepting a *ditch* before it was, in fact, completed, is not void.<sup>4</sup>

FOREIGN OR DOMESTIC.—Courts of admiralty, in certain cases, had jurisdiction over foreign vessels only. Where a decree had been made in such an alleged case, it was held to be incompetent to show in a collateral suit that the vessel was not foreign.<sup>5</sup> So, an error of fact in partition proceedings concerning the *indivisibility* of the premises, and the necessity of a sale, cannot be overhauled collaterally.<sup>6</sup>

OCCUPIED.—But where a non-resident owned two adjoining tracts of land in New York, consisting of "lot 3" and a "100-acre tract," and a tenant lived on lot 3 and had his barn on the 100-acre tract, an assessment and sale of this tract as unoccupied land, were held to be void collaterally, because it was occupied.<sup>7</sup> As the action of the assessors is regarded as judicial in that state, I do not think the decision sound. A statute of the province of Victoria authorized justices to issue a publican's license to a person for a house actually occupied by him; and in such a case, the judgment of the justice that the house licensed was occupied by the licensee was held conclusive upon *certiorari*.<sup>8</sup>

1. United States v. Arredondo, 6 Peters 691, 747.

2. Hilton v. Mason, 92 Ind. 157, 162.

3. Ashcroft v. Bourne, 3 B. & Ad. 684 (23 E. C. L. 301).

4. Simonton v. Hayes, 88 Ind. 70, 73.

5. Otis v. The Rio Grande, 1 Woods 279, 282.

6. Hunter v. Stoneburner, 92 Ill. 75, 79; Wilson v. Smith, 22 Gratt. 493, 502.

7. Calkins v. Chamberlain, 15 N. Y. St. Rep'r 576.

8. Regina v. Alley, 9 Victorian Law 302. See section 625, *infra*.



§ 535. **Section 534, continued—Platted lands.**—The statute of Indiana gave the board of county commissioners jurisdiction to annex land to a city where it was *not* platted. A petition for such purpose alleged that the land was not platted, and an order of annexation was made, which was held to be conclusive, collaterally, that the land was not platted.<sup>1</sup>

**POSSESSION.**—A commission was appointed by an English statute for the purpose of dividing and inclosing certain waste lands and of determining any dispute between interested parties *concerning the respective shares and proportions* claimed by them, but they were forbidden to determine any question of title or right to any particular part or portion *contrary to the possession* of any such party. An appeal was allowed from any decision made by them. The commissioners allotted certain portions of the land to the defendants, and they claimed title thereunder, inasmuch as no appeal had been taken; but the allotment was held void and that there was no need of an appeal.<sup>2</sup> The commissioners had power to determine who was *in possession* of any parcel and to award it to him; and a mistake as to the possession was one of fact, and did not make the judgment void according to *Ashcroft v. Bourne*, just cited.

**PUBLIC OR PRIVATE PROPERTY.**—An assessment in Illinois was made and confirmed for the improvement of an alleged public street. Afterwards a specific assessment was laid, and it was held to be incompetent to show in defense that the street was private and not public;<sup>3</sup> and the same was ruled in a late English case, where there was an attempt by *certiorari* to quash an order of a magistrate fixing a street sewer assessment, upon the ground that the place was not, in fact, a street, but was the property of a private person; this was denied because the jurisdiction depended upon the allegations, and because the magistrate was competent to decide whether the place was a street or not.<sup>4</sup> So, where the county court of Tennessee had power to lay out a road when it would be for the "public benefit," it was decided that its order could not be controverted collaterally by showing that the road was not for the public benefit.<sup>5</sup>

1. *Mullikin v. City of Bloomington*, 72 Ind. 161, 166.

2. *Attorney-General v. Lord Hotham*, 1 Turner & Russell 209, 218.

3. *Lehmer v. People*, 80 Ill. 601.

4. *Ex parte Wake*, L. R., 11 Q. B. Div. 291. See section 559<sup>3</sup>.

5. *Gilson v. State*, 73 Tenn. (5 Lea) 161, 163.

§ 536. **Consideration wanting.**—A judgment is never void because the claim upon which it was founded was without consideration;<sup>1</sup> and that fact furnishes no cause either to enjoin its enforcement<sup>2</sup> or to defeat a new action upon it.<sup>3</sup> So, testimony that a justice's judgment had no consideration will not affect a title derived through it;<sup>4</sup> and in a suit between creditors over the distribution of a fund, the consideration of their judgments cannot be inquired into.<sup>5</sup>

CONSTABLE APPOINTED.—The New York statute authorized three justices to appoint a constable to act instead of one elected and refusing to serve. Where one had been thus appointed, it was held incompetent to show collaterally that the person elected had not refused to serve, because that was a question the justices had judicially passed upon.<sup>6</sup>

§ 537. **Contempt proceedings.**—A commitment for contempt which is regular on its face, is not void on *habeas corpus* because of errors of fact.<sup>7</sup> A justice of the peace fined a person for contempt, which he paid, and then sued the justice before another justice to recover it back, but it was held that the merits of the contempt proceeding could not be overhauled in the new action.<sup>8</sup> So, where a justice was sued for committing a person for alleged contemptuous conduct in his official presence, it was held that the finding of the justice could not be contradicted by the testimony of witnesses in respect to what was done.<sup>9</sup> A person was imprisoned for contempt in refusing to produce a person held in custody. On *habeas corpus*, he offered to show that he did not have the custody of the person, and that he was imprisoned by the sheriff of another county, and not within the jurisdiction of the court; but this was decided to be a collateral attack on the *habeas corpus* proceeding by matter *dehors* the record, and not admissible.<sup>10</sup> But where the county court in Illinois had power to imprison an administrator for refusing to obey an order to pay a claim when he had money to pay it, an imprisonment of an administrator for refusing to obey such an order when he had

1. *Watson v. Camper*, 119 Ind. 60, 65 (21 N. E. R. 323).

2. *Garrison v. Cobb*, 106 Ind. 245 (6 N. E. R. 332).

3. *Porter v. Gile*, 47 Vt. 620.

4. *Vandyke v. Bastedo*, 15 N. J. L. (3 Green) 224, 229.

5. *Stiles v. Bradford*, 4 Rawle 394, 401.

6. *Wood v. Peake*, 8 Johns. 69, 71.

7. *Matter of Bissell*, 40 Mich. 63.

8. *Moor v. Ames*, 3 Caines 170.

9. *Lining v. Bentham*, 2 Bay 1.

10. *Ex parte Sternes*, 77 Cal. 156 (19 Pac. R. 275).

no money was held void.<sup>1</sup> But why the county court was not as competent as the circuit court to determine the fact in dispute was not very clearly pointed out.

A receiver was appointed in New York for a debtor, and he was ordered to deliver all his property, including a specified saloon, to the receiver. On his refusal to deliver the saloon, he was brought up for contempt and swore that his wife owned it, and that he was simply employed there at a salary; but the court adjudged him to be in contempt and fined and imprisoned him. This was held void because the title was in dispute.<sup>2</sup> This case seems clearly wrong. The court found as a fact that he did have the possession and control of the saloon, and *he* could not further dispute that. No other person was in court claiming the title. A statute of Louisiana provided, that "if one *against whom* the injunction is directed violate the same, or refuse to obey," he is guilty of a contempt. In such a proceeding a person was arrested for contempt, tried, convicted and imprisoned. He then sued the plaintiff in the injunction case for false imprisonment, alleging that he was "in no way or manner a *party*" to the injunction case. It was held that his complaint showed the contempt judgment to be void; that if the writ did not run *against* him, the court had no power to punish him.<sup>3</sup> But whether or not he was a party to the injunction case was a question of fact in the proceeding for contempt, and a complete defense if he was not. This case is clearly wrong, as it seems to me.

§ 538. **Contract made.**—A statute provided that "if any seaman who shall have signed a contract to perform a voyage, shall . . . desert . . . such vessel," it should be lawful for any justice of the peace to apprehend him, and, on proof that he had signed such a contract, to commit him to jail. A seaman was so committed by a justice of the peace, and he was released on *habeas corpus* by a federal court upon proving that his name was signed to the shipping contract without his consent.<sup>4</sup> Why he did not make that defense before the justice the case does not state. On the contrary, where a person was arrested in a state court upon a claim alleged to be a tort and imprisoned, it was held, on *habeas corpus* in a federal court, that he could not

1. Von Kettler v. Johnson, 57 Ill. 109, 115.

2. Gallagher v. O'Neil, 3 N. Y. Supp. 126 (21 N. Y. St. Rep'r 161).

3. Barthe v. Larquie, 42 La. Ann. 131 (7 S. R. 80)—Fenner, J., *dissenting*.

4. *In re* Bryant, Deady 118.

show that the claim was founded upon a contract and released by a discharge in bankruptcy.<sup>1</sup>

CONTRACT UPON CONDITION.—That a contract upon which a judgment was rendered was dependent upon another which the plaintiff could not perform, was decided to be no cause to quash an execution issued to enforce the judgment.<sup>2</sup>

CONTUMACIOUS CLERK. — Where the clerk of the quarter sessions had been dismissed for contumaciously refusing to enter an order, it was held that he could not show in a collateral action that he did not so refuse.<sup>3</sup>

§ 539. **Crime.** — When a criminal charge is made against a person in a court having power to investigate its truth, and the defendant is arrested and brought in, the jurisdiction is complete over both subject-matter and person. The court must proceed and determine the truthfulness of the charge. It does not seem to me to be possible that a conviction is void, and all concerned trespassers, because in fact the defendant is not guilty; or, in other words, it seems to me to be subversive of sound legal principles to allow a party convicted before one jury to sue the judge or the person making the charge before another jury and to offer evidence to show that he was not guilty; or to go before some judge or commissioner and show his innocence and obtain a release on *habeas corpus*. Yet a late and learned author says: "That the state should hold the citizen responsible for something which is not a crime cannot be maintained under any law. That one imprisoned without having committed any crime is illegally restrained of his liberty, is unquestionably true. That the object of the writ of *habeas corpus* is to relieve from illegal imprisonment, is conceded. Therefore, if the prisoner can show, at any stage of the proceedings against him, that he has committed no offense, he annihilates the question of jurisdiction of the subject-matter—removes the foundation on which the charge against him rests, and should go free."<sup>4</sup> The author gives this as the result of the authorities.

BUMBOAT CASE.—The leading case on this point was decided in England in 1819, and is commonly known as the *Bumboat Case*. An act of parliament authorized magistrates to order the seizure of any *boat* loaded with gunpowder and to convict and

1. *Re Devoe*, 1 Lowell 251.

3. *Wildes v. Russell*, L. R., 1 C. P.

2. *Galena and S. W. R. R. Co. v.* 722 (35 L. J. C. P. 354).

*Ennor*, 9 Ill. App. 159, 163.

4. *Church on Habeas Corpus*, § 367.

forfeit it. A conviction was had under the act. The owner brought trespass and offered to prove that it was not a *boat* but a *vessel* of thirteen tons, and so not within the act. It was held that the conviction was conclusive that it was a boat.<sup>1</sup> On page 436, Dallas, C. J., says: "But, it is said that, in order to give the magistrate jurisdiction, the subject-matter of his conviction must be a boat; and that it is competent to the party to impeach the conviction by showing that this was not a boat. I agree that if he had not jurisdiction, the conviction signifies nothing. Had he, then, jurisdiction in this case? By the act of parliament he is empowered to search for and seize gunpowder in any boat on the river Thames. Now, allowing, for the sake of argument, that "boat" is a word of technical meaning, and somewhat different from a vessel; still it was matter of fact to be made out before the magistrate, and on which he was to draw his own conclusion. But, it is said that a jurisdiction limited as to person, place and subject-matter, is stinted in its nature, and cannot be lawfully exceeded. I agree; but upon the inquiry before the magistrate, does not the person form a question to be decided by the evidence? Does not the place, does not the subject-matter, form such a question? The possession of a boat, therefore, with gunpowder on board, is part of the offense charged, and how could the magistrate decide but by examining evidence in proof of what was alleged? The magistrate, it is urged, could not give himself jurisdiction, by finding that to be a fact which did not exist. But he is bound to inquire as to the fact, and, when he has inquired, his conviction is conclusive of it. The magistrates have inquired in the present instance, and they find the subject of the conviction to be a boat." Burrough, J., on page 440, says: "In the present case, by act of parliament, the magistrate has jurisdiction over bumboats and other boats; but in the very exercise of that jurisdiction, he must make inquiry as to fact, and decide on all the evidence which comes before him; when he has done this, the conviction is conclusive as to the facts stated." Richardson, J., on page 442, says: "Whether the vessel in question were a boat or not, was a fact on which the magistrate was to decide; and the *fallacy lies in assuming that the fact, which the magistrate has to decide, is that which constitutes his jurisdiction.*" On the same principle it has been decided that, where a person

1. *Brittain v. Kinnaird*, 1 Brod. & Bing. 432 (5 E. C. L. 725).

was convicted by two magistrates and committed, matters of defense to the original case,<sup>1</sup> or the fact that the witnesses testified falsely,<sup>2</sup> or that the evidence did not warrant the conviction,<sup>3</sup> could not be inquired into in a proceeding for a release on *habeas corpus*. So, an early case in the Supreme Court of the United States held that a judgment forfeiting the title to land on account of the alleged treason of the owner, was not void because the owner was not in fact guilty;<sup>4</sup> and where a person had the option to work on the highway or pay a sum in composition, it was held that a conviction for failing to work was not void because it did not show that he had failed to pay the composition, as that was a matter of defense.<sup>5</sup> The censors of the college of physicians—a judicial body—fined and imprisoned a person for administering noxious medicines, and he sued them for trespass; but it was decided that it was not competent for him to prove that his medicines were not noxious.<sup>6</sup> So a commitment of a slave as a “runaway” was held not void because he was not a “runaway.”<sup>7</sup> The trial and conviction of an alleged accessory after the acquittal of the principal is erroneous, but not void,<sup>8</sup> although the allegation that he was an accessory was false. When the state closed its evidence in a case for rape, the defendant requested the court to instruct the jury to acquit. The court said to the jury that the state having failed to make out a case, they might acquit; but the jury, thinking differently, brought in a verdict of guilty upon which a judgment was rendered. This was held not void on *habeas corpus*.<sup>9</sup> A conviction for the unlawful sale of intoxicating liquor in a certain county in Missouri is not void because, in fact, the county never legally adopted the law.<sup>10</sup>

**SAME CRIME.**—A special judge was appointed to try a criminal case in Missouri, and the indictment was quashed and a new one returned. The regular judge held it to be for the same crime as the first one, and set it for trial before the same special judge, before whom the defendant was tried and convicted. On *habeas*

1. *Ex parte* Gill, 7 East 376.

2. *Ex parte* Allen, 12 Nev. 87.

3. *In re* Morris, 40 Fed. R. 824.

4. *Kempe's Lessee v. Kennedy*, 5 Cranch 173.

5. *Fawcett v. Fowlis*, 7 B. & C. 394 (14 E. C. L. 180).

6. *Groenvelt v. Burwell*, 1 Salk. 396.

7. *Jarret v. Higbee*, 5 T. B. Mon. 546, 556.

8. *Ex parte* Bowen, 25 Fla. 214 (6 S. R. 65).

9. *In re* Thompson, 9 Mont. 381 (23 Pac. R. 933).

\*10. *In re* Mitchell, 104 Mo. 121 (16 S. W. R. 118).

*corpus* it was held to be incompetent to show that the indictments were not for the same crime.<sup>1</sup>

SIMONY.—It was decided in an old case that a sentence for simony in an ecclesiastical court could not be overhauled in the civil courts for errors of fact.<sup>2</sup>

CONTRARY CASES.—An act of parliament made it a misdemeanor for a potter who had contracted to serve his master for a certain time, to absent himself. On *habeas corpus* by a person convicted under this statute, the court, by Baron Watson, said: “For instance, if the person convicted was not a potter, or if a potter, there was no contract between the parties, there would be no jurisdiction in the magistrate to adjudicate, and he could not, by finding those facts, confer on himself jurisdiction.”<sup>3</sup>

A person was duly convicted of stealing a mare in a court of the Indian territory, and sentenced to prison. On *habeas corpus* in the United States court, he was allowed to prove that he never stole her; that he lawfully took her to Kansas and disposed of her; the court released him, holding, clearly, that the territorial court had no jurisdiction.<sup>4</sup> It seems that the doctrine of collateral attack had not yet reached that part of the country.

The statute made it a misdemeanor “to assault another with a deadly weapon . . . with intent to inflict upon the person of another a bodily injury, where no considerable provocation appears, or where the circumstances of the assault show an abandoned and malignant disposition.” The information charged that defendant did assault another “with a deadly weapon commonly called a revolver, . . . loaded with powder and leaden balls . . . and discharged at and against the said complainant . . . with intent to do him . . . bodily injury, without provocation and in an abandoned manner.” On this, the defendant was convicted and imprisoned under the statute—the court having no jurisdiction to try felonies, such as an assault with intent to kill. On *habeas corpus* before another court, it went into the evidence given on the trial and determined that it showed an assault with intent to kill—a felony—and that therefore the trial court had no jurisdiction and the defendant was released.<sup>5</sup> But

1. *Ex parte* Clay, 98 Mo. 578 (11 S. W. R. 998).

2. *Phillips v. Crawley*, Freeman 84, pl. 103 (12 Viner's Abr. 128).

3. *In re* Baker, 2 H. & N. 219, 234.

4. *Ex parte* Kenyon, 5 Dillon 385, 389.

5. *Ex parte* Brown, 40 Fed. R. 81—Parker, J.



the defendant was on trial for a misdemeanor. If he was not guilty, then was a good time to show that fact.

§ 540. Dates and time—Contradicting record, concerning—Day wrong.—That a judgment has been *altered* in any manner, even as to *date*, cannot be shown in a collateral action.<sup>1</sup> The date of a probate order giving permission to sue an administrator on his bond cannot be contradicted by parol in the suit on the bond;<sup>2</sup> and where a record purported to have been made in open court on March 12, it was decided to be incompetent to show collaterally, that it was made in the clerk's office ten days earlier.<sup>3</sup> So, where a justice's judgment in Illinois appeared to be regular, it was held inadmissible to show collaterally, that the justice took the case under advisement and held it so long as to lose jurisdiction, and then entered the judgment and dated it back to the day of trial.<sup>4</sup> The record of a justice of the peace in Vermont showed a proper disposition of a cause, but the plaintiff sued the justice for willfully and maliciously absenting himself when the trial was ready to proceed, thereby causing heavy costs. It was held that he could not contradict the record, nor prove that it was recently made in opposition to its date;<sup>5</sup> and where a record of conviction was regular on its face, the defendant was denied the right to show, on *habeas corpus*, that after his plea of guilty, he was allowed to go free and without bonds, and that he was arrested some two months afterward and taken before the court, without warrant, and sentenced.<sup>6</sup> A clerk in Iowa took a stay bond long after the entry of judgment, but dated and recorded it as of the date of the judgment; and it was held that the recorded date could not be contradicted collaterally.<sup>7</sup> Confessions in vacation in Illinois taken before the clerk, and executions issued, appeared to be regularly done on the 16th. It was held admissible collaterally, to show by parol that the cognovits were left with him on the 16th, and executions issued at once, and that the judgments were not written up until the 18th; and for those reasons the executions were held void.<sup>8</sup> This case is wrong. It relies

1. Healey v. Mayor, 17 Lower Canada 409.

2. Richardson v. Hazelton, 101 Mass. 108.

3. Quinn v. Com., 20 Gratt. 138.

4. Wiley v. Sutherland, 41 Ill. 25, 27; *accord*, as to *dating back*, Saunders v. Pike, 6 Or. 312, 314.

5. Barnard v. Flanders, 12 Vt. 657, 660.

6. Smith v. Hess, 91 Ind. 424.

7. Maynes v. Brockway, 55 Iowa 457 (8 N. W. R. 317).

8. Baker v. Barber, 16 Ill. App. 621, 623.

upon *Ling v. King*;<sup>1</sup> but in that case the cognovit was merely spread upon the record and no judgment was entered.

§ 541. **Section 540 continued—Hour wrong.**—Where a justice's record in Iowa showed that a judgment was rendered at the proper time, parol evidence was held inadmissible to show that it was rendered at an earlier hour.<sup>2</sup> The contrary was decided in New Hampshire, where it was held to be competent to contradict the record that a poor debtor's discharge was given at a certain hour, by showing that the creditor was present, and that the debtor and justice were not.<sup>3</sup> In Maine, a debtor notified his creditor that at a certain place, at 10 o'clock, he would apply to two justices to take the poor debtor's oath. The statute gave the debtor and creditor each the right to select one justice, and upon the failure of the creditor to do so, authorized the sheriff or his deputy to select the other justice. The debtor appeared at 10 o'clock and selected a justice, and the creditor not being present, a deputy sheriff selected the other justice, and they examined and discharged the debtor at 10.15, and departed and locked the office; at 10.30, the creditor's attorney appeared with his justice, and remained until 11.15, when they departed. The deputy sheriff certified that the creditor "neglecting and refusing to appear," he appointed a justice. There was no statute requiring the justice to wait an hour for the parties to appear, but that was the usual custom. The record was fair on its face, but it was held void.<sup>4</sup> The case relies on *Williams v. Burrill*,<sup>5</sup> where it was held competent to prove by parol that the justices who granted a poor debtor's discharge were not selected at the time and place shown by the record. The court said: "That the persons composing the tribunal should be justices of the peace and of the quorum, and should also be selected according to the statute are equally material. It cannot be admitted that persons may assume to act judicially as a tribunal of inferior jurisdiction, without, in fact, having the least authority, and protect their acts by a jurisdiction conclusively established by their own records." It cites *Granite Bank v. Treat*,<sup>6</sup> which decided that a discharge in due form was sufficient to defeat an action on the debtor's bond.

1. *Ling v. King*, 91 Ill. 571.

2. *Cory v. King*, 49 Iowa 365.

3. *Banks v. Johnson*, 12 N. H. 445, 151.  
450.

4. *Foss v. Edwards*, 47 Me. 145, 149.

5. *Williams v. Burrill*, 23 Me. 144.

6. *Granite Bank v. Treat*, 18 Me.  
340.

There was no attempt made to impeach the discharge. A *dictum* in the case says: "The certificate, however, would not be conclusive on this point, and it would be competent for the plaintiff to prove that they had not jurisdiction," citing *Smith v. Rice*.<sup>1</sup> It seems to me that the Iowa case is right and the Maine and New Hampshire cases wrong.

§ 542. Section 540, continued—Term or vacation.—Where the record shows that the court stood adjourned on a certain day, the judge cannot be permitted to testify that it was in session.<sup>2</sup> So, where a confession of judgment appeared to be regular on the record, it was decided to be incompetent to show collaterally, by parol, that the court stood adjourned until 10 o'clock, and that it met and entered the confession before that time. The court said: "The record when tried by itself, is complete, disclosing no irregularity whatever. It shows that the court was opened by proclamation before the judgment was entered. . . . But the record imports absolute verity when brought in question by such a proceeding as that below, and could be impeached by the parol testimony of neither the clerk nor the judge of the court."<sup>3</sup> Where the record of a district court in Kansas,<sup>4</sup> or of a board of county commissioners in Indiana,<sup>5</sup> shows that a proceeding was had in term, parol evidence is inadmissible to prove the contrary. A conviction and sentence to jail in Indiana were rendered in term, but was not entered on the record. After the bringing of *habeas corpus* in vacation, the judge ordered the clerk to enter the proper judgment as of the proper time, which he did. This was held to be void.<sup>6</sup> As the judgment had been actually rendered, but not entered, it was the duty of the clerk to enter it as of the date of the rendition, without any order. This case seems wrong for another reason, namely: When the *habeas corpus* proceeding was heard, the judgment appeared to be regularly entered in the order book, and it was incompetent to show, in that proceeding, that the clerk had entered it in vacation.<sup>7</sup>

1. *Smith v. Rice*, 11 Mass. 507.

2. *Ainge v. Corby*, 70 Mo. 257, 260.

3. *Richardson v. Beldam*, 18 Ill. App. 527, 529—citing *Read v. Sutler*, 2 Cush. 115; *Willard v. Whitney*, 49 Me. 235, and *Herrington v. McCullum*, 73 Ill. 482; affirmed, *Richardson v. Beldam*, 119 Ill. 320 (10 N. E. R. 191).

4. *Mitchell v. Insley*, 33 Kan. 654 (7 Pac. R. 201).

5. *Weir v. State*, 96 Ind. 311, 316.

6. *Mitchell v. St. John*, 98 Ind. 598.

7. *Passwater v. Edwards*, 44 Ind. 343.

§ 543. **Default, set aside.**—Where the record of a justice of the peace in Maine showed a judgment by default, and that the default was set aside within twenty-four hours, the time prescribed by statute, and that a trial was had, it was held that a witness prosecuted for perjury committed on the trial, might show in defense, by parol testimony, that the default was not set aside within the twenty-four hours.<sup>1</sup> This seems to me to be wrong. The record concluded the parties, and what concluded them concluded the world. Where a default was set aside in North Carolina because there was neither service nor appearance, this order was held not to be void because there was, in fact, an appearance.<sup>2</sup>

**DEFENSE MADE.**—An administrator in Indiana filed a claim against the estate. The record showed that the court, according to a statute, appointed a person to defend the estate, and that he made a defense. In a suit by a succeeding administrator to set aside this judgment, he sought to prove that the estate was not defended; but it was decided to be incompetent to do so.<sup>3</sup>

**DISMISSAL ON MERITS.**—A decree dismissing a bill on the merits cannot be contradicted by showing that the court ordered it to be dismissed for want of prosecution, and that the clerk, by mistake, entered it on the merits.<sup>4</sup>

**DISTRIBUTION OF FUNDS.**—In a contest between creditors over the distribution of a fund, the merits of their judgments cannot be inquired into.<sup>5</sup> So, in judicial proceedings to establish a ditch, a judgment assessing benefits to the township cannot be questioned in an action of *mandamus* to compel the trustee to pay them.<sup>6</sup>

**DIVISION OF DAMAGES BETWEEN LANDLORD AND TENANT.**—A city in Massachusetts proceeded to condemn land owned by a landlord and his tenant for a street. The statute in such cases provided for the appointment of a trustee to collect the damages awarded in case the owners could not agree upon a division between themselves. A notice for the tenant was lawfully left

1. *State v. Hall*, 49 Me. 412.

2. *Bender v. Askew*, 3 Dev. Law 149 (22 Am. D. 714).

3. *Bentley v. Brown*, 123 Ind. 552 (24 N. E. R. 507).

4. *Garner's Adm'r v. Strode*, 5 Litt. 314.

5. *Brantingham v. Brantingham*, 12 N. J. Eq. (1 Beasley) 160; *Borland's*

*Appeal*, 66 Pa. St. 470; *Appeal of Second National Bank*, 85 Pa. St. 528, 530; *Appeal of Second National Bank*, 96 Pa. St. 460; *Mattingly v. Nye*, 8 Wall. 370; *Stovall v. Banks*, 10 Wall. 583, 588.

6. *State v. Thompson*, 109 Ind. 533 (10 N. E. R. 305).

at his residence, which he failed to receive, and the landlord falsely alleged in his petition that he could not agree with him on a division of the damages, and thereby procured the appointment of a trustee. This appointment was decided to be valid, collaterally.<sup>1</sup>

§ 544. **Divorce.**—A divorce granted on service by publication is not void because the charges made in the petition were false in fact,<sup>2</sup> nor because the petition omitted to mention a fact about a case in another state which would have barred relief.<sup>3</sup> So, a decree of another state duly granting a divorce, is not void on account of errors of fact.<sup>4</sup>

**DURESS.**—When a person is attached for violating an injunction which appears to have been entered by his consent, he cannot show, as an excuse, that his consent was obtained by duress.<sup>5</sup>

**ELECTION.**—A judgment of a county court in Texas affirming the validity of an election to vote aid to a railroad, cannot be overhauled collaterally on account of error.<sup>6</sup>

**EQUITY.**—So, error of fact in a cause in equity does not render it void and liable to be impeached in another suit.<sup>7</sup>

§ 545. **Exemptions, generally.**—An exemption wrongfully allowed to a bankrupt,<sup>8</sup> or a justice's judgment wrongfully ordering exempt property to be sold,<sup>9</sup> or a probate judgment ordering a sale of exempt property which the statute gave to the widow,<sup>10</sup> or an order to a receiver in a foreclosure proceeding to collect and apply the rents which were exempt during the time allowed for redemption,<sup>11</sup> or an order in supplementary proceedings to deliver exempt property to the sheriff,<sup>12</sup> is not void.

**EXEMPTION OF HOMESTEAD.**—Judgments denying homestead rights by reason of a mistake of fact have been held void in

1. *Boston v. Robbins*, 126 Mass. 384, 388.

2. *Larimer v. Knoyle*, 43 Kan. 338 (23 Pac. R. 487).

3. *Harrison v. Harrison*, 19 Ala. 499, 512.

4. *Amory v. Amory*, 3 Bissell 266, 271; *Slade v. Slade*, 58 Me. 157; *accord*, in any case, *Walker v. Chase*, 53 Me. 258.

5. *State v. Kennedy*, — N. H. — (23 Atl. R. 431).

6. *Anderson County v. Houston*, etc., R. R. Co., 52 Tex. 228, 243.

7. *Wright v. Trustees*, 1 Hoff. Ch. 202, 214.

8. *Brengle v. Richardson*, 78 Va. 406, *citing* *Adams v. Logan*, 27 Gratt. 201.

9. *Rountree v. Walker*, 46 Tex. 200, 203.

10. *McGowen v. Zimpelman*, 53 Tex. 479, 483.

11. *Storm v. Ermantrout*, 89 Ind. 214, 216.

12. *Ex parte McCullough*, 35 Cal. 97

Arkansas, Illinois, South Carolina, Texas and Wisconsin, while the contrary has been held in Kansas, Missouri, Texas and Virginia. Under a statute of Arkansas, the homestead of a decedent leaving a wife or minor children, was not assets in the hands of the administrator, or, in other words, it was exempt from sale to raise means to pay debts. Notwithstanding that fact, an administrator obtained an order to sell a parcel of land which was shown in the petition to have been the *residence* of the decedent, and was in fact his *homestead*, and sold it. This sale was decided to be void.<sup>1</sup> In this case the supreme court admits that the probate court had jurisdiction to set apart the homestead from other lands, to determine whether or not it had been impressed with the homestead character by the parent, whether it exceeded the prescribed quantity or value, whether the children were now of age, etc.; and it admits that an erroneous determination of any of these matters would not have been void. It then says: "But an order of sale of a parcel of land, as in this case, which is shown by the petition, and the order itself, to have been the *residence* of a deceased head of a family, is an absolute nullity." The court overlooks the fact that a *residence* is not necessarily a homestead, and it also overlooks the fact that when the administrator filed his petition to sell this land to pay debts, all the heirs were called upon to show any cause existing why the relief prayed for should not be granted. The case virtually admits that if they had appeared and pleaded that it was their homestead and issue had been joined and found against them, such determination would not have been void, even though erroneous. But a judgment by default, where the party is in court—as the heir is in Arkansas—and has an opportunity to be heard, is just as binding as though he had been heard and defeated.

The supreme court of Illinois said: "To give effect to the homestead act according to the design of the framers, the right can only be lost by release or abandonment in the mode pointed out in the statute," and a decree by default was held not to bar it.<sup>2</sup> It is quite evident that the court confounded the doctrines of *res judicata* and collateral attack as explained in section 17, *supra*. The widow in South Carolina was entitled to

1. McCloy v. Arnett, 47 Ark. 445 Davis, 37 Ark. 316; Nichols v. Shear- (2 S. W. R. 71). Accord, Altheimer v. en, 49 Ark. 75 (4 S. W. R. 167).

2. Moore v. Titman, 33 Ill. 358, 369.

a homestead in land, and was made a party to a proceeding to sell it to raise means to pay her deceased husband's debts. She failed to set up her rights and an order to sell absolutely was made, but nevertheless it was decided that her rights were not barred.<sup>1</sup> The Texas statute forbade the sale of the homestead of a decedent by an administrator. It descended to the minor children free from all debts, and a sale of it made by order of the probate court was held to be void.<sup>2</sup> The supreme court admits that the probate court had power to determine what *was* the homestead. But the power to determine what *was* the homestead necessarily included the power to determine what *was not*. The case notices the fact that the children were not notified. But no notice to heirs is necessary in Texas, as the proceeding is held to be *in rem*. Where the question of homestead or no homestead is made, a wrongful denial of the right does not make the judgment void in Texas.<sup>3</sup> These latter citations show that the others which hold the judgments void when by default, confuse the doctrines of *res judicata* and collateral attack. In *Willis v. Matthews*, the court said: "Unless the issue is made by the pleadings, the court does not pass upon the question of whether the property is or is not a homestead, and its judgment is neither 'directly on the point, nor does it necessarily involve the decision of the question.'" It is evident from this quotation that the court was misled by the not very lucid and easily misunderstood *Duchess of Kingston's* case. The Wisconsin statute excepted the homestead of a decedent from sale to pay his debts, but an administrator filed a petition to sell certain land, neither alleging that it was nor was not the homestead, and after due notice to the heirs, obtained an order to sell, and sold it. In ejectment, the heirs were allowed to recover upon showing that it was the homestead.<sup>4</sup> But the notice in the proceeding to sell called upon the heirs to show any and all causes why the

1. *McMaster v. Arthur*, 33 S. C. 512. (12 S. E. R. 308—McIver, J., *dissenting*.)

2. *Yarbors v. Brewster*, 38 Tex. 397, 408. *Accord*, *Hamblin v. Warnecke*, 31 Tex. 91, 93; *Cummins v. Denton*, Texas Unreported Cases, 181; *Willis v. Matthews*, 46 Tex. 478, 483; *Seligson v. Collins*, 64 Tex. 314.

3. *Lee v. Kingsbury*, 13 Tex. 68 (62 Am. D. 546); *Tadlock v. Eccles*, 20 Tex. 782 (73 Am. D. 213)—a foreclosure of a mortgage; *Meyer v. Paxton*, — Tex. — (14 S. W. R. 568)—a judgment in attachment ordering the sale of the homestead, which was said to be void unless the question of homestead was actually litigated.

4. *Howe v. McGiven*, 25 Wis. 525.



land described in the petition should not be sold, and they had their day in court then. The supreme courts of Kansas and Virginia, and the court of appeals of Missouri, have held that such sales are not void;<sup>1</sup> and this seems to me to be the better rule. See section 559, *infra*.

§ 546. **Exemption from taxation.**—The statute of New York provided that a specified amount of the property of ministers of the gospel should be exempt from taxation; but it was held that the assessors, who act judicially, were not liable for taxing such exempt property.<sup>2</sup> So, it was ruled in Minnesota that a tax, judicially assessed, is not void because the land was exempt;<sup>3</sup> and the same ruling was made in England in respect to an assessment of a poor rate to the occupier of land, exempt because it belonged to a literary society.<sup>4</sup> But the later cases in New York are opposed to these cases, and it is now held in that state that all assessments of exempt property are void.<sup>5</sup> See section 223, *supra*.

§ 547. **Exempt wages.**—A judgment against a garnishee for exempt wages, was decided not to be void in Iowa, and to be a protection to the corporation garnished,<sup>6</sup> while the contrary was held in Indiana.<sup>7</sup> The Indiana case was this: A and B were residents of Indiana, and C was a railway company extending from Indiana into Missouri, for which B was working by the month. By the laws of both Indiana and Missouri, the wages due from C to B were exempt from garnishment. A garnished C for the wages due B, in a justice's court in Missouri, and recovered judgment by default, which C paid. B then sued C in Indiana for his wages, and C pleaded in defense the Missouri judgment. This was held to be no answer, because C knew that A had no cause of action and ought to have made defense to the garnishment suit. This case seems to overturn all the law in respect to garnishment, which is that a judgment where there was

1. *Dictum* in *Fudge v. Fudge*, 23 Kan. 416; *Rolf v. Timmermeister*, 15 Mo. App. 249, 252; *Spots v. Com.*, 85 Va. 531 (8 S. E. R. 375).

2. *Vail v. Owen*, 19 Barb. 22—*approved* in *Barhyte v. Shepherd*, 35 N. Y. 238, 243; *disapproving* *Prosser v. Secor*, 5 Barb. 607.

3. *County of Chisago v. St. Paul and Duluth R. Co.*, 27 Minn. 109 (6 N. W. R. 454).

4. *Birmingham v. Shaw*, 10 Ad. & El. N. S. 868, 880 (59 E. C. L. 867, 879).

5. *Matter of New York Catholic Protectory*, 77 N. Y. 342; *Williams v. Board of Supervisors*, 78 N. Y. 561, 563.

6. *Wigwall v. Union Coal & M. Co.*, 37 Iowa 129.

7. *Terre Haute and Indianapolis R. Co. v. Baker*, 122 Ind. 433, 441 (24 N. E. R. 83).

issue. Hence, in my opinion, all cases which hold that a record may be shown to be forged or altered in a collateral proceeding, are wrong.

AN ATTORNEY was sued in North Carolina for surreptitiously entering a judgment upon the record in vacation, but as it appeared to be regularly entered in term, it was held to be incompetent to prove that it was not what it appeared to be, and the action was defeated.<sup>1</sup>

CLERKS' ENTRIES, UNAUTHORIZED.—It cannot be shown, collaterally, that a judgment for costs against school directors, personally, was not authorized by the court's minutes, and that the clerk, upon the instigation of the adverse attorney, spread the judgment on the record in vacation.<sup>2</sup> A California statute required the clerk to include the costs in the judgment. They were left in blank, but were afterwards filled in, and an execution was issued and land was sold. In a collateral contest between creditors, it was held to be competent to show that the blank was filled in vacation, and that the judgment was void.<sup>3</sup> It seems quite clear to me that this case is wrong. In a contest precisely similar in Illinois, it was decided to be incompetent to prove by the judge that he never saw the papers in the case, and never ordered a judgment to be entered;<sup>4</sup> and in accord with this, is a case in Minnesota, which held it incompetent to show collaterally that a judgment, apparently regular, was entered by the clerk in the absence of the judge;<sup>5</sup> nor can it be shown that a judgment was entered by the order of an ex-judge given outside of the district.<sup>6</sup> But in a late and somewhat noted case in New York, it was held to be competent to prove collaterally, in order to avoid the appointment of an administrator, that the surrogate had signed letters in blank, and that the clerk had filled them up in his absence.<sup>7</sup> The validity of titles derived through judicial proceedings seems to hang by a slender thread in that state.

JUSTICES' UNAUTHORIZED ENTRIES.—About six weeks after a justice's term of office in Missouri had expired, and after he had delivered his books and papers to his successor, he secretly en-

1. Reid v. Kelley, 1 Dev. L. 313.

5. State v. Macdonald, 24 Minn.

2. Black v. Ross, 37 Mo. App. 250, 48, 51.  
256.

6. *In re* Watson, 30 Kan. 753.

3. Chapin v. Broder, 16 Cal. 403, 419.

7. Roderigas v. East River Savings Institution, 76 N. Y. 316.

4. Koren v. Roemheld, 7 Ill. App. 646, 649.

tered up a judgment in his old docket on a case he had tried before his term expired—but did not date the entry. This was held void, collaterally—simply because he had ceased to be justice. The fact was proved by his successor in office, who swore that he examined the docket some six weeks after he got it, and that no such judgment was then recorded.<sup>1</sup> According to that doctrine the succeeding justice could swear any judgment off the old docket. Of course that could be done in a direct proceeding to expunge unlawful matters from the record, but not so as to affect *bona fide* purchasers. In an action of trespass for opening a highway in Ohio, the plaintiff offered to prove that a purported record of the board of commissioners ordering the highway to be opened, was never made by it; that he had examined the record at a certain time, and that no such order was then in it. This evidence was held inadmissible.<sup>2</sup> In another Ohio case, it was said that a justice's court, although it had neither clerk nor seal, and a docket unpretending, simple and informal, was a court of record, and could no more be contradicted than that of the highest court; and that it could not be shown that a recognizance purporting to be taken by him, was not, in fact, taken, or that he forged it in the absence of the recognizers.<sup>3</sup> So in Pennsylvania, where a justice of the peace entered a person's name on his docket as bail for the stay of execution, it was held to be incompetent for him to show, collaterally, that the entry was made in his absence upon a forged letter.<sup>4</sup>

SUBSEQUENT ALTERATIONS.—It cannot be shown, collaterally, that a judgment of the circuit court was changed after it was signed by the judge;<sup>5</sup> nor that a justice's judgment was rendered against three persons, and that, afterwards, the justice erased the name of one, so as to let it stand against two only;<sup>6</sup> nor that a justice's judgment for the defendant had been changed from one of nonsuit.<sup>7</sup> A justice's record in Michigan showed a judgment against Warren T. Johnson. When offered in evidence against another person he was permitted to prove that it was originally entered against William T. Johnson, and that some weeks after-

1. Gage v. Vail, 73 Mo. 454.

5. Hall v. Durham, 109 Ind. 434 (9

2. Beebe v. Scheidt, 13 O. St. 406, N. E. R. 926; 10 id. 581).

409.

6. Turner v. Ireland, 30 Tenn. (11 Humph.) 446.

3. State v. Daily, 14 O. 91, 98.

4. Clark v. M'Comman, 7 Watts & Serg. 469.

7. Garfield v. Douglass, 22 Ill. 100, 102.

wards, the justice, on the suggestion of the defendant that his name was Warren and not William, erased William and wrote Warren. This was held to make the judgment void in replevin for goods seized under it.<sup>1</sup>

Where a divorce record in Vermont showed a decree of dismissal "without prejudice," it was held to be inadmissible to prove, collaterally, that the words "without prejudice" were entered by order of the judge after the court had adjourned for the term.<sup>2</sup> But where a plaintiff recovered a judgment in Texas for four thousand three hundred and ninety-eight dollars and twenty-five cents, and after the close of the term procured a deputy clerk to change it to four thousand five hundred dollars and ninety-eight cents, it was held void.<sup>3</sup>

A complaint upon a recognizance in Indiana alleged that the judgment of forfeiture was entered on the record in vacation by the clerk in a blank space left by the court for that purpose; and that the judge, in term, had signed his name at the foot of this blank space. These allegations were held to show that the judgment of forfeiture was void.<sup>4</sup> As the pleader saw fit to waive the estoppel and show the actual facts, the court was right in deciding on the facts as presented by him.

§ 550. **Fraud in domestic judgments—Principle involved.**—Fraud in a domestic judgment never makes it void. To hold that it does, contradicts the record on a question of fact. *Fermor's Case*<sup>5</sup> is sometimes cited to sustain the doctrine that fraud makes a judgment void collaterally, but it does not so decide. That case was this: The statute authorized a "fine" to be levied with "proclamations," and provided that the same should bar all claimants after five years. Smith, a tenant, sub-let a portion of the premises to one Chapel for life, and then caused a fine to be levied and proclamations to be made in his own favor as to all the land. But Fermor, the landlord, knew nothing of this, and Smith kept on paying rent. After the death of Chapel, which was more than five years after the levying of the fine, Smith ceased to pay rent and claimed the title as against Fermor by virtue of the fine. By some means, not shown in the report, the

1. *Foster v. Alden*, 21 Mich. 507.

4. *State v. Thistlethwaite*, 83 Ind.

2. *Burton v. Burton*, 58 Vt. 414 (5 Atl. R. 281, 286).

5. *Fermor's Case*, 2 Coke (Part 3)

3. *Hardy v. Broaddus*, 35 Tex. 668. 77.

cause between Fermor and Smith got into the court of chancery. The chancellor (Sir Thos. Egerton) took the opinion of all the justices of England and barons of the exchequer on the question, and they held that the five years' statute of limitations did not apply to the case, on account of the fraud and deceit of the tenant. In a case decided in Connecticut, in 1803, the facts were these: The owner of a vessel, knowing it was lost, procured its insurance; afterwards, the matter was submitted to arbitration, and an award made in favor of the insured and paid. The insurer then sued him to recover it back on account of the fraud. The court said, that an award decides the rights of the parties as effectually as a judgment at law or a decree in chancery; and that, although for corrupt practices of the arbitrators, or parties, it may be annulled in chancery, yet the losing party "can never leap over it, treating it as void, and litigate his right anew, by commencing an action, as if it had not been made, and in a collateral manner attack its validity."<sup>1</sup> That fraud in the cause of action does not make the judgment of a domestic court void, has been held in Alabama,<sup>2</sup> Connecticut,<sup>3</sup> Illinois,<sup>4</sup> Indiana,<sup>5</sup> Iowa,<sup>6</sup> Kansas,<sup>7</sup> Kentucky,<sup>8</sup> Massachusetts,<sup>9</sup> Missouri,<sup>10</sup>

1. Bulkley v. Stewart, 1 Day 130, 132.

2. Dunklin v. Wilson, 64 Ala. 162, 170; *contra, dictum* in Pettus v. McClannahan, 52 Ala. 55, 58.

3. Bulkley v. Stewart, 1 Day 130, 132. In 1 Chitty's Pl. 512, it is said: "The original defendant, nor his bail, nor sureties, cannot plead that the judgment was obtained against him by fraud."

4. Sawyer v. Moyer, 109 Ill. 461, 464.

5. White Water Valley Canal Co. v. Henderson, 3 Ind. 3, 7; Markle v. Board of Com'rs, 55 Ind. 185, 187; Hunter v. Burnsville Turnpike Co., 56 Ind. 213, 219; Weiss v. Guerineau, 109 Ind. 438, 443 (9 N. E. R. 399); Nicholson v. Nicholson, 113 Ind. 131, 137 (15 N. E. R. 223); McLeod v. Applegate, 127 Ind. 349 (26 N. E. R. 830.)

6. Webster v. Reid, Morris 467, 479; Kerr v. Leighten, 2 G. Greene 196,

199; Mason v. Messenger, 17 Iowa 261, 272; Cottle v. Cole, 20 Iowa 481, 484; Smith v. Smith, 22 Iowa 516, 518; Lathrop v. American Emigrant Co., 41 Iowa 547, 549; Johns v. Pattee, 55 Iowa 665 (8 N. W. R. 663); Phelan v. Johnson, 80 Iowa 727 (46 N. W. R. 68).

7. *Dictum* in Simpson v. Kimberlin, 12 Kan. 579, 588.

8. Gaines v. Johnson, — Ky. — (15 S. W. R. 246).

9. Homer v. Fish, 1 Pick. 435, 439 (11 Am. D. 218); M'Rae v. Mattoon, 13 Pick. 53, 57, 58; Greene v. Greene, 2 Gray 361 (61 Am. D. 454); *contra*, Pierce v. Jackson, 6 Mass. 242. In Young v. Watson, — Mass. — (28 N. E. R. 1135), it was decided that a judgment was not void because the defendant's attorney agreed to the entry against his express directions.

10. Jones v. Talbot, 9 Mo. 121, 124.

Nebraska,<sup>1</sup> New Hampshire,<sup>2</sup> New York,<sup>3</sup> North Carolina,<sup>4</sup> Ohio,<sup>5</sup> Pennsylvania,<sup>6</sup> Sandwich Islands,<sup>7</sup> Tennessee,<sup>8</sup> Texas,<sup>9</sup> West Virginia,<sup>10</sup> and by the courts of the United States<sup>11</sup> and England.<sup>12</sup> That fraud does make the judgment void in such cases, has been held in Maine,<sup>13</sup> Massachusetts,<sup>14</sup> Mississippi,<sup>15</sup> Pennsylvania,<sup>16</sup> and Vermont;<sup>17</sup> and there are *dicta* to the same effect in Kansas,<sup>18</sup> Missouri<sup>19</sup> and New Hampshire.<sup>20</sup> A few of the cases cited need special notice.

**DIVORCE.**—In the case from 37 Miss. 185, the husband was absent in California. The wife filed a petition for divorce on the ground of desertion, caused due service by publication to be made, and obtained a decree granting to her a divorce and a certain slave, Louisa, and her children. She then sold the slaves to Davis and Odell. Afterwards the husband returned and filed a bill to review the decree of divorce, which was dismissed. He then filed a bill against his wife and Davis and Odell to recover the slaves

1. McKeighan v. Hopkins, 14 Neb. 361 (15 N. W. R. 711).

2. Hillsborough v. Nichols, 46 N. H. 379, 384; Spafford v. Smith, 59 N. H. 366.

3. People v. Pease, 30 Barb. 588, 604; Ritchie v. Putnam, 13 Wend. 524, 526; People v. Downing, 4 Sandford 189, 191; White v. Merritt, 7 N. Y. 352; Town of Ontario v. First National Bank, 12 N. Y. Supp. 434.

4. Spivey v. Harrell, 101 N. C. 48 (7 S. E. R. 693).

5. Johnson v. Pomeroy, 31 O. St. 247.

6. Hoffman v. Coster, 2 Wharton 453, 469; Morris v. Galbraith, 8 Watts 166; Coleman v. Coleman, 19 Pa. St. 100, 110; Thompson's Appeal, 57 id. 175; Givens' Appeal, 121 id. 260 (15 Atl. R. 468); *contra*, Jackson v. Summerville, 13 Pa. St. 359; Mitchell v. Kintzer, 5 Pa. St. 216.

7. *In re* Gip Ah Chan, 6 Hawaiian, 25, 38.

8. Kelley v. Mize, 35 Tenn. (3 Sneed.) 59.

9. Hatch v. Garza, 22 Tex. 176, 188; Thouvenin v. Rodriguez, 24 Tex. 468, 480; Murchison v. White, 54 Tex. 78, 85; *dictum* in Fleming v. Seeligson, 57

Tex. 524, 531; Mikeška v. Blum, 63 Tex. 44, 46.

10. *Dictum* in Wandling v. Straw, 25 W. Va. 692, 704.

11. Allison v. Chapman, 19 Fed. R. 488; Ammidon v. Smith, 1 Wheaton 447, 458; Oglesby v. Attrill, 105 U. S. 605.

12. Prudham v. Phillips, Ambler 763 (A. D. 1775).

13. Sargent v. Salmond, 27 Me. 539, 547; Sidensparker v. Sidensparker, 52 Me. 481, 487 (83 Am. D. 527); *dictum* in Caswell v. Caswell, 28 Me. 232, 237. *Contra dictum* in Granger v. Clark, 22 Me. 128, 130.

14. Pierce v. Jackson, 6 Mass. 242.

15. Plummer v. Plummer, 37 Miss. 185—Handy, J., *dissenting*.

16. Mitchell v. Kintzer, 5 Pa. St. 216; Jackson v. Summerville, 13 Pa. St. 359, 369.

17. Parkhurst v. Sumner, 23 Vt. 538, (56 Am. D. 94).

18. *Dictum* in Russel v. State, *ex rel.* Nicholson, 11 Kan. 308, 322.

19. *Dictum* in Phelps County v. Bishop, 68 Mo. 250, 253.

20. *Dictum* in Demeritt v. Lyford, 27 N. H. (7 Foster) 541, 548.

on the ground that the decree of divorce was void for fraud, and that his title to the slaves had not been divested, alleging that the whole divorce proceeding was fraudulent; and it was held that he could recover. But in the English case from *Ambler*, it was decided that a party to a divorce suit could not show, in a collateral action, that the divorce was obtained by fraud, and the cases from 2 *Gray* 361, and 113 *Ind.* 131, are to the same effect.

**INSURANCE.**—In the case from 1 *Pick.* 435, the owners of a vessel, knowing that it was lost, obtained a policy of insurance on it, and recovered a judgment on the policy, which was paid. The insurer then discovered the fraud and sued to recover the money paid; but it was held that he could not do so. This case was approved in 13 *Pick.* 53-58, where the court said: "If the first judgment is thus to be rendered void, the second is liable to the same allegation, and the third, and so on. The law would become a game of frauds, in which the greatest rogue would become the most successful player."

**NATURALIZATION.**—The cases from 30 *Barb.* 588, and 13 *Wend.* 524, decide that it cannot be shown, collaterally, that a judgment naturalizing an alien was fraudulent, or that the person was not entitled to be naturalized.

**NEGLIGENCE.**—In the case from 7 *N. Y.* 352, the defendants undertook to collect a bill for the plaintiff, and advanced him the amount; by their negligence the bill was lost. They represented to him that they had used due diligence to collect, and had failed, and sued him to recover the advance made, alleging the advance, due diligence and failure to collect, and recovered a judgment. He then sued them and alleged that they had, in fact, lost the bill by their negligence, and had concealed that fact from him, but it was held that he could not impeach the first judgment in this collateral way. So, in 46 *N. H.* 379, a person sued a town for injuries caused by a defect in the highway, and a judgment was rendered in his favor by agreement, which the town paid. The town then sued to recover back the money, alleging that he never received any injuries, and that the whole case was a conspiracy to defraud the town. The judgment was held a bar to this action.

**PARTITION.**—The case from 13 *Pa. St.* 359, was ejectment by heirs for the undivided one-half of certain land. The defense was that, in a partition suit between their ancestor and the owners of the other half, a valuation was placed on the land by the



court, as permitted by the statute; that the defendant (in the ejectment case), holding a deed made by their ancestor pending the proceeding in partition, appeared in court and accepted the land at the valuation, whereupon the whole tract was decreed to him on his paying into court one-half the valuation, which he did. It was held that the plaintiffs might show that the deed was obtained from their ancestor by fraud, and that the decree in partition was therefore void and did not pass their title.

**SHERIFF'S DEED.**—In 2 Wharton 453, a judgment confirming a sheriff's deed to Charles Snowden had been entered. In ejectment, it was held incompetent to show that the deed was originally executed to Nathaniel R. Snowden, and that the name "Nathaniel R." was erased and "Charles" substituted, before confirmation, by the fraud of Charles, and without the consent of Nathaniel or the sheriff. In the Kansas case (11 Kan. 308), it was said: "The records of a court import absolute verity, and the parties to a suit are concluded by its judgment. Yet, if it be shown that judge and clerk have fraudulently combined and entered up a false judgment, its rottenness destroys it altogether. It concludes nobody. No rights can rest upon it." In the New Hampshire case (27 N. H. 541), it was said: "Any fact may be alleged or proved which goes to take away the jurisdiction, and if apparent jurisdiction has been conferred by fraud or collusion, the judgment may be impeached on that ground." In a later case in Missouri, it was said that the authorities differ on the point whether or not fraud is a good defense to a judgment.<sup>1</sup> The supreme court of Illinois held that fraud in *procuring* a judgment was a defense to an action upon it at law.<sup>2</sup> That was the allowance of an equitable defense to a case at law, and if the practice there so permitted, it was not a collateral attack. In 23 Vt. 538, the court admitted that bail in a civil cause was privy to the judgment, but it held that when he was sued on the recognizance he could show that the judgment was taken through the fraud and collusion of the parties with intent to defraud him. I think this case is unsound.

§ 551. Section 550 continued—**Administrator's appointment or final settlement, obtained by fraud.**—The *appointment* of an administrator was said to be void collaterally in Texas "where it is shown to have been obtained for fraudulent purposes and by methods

<sup>1</sup> 1. McClannahan v. West, 100 Mo. 309 (13 S. W. R. 674).      2. Carr v. Miner, 42 Ill. 179, 191.

violative of express law."<sup>1</sup> So, in New York, a sheriff took an indemnifying bond and then levied on property claimed by another person, who sued him. The sheriff then died and the plaintiff procured the appointment of an administrator for him, and had the action revived and took a judgment by default, all of which was done secretly and fraudulently so as to prevent the obligors on the bond from interposing a meritorious defense. For this reason the judgment was held void.<sup>2</sup> Both of these cases seem to me unsound.

**FINAL SETTLEMENT.**—The final settlement of an administrator or guardian is not void for fraud;<sup>3</sup> nor because he allowed a fraudulent claim;<sup>4</sup> nor because the report was false and fraudulent;<sup>5</sup> nor because he fraudulently withheld assets and converted them to his own use;<sup>6</sup> nor because the sales of property were fraudulent and made for his own benefit.<sup>7</sup> But in New Hampshire, the statute provided that, when any estate was entirely expended in paying the widow's allowance, the expenses of the last sickness and funeral of the deceased and expenses of administration, the court should wholly discharge the administrator from all claims of creditors of the estate. On a proper showing of those facts, the court duly entered a decree granting such a discharge. A creditor then sued him and was allowed to avoid the decree of discharge by showing that a part of the estate was fraudulently kept back by the administrator and not reported.<sup>8</sup> The court placed its decision on the ground that the fraud was not put in issue. On page 286, it said: "In most cases the fact of fraud is one wholly extraneous to the record. It relates to matters not involved in the issue determined in the case, or of any official return, or of any fact admitted, and in our view in every such case it forms a perfect answer to any claim or defense

1. Harwood v. Wylie, 70 Tex. 538 (7 S. W. R. 789).

2. Wheeler v. Sweet, 16 N. Y. Supp. 836.

3. State, use of Tourville v. Roland, 23 Mo. 95, 97.

4. Holland v. State *ex rel.* Fenton, 48 Ind. 391; *accord*, State *ex rel.* Pountain v. Gray. — Mo. — (17 S. W. R. 500)—where he himself owned the fraudulent claim.

5. Sanders v. Loy, 61 Ind. 298.

6. Harlow v. Harlow, 65 Me. 448, relying upon Parcher v. Bussell, 11 Cush. 107.

7. Probate Court v. Merriam, 8 Vt. 234, 236.

8. Tebbetts v. Tilton, 31 N. H. 273, 286, 288. In Tebbetts v. Tilton, 24 N. H. 120, apparently the first appeal, a reply to the answer of discharge, that the administrator had \$500 worth of goods which he never accounted for, without charging fraud, was held bad.

founded on a record." On 288, it said: "In the present case, the fraud alleged as avoiding the judgment relates to a concealment of a portion of the estate of the deceased. This is a matter affecting the jurisdiction of the court. . . . The jurisdiction depends entirely upon the fact that all the estate is expended in the manner provided. . . . Any fact upon which the jurisdiction depends may be denied, unless, perhaps, in the case of an express decision upon the point." This and all similar cases confuse the doctrines of *res judicata* and collateral attack as explained in section 17, *supra*, and are contrary in principle to later cases in New Hampshire considered in the next section.

**Sec. 552. Section 550 continued—Administrator's order to sell land, obtained by fraud.**—An order to sell land procured by the fraud of the administrator,<sup>1</sup> or by his fraudulent representation that the personal estate was insufficient to pay the debts;<sup>2</sup> or when he knew there were no debts,<sup>3</sup> or knew there was no necessity to sell land,<sup>4</sup> is not void, as the heirs are in court and have an opportunity to prevent the granting of the order.<sup>5</sup> An executor filed a petition in Massachusetts to sell land, showing the amount of the claims against the estate and the value of the assets in his hands. He suppressed a debt due from himself to the estate, which, if set forth, would have shown the assets equal to the claims. A license to sell was granted and sale made. One of the heirs sued him on his bond for maladministration in selling her share of the land, alleging the facts above set forth, and it was held that she could recover.<sup>6</sup> This heir was summoned in to show cause why a license should not be granted. The judgment granting it was necessarily conclusive on her, until annulled, that the allegations of the petition were true. The court did not notice this point, nor was there anything in the case alluding to any statute authorizing the suit in disregard of the order of sale. Unless such a statute existed, the case, in my opinion, is not tenable.

**§ 553. Section 550 continued—Administrator's or guardian's purchase at his own sale.**—A purchase by an administrator or guardian at his own sale, does not make it void in Delaware,<sup>7</sup> Georgia,<sup>8</sup>

1. Blanchard v. Webster, 62 N. H. 467.

2. Gordon v. Gordon, 55 N. H. 399, 401.

3. Boyd v. Blankman, 29 Cal. 19 (87 Am. D. 146).

4. Bush v. Sheldon, 1 Day. 170 (A. D. 1803).

5. Boyd v. Blankman, *supra*.

6. Chapin v. Waters, 110 Mass. 195.

7. Van Dyke v. Johns, 1 Del. Ch. 93 (12 Am. D. 76, 83).

8. Smith v. Granberry, 39 Ga. 381 (99 Am. D. 464); White v. Moss, 67 Ga. 89.

Kentucky,<sup>1</sup> Massachusetts,<sup>2</sup> or New York,<sup>3</sup> but the contrary was held in an early case in Michigan;<sup>4</sup> and where the purchase was made indirectly and secretly by an agent, it is collaterally valid in Massachusetts,<sup>5</sup> New Jersey,<sup>6</sup> New York<sup>7</sup> and Texas;<sup>8</sup> and the same ruling was made in Missouri in respect to a sale where the attorney of the administrator made the purchase and afterwards sold to him at a large advance.<sup>9</sup>

PENNSYLVANIA CASES.—In Pennsylvania, the courts of law seem to administer equitable relief in legal actions, and therefore, where an administrator was a secret purchaser at a sale of the decedent's land made by the sheriff, the heirs were allowed to recover the land in ejectment against his devisee;<sup>10</sup> and the same ruling was made where the vendee at such a sale purchased by means of fraudulent misrepresentations.<sup>11</sup> The case cited from 7 Watts 86, recognizes the fact that a *bona fide* purchaser from such fraudulent vendee would get a good title, thus demonstrating that these attacks are not considered collateral. Still, it seems to me, that the direct remedy in all such cases would be to move to set aside the confirmation.

FRAUD IN THE SALE.—An administrator's sale of land to pay claims known by him to be fraudulent;<sup>12</sup> or a sale made by collusion;<sup>13</sup> or a conspiracy between the administrator and the purchaser;<sup>14</sup> or simply fraud in the sale,<sup>15</sup> does not make it void.

1. Clements v. Ramsey, — Ky. — (4 S. W. R. 311).

2. Harrington v. Brown, 5 Pick. 519; Litchfield v. Cudworth, 15 Pick. 23, 31; Blood v. Hayman, 13 Metc. 231.

3. Bostwick v. Atkins, 3 N. Y. 53, 60.

4. Dwight v. Blackmar, 2 Mich. 330.

5. Ives v. Ashley, 97 Mass. 198, 204.

6. Runyon v. Newark India Rubber Co., 24 N. J. Law (4 Zab.) 467, 475—*disapproving* Den v. Wright, 8 N. J. Law (3 Halstead) 175, and Den v. McKnight, 11 N. J. Law (6 Halstead) 386, and Den v. Hammel, 13 N. J. Law (3 Harrison) 74, and *citing with approval*, Thorp v. Cullum, 6 Ill. (1 Gilman) 615.

7. Mutual Life Ins. Co. v. Schwaner, 43 N. Y. Supr. (36 Hun) 373, 375, and 101 N. Y. 681.

8. Dodd v. Templeman, 76 Tex. 57 (13 S. W. R. 187); *contra*, Hamblin v. Warnecke, 31 Tex. 91, 94.

9. Grayson v. Weddle, 63 Mo. 523, 529.

10. Riddle v. Murphy, 7 Serg. & Rawle 230, 236.

11. Gilbert v. Hoffman, 2 Watts 66 (26 Am. D. 103); McKennan v. Pry, 6 Watts & Serg. 137; Hoffman v. Strohecker, 7 Watts 86; Small v. Jones, 1 Watts & Serg. 128; McCaskey v. Graff, 23 Pa. St. 321; Sharp v. Long, 28 id. 433.

12. Myer v. McDougal, 47 Ill. 278, 281.

13. Pearson v. Burditt, 26 Tex. 157, 172.

14. *Dictum* in McNally v. Haynes, 59 Tex. 583.

15. Capt v. Stubbs, 68 Tex. 222 (4 S. W. R. 467).

fraudulent vendee cannot show that the creditor's judgment was unfounded in fact.<sup>1</sup>

§ 555. Section 550 continued—Crime, fraudulent acquittal of.—A late case in Indiana decides that a judgment of acquittal in a criminal case where the record was fair on its face, was not void because the defendant bribed the prosecuting attorney to keep the state's witnesses away, and to assist in imposing upon the court;<sup>2</sup> but precisely the contrary was ruled in Tennessee.<sup>3</sup> On principle, it seems to me that the Tennessee case is wrong, because it permits a record apparently regular to be overturned collaterally by parol evidence. That an acquittal obtained by fraud is void and no bar to a new prosecution has been held in Indiana,<sup>4</sup> Minnesota,<sup>5</sup> North Carolina,<sup>6</sup> Tennessee<sup>7</sup> and Wisconsin;<sup>8</sup> but these cases, in my opinion, are unsound. See section 423, *supra*.

§ 556. Section 550 continued.—Justice's fraudulent conduct.—A cause before a justice of the peace in Kansas was adjourned to a day named. Afterwards, the justice told the defendant's attorney that he could not try the case on the day set, and that he would notify him of the time at which it would be tried. Notwithstanding this, he rendered a judgment by default on the day set, but this was held not void;<sup>9</sup> and the same ruling was made in Georgia in respect to a justice's judgment by default, where the defendant had a discharge in bankruptcy, but was induced to remain absent by an assurance of the justice that he need not plead it and that no judgment would be rendered against him.<sup>10</sup>

§ 557. Section 550 continued—Lis pendens agreement violated.—Hogg sued Ruffner to foreclose a mortgage in the federal court in Indiana, and during the pendency of the suit, a contract was made between them by which Hogg agreed simply to foreclose his mortgage and take no personal judgment. But, on default, he took not only a foreclosure, but a personal

1. *Sidensparker v. Sidensparker*, *supra*; *Starr v. Starr*, 1 O. 321, 326.

2. *Shideler v. State*, 129 Ind. 523 (28 N. E. R. 537).

3. *State v. Epps*, 36 Tenn. (4 Sneed) 552.

4. *Watkins v. State*, 68 Ind. 427 (34 Am. R. 273).

5. *State v. Simpson*, 28 Minn. 66 (9 N. W. R. 78; 41 Am. R. 269).

6. *State v. Swepson*, 79 N. C. 632.

7. *State v. Lowry*, 31 Tenn. (1 Swan)

34.

8. *McFarland v. State*, 68 Wis. 400 (32 N. W. R. 226).

9. *Snively v. Hill*, 46 Kan. 494 (26 Pac. R. 1024).

10. *Hood v. Parker*, 63 Ga. 510.

judgment, which became a lien on other lands of Ruffner. Afterwards, Ruffner conveyed these other lands by warranty deed to Link, and Hogg had them sold on execution and purchased them himself. Then Link sued Hogg to quiet title. It was held that the fraud upon Ruffner gave no equitable cause of action in favor of Link to quiet title.<sup>1</sup> If the judgment had been void, Hogg could not have shown title at all. The case is an authority that the violation of a *lis pendens* agreement does not make the judgment void. To the same effect are decisions in New York<sup>2</sup> and Vermont.<sup>3</sup> See section 564, *infra*.

A PARTITION sale made at an inadequate price, and confirmed upon a fraudulent report, is not void.<sup>4</sup>

PETITIONER.—So, fraud in obtaining a certificate of freeholders in respect to the necessity of a proposed road, does not make the proceeding void.<sup>5</sup>

TRUSTEE.—A trustee in Pennsylvania sold property and reported the sale, which was confirmed. This was held to be a bar to an action on his bond for alleged fraud in making the sale. The court said: "The judgment cannot be collaterally assailed for any fraud which the parties to the transaction, on which it is founded, may have committed against each other." <sup>6</sup>

§ 558. **Fraud in foreign and other state judgments.**—Where the party was afforded an opportunity to have a trial before the foreign court, by being personally served with process within its jurisdiction, fraud in the cause of action is no defense to an action on the judgment in another state or country. So also, fraud in the cause of action is incompetent as evidence in an action in another state concerning the title to property seized and sold or sequestrated in the foreign state on service either personal or constructive, because the party has already had his day in court. If the foreign court was deceived by fraud or perjury, that is no more than might have happened in a domestic court. Because the evidence upon which a judgment was founded was false, forged or perjured, the decision is none the less on the merits. A trial on the merits is an attempt to sift the truth from the falsehood. In an early case in Ohio, there was an attempt to show that a Virginia

1. Hogg v. Link, 90 Ind. 346.

2. Whitaker v. Merrill, 28 Barb. 526, 79.  
531; *dictum* in Cleveland v. Boerum,  
27 Barb. 252, 259.

3. Kimball v. Newport, 47 Vt. 38.

4. Hunter v. Stoneburner, 92 Ill. 75,

5. People *ex rel.* Odle v. Kniskern,  
50 Barb. 87, 90.

6. Com. v. Trout, 76 Pa. St. 379, 384.

judgment was fraudulent, but the court decided that it could not succeed, saying: "It is remarkable that this question has never received a precise determination. As the books abound so fully in the general doctrine, that fraud avoids all judicial acts, and the proposition is so often asserted in terms which import that a judgment may for that cause be impeached collaterally, one would expect to meet with several cases in which the question had been directly adjudged."<sup>1</sup> That a judgment of another state was obtained by evidence known to be false and perjured,<sup>2</sup> and while defendant was absent on account of sickness;<sup>3</sup> or that the cause of action was fraudulent,<sup>4</sup> or that it was obtained by fraud,<sup>5</sup> or by fraud, imposition and mistake,<sup>6</sup> does not make it void. In an action of trover in Connecticut for a brig, the answer was that it was duly condemned and sold by order of a prize court in Guadaloupe. To invalidate this, the plaintiff offered in evidence the deposition of the master of the brig to prove that the condemnation was procured by the fraudulent conduct of the defendant, but the evidence was held to be inadmissible.<sup>7</sup> So, in an action on a judgment of another state, an answer that the record does not contain a true copy of the declaration, but a paper substituted therefor without authority, is bad.<sup>8</sup> A guardianship was pending in Illinois, and the guardian wrongfully obtained a receipt in full from the ward, and then fraudulently used it to obtain a final settlement and discharge from the probate court. This was held to bar a suit by the ward against the guardian in Kansas.<sup>9</sup>

CONTRA.—It has been intimated in Illinois and decided in Tennessee, that fraud is a defense to an action on a judgment from another state.<sup>10</sup>

1. *Anderson v. Anderson*, 8 Q. 109.

2. *Riley v. Murray*, 8 Ind. 354, 356; *Engstrom v. Sherburne*, 137 Mass. 153; *McDonald v. Drew*, 64 N. H. 547 (15 Atl. R. 148).

3. *Metcalf v. Gilmore*, 59 N. H. 417 (47 Am. R. 217).

4. *Field v. Sanderson*, 34 Mo. 542 (86 Am. R. 124).

5. *Christmas v. Russell*, 5 Wall. 290, 292, 307; *Maxwell v. Stewart*, 22 Wall. 77, 81; In *Thompson v. Whitman*, 18 Wall. 457, 467, the court said that it was held in *Christmas v. Russell*, that fraud *was* a good defense; and in *Maxwell v. Stewart* it was said that it was

held in *Christmas v. Russell* that fraud could *not* be pleaded as a defense, which was what the court did hold.

6. *Benton v. Burgot*, 10 Serg. & R. 240.

7. *Stewart v. Warner*, 1 Day 142 (2 Am. D. 61).

8. *Johnson v. Dobbins*, 12 Phila. 518.

9. *Davis v. Hagler*, 40 Kan. 187 (19 Pac. R. 628).

10. *Dictum* in *Welch v. Sykes*, 8 Ill. (3 Gilman) 197, 199; *Coffee v. Neely*, 49 Tenn. (2 Heisk.) 304, 317. This case admits that 1 Ch. Pl. 486 *n.* is to the contrary.



A child was living with one Lee in Ohio, and its father was a resident of Indiana. Lee proceeded under a statute in Ohio, which required no notice, and duly procured an order from the probate court for the adoption of the child. In a *habeas corpus* proceeding in Indiana between the father and Lee, the father was allowed to show that Lee procured the order of adoption by fraud.<sup>1</sup> On principle, I think this case wrong. The proceeding was *in rem*, and the Ohio court had the child before it, which gave it an actual jurisdiction which fraud could not destroy. In an action in Texas on an Alabama judgment, a plea that the suit was only intended to recover about seventy dollars for the service of a negro, but that by fraud, combination, etc., nine hundred and twenty-seven dollars and fifty cents were recovered, was held good.<sup>2</sup> To a suit in England upon a Russian judgment for the value of goods, the answer was that, at and before the rendition of the judgment, the plaintiff was in the possession of the goods, and fraudulently concealed that fact from the court—impliedly admitting that the question of possession was in controversy in the Russian court. This was held a good answer, on the ground that *fraud* can always be shown as a defense to a foreign judgment.<sup>3</sup> On page 302, Lord Coleridge, C. J., said: "We are to decide whether the courts at Tiflis have been misled by the fraud of the plaintiff; but the question whether they were misled, never could have been submitted to them, never could have been in issue before them, and therefore never could have been decided by them. The English courts are not either re-trying nor even re-discussing any question which was or could have been submitted to the determination of the Russian courts." On page 306 Brett, L. J., said: "It has been contended that the same issue ought not to be tried in an English court which was tried in the Russian courts; but I agree that the question whether the Russian courts were deceived, never could be an issue in the action tried before them." He then proceeded to show that the issue made—namely, whether the Russian courts were deceived, was not before them, and that to try that issue was not to re-try anything. According to that logic, a suit would never end. It could always be alleged that the court was deceived in the last suit tried. The plaintiff in the Russian court alleged that the defendant had converted his goods, which the defendant

1. Lee v. Back, 30 Ind. 148, 153.

3. Abouloff v. Oppenheimer, L. R.,

2. Drinkard v. Ingram, 21 Tex. 650. 10 Q. B. Div. 295, 299, 306.

denied. Why the Russian court was not as competent as any other to determine what the truth was, or why it was not as competent to detect the false testimony of the plaintiff, as the English court was to detect the false testimony of the defendant, that learned court did not point out. A court is always misled and deceived before it will render an erroneous decision.

It is evident that the court confused the doctrines of *res judicata* and collateral attack, as explained in section 17, *supra*. The defendant in the Russian court had the opportunity to show any cause that existed why the plaintiff ought not to recover. If he failed to raise the proper issues, it was his own fault. He ought to have seen to it that the court was not deceived. The same court, in an earlier case, had decided that, in an action on a foreign judgment, it was no defense that the causes of action upon which it was founded were obtained by the fraud and covin of the plaintiff.<sup>1</sup> In each case the plaintiff alleged that he had a cause of action, and in each case he deceived and misled the court by fraud and perjury. So, in another late English case, where a suit was brought on a foreign judgment, a plea that the defendant had been kept from appearing by the fraudulent promise of the plaintiff, was held good.<sup>2</sup> So, in New York, where the plaintiffs sued the defendants for damages caused by fraudulent conduct, they were permitted to recover upon showing that the defendants and they were jointly interested in land in Texas, and that the defendants conspired with a stranger and induced him to bring an action in a federal court in that state against both the defendants and themselves, and to recover the land, fraudulently, from all of them.<sup>3</sup> The plaintiffs had had their day in court in Texas and were given another in New York.

FRAUD IN COGNOVIT.—Where a judgment is entered on a *cognovit*, and an action is brought upon the judgment in another state, it is a defense that the original claim had no consideration, and that the *cognovit* was procured by duress,<sup>4</sup> or that the claim was paid before the judgment was entered.<sup>5</sup>

1. *Bank of Australasia v. Nias*, 16 Ad. & El. N. S. (Q. B.) (71 E. C. L.) 717, 734.

2. *Ochsenbein v. Papelier*, 8 L. R. Ch. 695 (42 L. J. Ch. 861; 21 W. R. 516; 28 L. T. N. S. 459).

3. *Mussina v. Belden*, 6 Abb. Pr. 165, 176.

4. *Trebilcox v. McAlpine*, 17 N. Y. Suppl. 221.

5. *First National Bank v. Cunningham*, 48 Fed. R. 510—*Jackson*, J.

**FRAUD IN WILL.**—A will was duly admitted to probate in Iowa, and in a suit to quiet title in Indiana, it was held to be incompetent to show that it was obtained by fraud.<sup>1</sup> It will be seen that this case is opposed to the English cases cited above, and to the Illinois case cited in section 521, page 531, *supra*. The two cases in respect to the *cognovits* merely permitted an equitable defense to be made in a court of law.

§ 559. **Gambling debt.**—A judgment cannot be collaterally attacked because the cause of action was founded on a gambling transaction,<sup>2</sup> and that fact is no defense to an action on an appeal bond given to remove the case to a higher court.<sup>3</sup>

**HIGHWAY.**—The board of county commissioners in Kansas had power to improve “any regularly laid out road,” and under this statute a petition was presented to the board asking for the improvement of such an alleged road, and an order was made and land assessed. A landowner was then permitted to enjoin the collection of the assessment upon showing that the *locus* was not, in fact, a highway;<sup>4</sup> but in Massachusetts where the petition to the county commissioners to lay out a highway contained the necessary allegations, and an order was made accordingly, it was decided that a landowner could not collaterally show the allegations of the petition to be false.<sup>5</sup> See sections 534 and 535, *supra*.

**HOMESTEAD.**—Where plaintiffs in attachment recovered a judgment in Wyoming and sold land as the property of the defendant and received a deed, and then brought a suit of an equitable nature against the defendant and his wife to cancel a deed for the land held by her, as fraudulent, and to quiet their title and for possession, a decree in their favor granting the relief sought was held to bar the homestead rights of defendants, although they were not in issue.<sup>6</sup> See section 545, *supra*.

§ 560. **Identity of causes.**—A criminal cause was set down for trial before a special judge in Missouri, and the first indictment being quashed and a new one returned, the regular judge decided

1. Winslow v. Donnelly, 119 Ind. 565 (22 N. E. R. 12).

2. Chicago Driving Park v. West, 35 Ill. App. 496, 499.

3. West v. Carter, 25 Ill. App. 245, 247.

4. Barker v. Hovey, — Kan. — (26 Pac. R. 585, 590).

5. Durant v. Lawrence, 1 Allen 125; *accord*, in respect to railway and highway crossings, is Brewer v. Boston, etc., R. R. Co., 113 Mass. 52.

6. Graham v. Culver, — Wyo. — (29 Pac. R. 270).

that it was for the same offense, and set it down before the same special judge, and the defendant having been convicted, applied to be discharged on *habeas corpus* upon the ground that the second charge was not for the same crime as the first, and that, therefore, the special judge had no power to try him; but it was held that the decision of the regular judge was conclusive.<sup>9</sup>

INDEBTED.—A finding made in supplementary proceedings that a third person is indebted to the judgment defendant in a specified sum, and an order that he pay it over to the plaintiff, cannot be assailed collaterally because he was not so indebted.<sup>1</sup>

INJUNCTION VIOLATED.—It is held in California,<sup>2</sup> Iowa<sup>3</sup> and New York,<sup>4</sup> that a judgment obtained in violation of an injunction, is not void, while the contrary is held in Indiana<sup>5</sup> and Maryland.<sup>6</sup> The case in 29 Iowa was this: A suit was brought in the state court to enjoin the collection of bonds, and a final injunction was granted. Pending that suit, an action was brought on the bonds in the federal court, and the adjudication of the state court was pleaded in bar and disregarded, and a judgment was rendered on the bonds. This was a flagrant violation of law, but the supreme court of Iowa held it not void. The proper remedy was a writ of error from the Supreme Court of the United States. In the case from 2 Maryland Chancery, a creditor, although enjoined from receiving a preference, proceeded in another court and obtained one, and it was held to be void. I think the Indiana and Maryland cases are wrong, because they permitted records, fair on their faces, to be overturned by evidence *aliunde*. In the Iowa case, the federal court disregarded conclusive evidence, and its consideration properly comes within Chapter XIV, *infra*.

§ 561. *Insolvent's discharge*.—The statute of Maryland provided that "Any person, *being insolvent*, may apply, by petition, . . . stating that he is insolvent," etc, and obtain a discharge from his debts. In a collateral attack on the judgment granting a discharge, it was sought to be shown that the debtor was not insolvent, and contended that that fact made the judgment void; but the court held otherwise, and rejected the evidence.<sup>7</sup> So,

9. *Ex parte Clay*, 98 Mo. 578 (11 S. W. R. 998).

1. *Bronzan v. Drobaz*, — Cal.— (29 Pac. R. 254).

2. *Rahm v. Mims*, 40 Cal. 421, 425.

3. *Clark v. Wolf*, 29 Iowa 197, 207.

4. *Grazebrook v. M'Creedle*, 9 Wend. 437; *Platt v. Woodruff*, 61 N. Y. 378.

5. *Collins v. Frasier*, 27 Ind. 477.

6. *Winn v. Albert*, 2 Md. Ch. 42.

7. *State v. Culler*, 18 Md. 418, 432;

*accord*, *McKinney v. Crawford*, 8 Serg.

where the petition stated that a certain note was in suit in a certain court, when in fact it was then in judgment ;<sup>1</sup> and where the debtor owned real estate in the name of a third person,<sup>2</sup> these facts did not affect the validity of the discharge, collaterally.

INTEREST IN PROPERTY, MISDESCRIBED.—An administrator's order to sell land is not void because the petition and proceedings misdescribe the interest of an heir,<sup>3</sup> or describe it as a "reversion" instead of a remainder after a life estate.<sup>4</sup> An Indiana statute authorized writs of attachment to be levied on land subject to execution, which was where the defendant held the *legal* title ; but in such a case, it was held that the order to sell was not void because, in fact, the defendant only held an equitable title.<sup>5</sup> He ought to have made that defense against the attachment. The contrary was held in Ohio,<sup>6</sup> but the decision seems to me to be wrong. The sheriff was commanded to seize the property of defendant of which he held the legal title, and the return showed, either expressly or impliedly, that such property had been seized, and the order to sell necessarily adjudicated that the return was true.

§ 562. Judge—Errors of fact, concerning.—The circuit court in Alabama had jurisdiction over certain cases when the probate judge was disqualified, and it was held that a recital in the circuit court record that the probate judge was disqualified, was conclusive, collaterally.<sup>7</sup> So, where the record in Indiana shows the due appointment of a special judge, it cannot be contradicted in a suit to annul the judgment.<sup>8</sup> A statute of Indiana authorized the clerk, sheriff and auditor to appoint a special judge in case the regular judge could not attend, but the constitution vested the power in the governor to appoint in case of a vacancy. Where a record showed that these officers appointed a special judge because the regular judge could not attend, it was held to be incompetent to show collaterally that the regular judge had resigned, and that a vacancy existed.<sup>9</sup>

& R. 351; *Sheets v. Hawk*, 14 Serg. & R. 173.

1. *Brewster v. Ludekins*, 19 Cal. 162, 169.

2. *Cunningham v. Turner*, 20 Me. 435.

3. *Gilmore v. Rodgers*, 41 Pa. St. 120, 128.

4. *Worthington v. Dunkin*, 41 Ind. 515, 521—a guardian's proceedings.

5. *Bates v. Spooner*, 45 Ind. 489, 492.

6. *Warner v. Webster*, 13 O. 505, as explained in *Lessee of Paine v. Mooreland*, 15 O. 435, 445 (45 Am. D. 585).

7. *Wilson v. Wilson*, 36 Ala. 655, 663.

8. *Rogers v. Beauchamp*, 102 Ind. 33, 36 (1 N. E. R. 185).

9. *Case v. State*, 5 Ind. 1, 3.

**JURY IMPANELED.**—The record in an action at law in Tennessee showed the impaneling and assessment of damages by a jury; and it was held to be inadmissible, in a suit in equity to correct the amount of the judgment, to show that no jury was impaneled, and that the judgment was by *nil dicit*.<sup>1</sup>

**LEVY.**—A judgment holding a levy by virtue of a defunct execution valid, is not void.<sup>2</sup>

**LICENSE TO SELL LIQUOR.**—Under a local option law in Kentucky, when a majority of the votes cast in any precinct was in favor of prohibition, and this result was certified to the county clerk and spread on the court records, that was *prima facie* evidence that prohibition existed in that precinct; and, where the county court granted a license to sell liquor in such a precinct, it was held to be void, and no protection to the licensee.<sup>3</sup> But if I understand the statute, the court did not take judicial notice of the fact that prohibition existed, but that was a defense against the application to be proved. But if I am wrong on this point, it still seems to me that a special case within a general class was overlooked, and that the license was collaterally valid within the rule considered in Chapter VII, *supra*.

**§ 563. Limitation or lapse of time—Appointment of administrator made too late or too soon.**—That the petition for the appointment of an administrator was not filed until the right to the relief prayed for was barred by the lapse of time, or that it was filed before the right to such relief had accrued, was a defense to the petition which all persons in interest had an opportunity to make, and for that reason it cannot be used to defeat the appointment collaterally. But the cases differ. Thus, where the statute prohibited the granting of letters of administration after twenty years from the death of a person, letters granted twenty years and nine days afterwards were held void;<sup>4</sup> but under the same statute in Tennessee it was held that the probate of a will thirty-three years after the death of the testator was not void.<sup>5</sup> In Texas it is held that the granting of letters after all claims against the estate are barred, is void;<sup>6</sup> and where land was sold under such a grant, the heirs were allowed to recover it thirty-six

1. *Bank of Tennessee v. Patterson*, 8 Humph. 363 (47 Am. D. 618).

2. *McDaniel v. Fox*, 77 Ill. 343, 345.

3. *Young v. Com.*, 14 Bush. 161.

4. *Wales v. Willard*, 2 Mass. 120.

5. *Townsend v. Townsend*, 4 Coldw. 70 (94 Am. D. 184).

6. *Stone Cattle and Pasture Co. v. Boon*, 73 Tex. 548 (11 S. W. R. 544, 546).

years afterwards, although it had passed through numerous hands.<sup>1</sup> In these two cases, the letters were granted fifteen years after the death. In another case, letters were granted ten years after the death on a petition which showed that the rightful jurisdiction was in another county. Seven years after that, letters *de bonis non* were issued on a petition alleging that decedent died a resident of that county, and land was sold. This was held void because the allegations of the petition were false, and because of the lapse of time, and because the whole proceeding was a fraudulent scheme to consume the estate; and the heirs, thirty-three years afterwards, were allowed to recover the land from an innocent purchaser.<sup>2</sup> But another Texas case held that an appointment of an administrator fourteen years after death, was not void.<sup>3</sup> Under the law of that state, the heirs could take the estate without administration, and it was presumed in the particular case that they had done so, and that there were no debts, and this was held to make the grant of letters of administration sixteen years afterwards, void.<sup>4</sup> So, the appointment of an administrator in Texas ten years after the heirs had accepted the estate and divided it by agreement, which agreement had received judicial sanction, was held void.<sup>5</sup> But, in the absence of any statute of limitations, appointments made respectively, twenty-five<sup>6</sup> and twenty-eight<sup>7</sup> years after death, were decided to be valid collaterally.

**TOO SOON.**—The appointment of the sheriff as administrator in Virginia before the expiration of three months from the time of death, is erroneous, but not void.<sup>8</sup>

**CIVIL CAUSE.**—A judgment on an “outlawed” note is not void, and a garnishee cannot raise the question.<sup>9</sup> So, an award made by canal appraisers is not void because the claim was barred by the statute of limitations, as that was a defense.<sup>10</sup>

§ 564. *Lis pendens* agreement.—In an action of ejectment in

1. Harwood v. Wylie, 70 Tex. 538 (6 S. W. R. 789).

2. Paul v. Willis, 69 Tex. 261 (7 S. W. R. 357).

3. Martin v. Robinson, 67 Tex. 368 (3 S. W. R. 550).

4. Blair v. Cisneros, 10 Tex. 35, 45.

5. Francis v. Hall, 13 Tex. 189, 192.

6. McFarland v. Stone, 17 Vt. 165, 173.

7. Ricard v. Williams, 7 Wheaton 59, 115.

8. Hutcheson v. Priddy, 12 Gratt. 85, 91.

9. Whitworth v. Detroit, L. and N. R. Co., 81 Mich. 98 (45 N. W. R. 500).

10. People *ex rel.* Jermain v. Thayer, 63 N. Y. 348, 352.



Texas, plaintiff claimed title through a judgment against defendants by default. They offered to show that the judgment was taken on a compromise, and that it was orally agreed that if they would permit the judgment to go for the whole land the plaintiff would convey to them the part now in controversy, but the evidence was held to be inadmissible.<sup>1</sup> See section 557, *supra*.

**MANDAMUS.**—In a proceeding against a city to enforce a judgment by *mandamus*, the city is concluded from contradicting the judgment.<sup>2</sup>

**“MANIFEST INJURY TO SERVICE.”**—A statute of the United States authorized the trial of a naval officer by those junior in rank where a court composed of a majority senior in rank could not be assembled “without manifest injury to the service.” A court was thus organized by an order reciting that “no other officers than those named can be assembled without manifest injury to the service,” and tried and convicted an officer. It was held that this recital could not be contradicted collaterally in order to show the conviction void.<sup>3</sup>

§ 565. **Maps, plans and surveys.**—A petition by a railroad in New York to condemn land alleged that the road had been located across defendant’s land, and that a map had been filed showing the route of the road. A decree of condemnation having gone by default, it was held to be incompetent for the landowner to prove, collaterally, that no map was filed;<sup>4</sup> and a like ruling was made in Massachusetts where there was an attempt to enjoin a judgment at law because it was based upon erroneous plans and surveys.<sup>5</sup>

§ 566. **Maturity of claim.**—When a suit is brought and a judgment demanded, that is an implied allegation, at least, that the claim sued upon is due. Whether or not it is due is a question of fact to be determined by the court, and an error on that point never makes the judgment void. A statute of Illinois authorized confessions to be entered in vacation on debts “due,” but a confession on a note apparently due was held not void because the note was antedated and not delivered until confession was made.<sup>6</sup> Attachment proceedings before a justice of the peace in Missouri

1. *Frisby v. Withers*, 61 Tex. 134, 137.

2. *Cairo v. Campbell*, 116 Ill. 305 (5 N. E. R. 114 and 8 id. 688).

3. *Mullan v. United States*, 140 U. S. 240 (11 S. C. R. 788).

4. *Allen v. Utica, I. and E. R. R Co.*, 22 N. Y. Supr. (15 Hun) 80, 82.

5. *Boston, etc., R. R. Co. v. Sparhawk*, 1 Allen 448 (79 Am. D. 750).

6. *Baldwin v. Freydenhall*, 10 Ill. App. 106.

are not void because the claim sued upon was not due, and they will protect the plaintiff from an action of trespass;<sup>1</sup> but in Kansas, where the note sued upon in attachment proceedings before a justice, showed that it was not due, the judgment was held void and no protection to the plaintiff, although the affidavit alleged that it was due.<sup>2</sup> This case seems to be wrong on the most elementary of principles, as the note might have been due, although not so appearing on its face. A foreclosure of a mortgage, where the note secured was not due;<sup>3</sup> or a foreclosure of a tax-purchase where the taxes were not delinquent;<sup>4</sup> or a judgment in garnishment,<sup>5</sup> or in a probate court,<sup>6</sup> before the debt was due, is not void. A statute of Wisconsin authorized a mortgage to be foreclosed when any interest or portion of the principal was due, and a decree to be entered showing the dates when future installments would become due, with authority to the plaintiff to then issue an order of sale if the installments were not paid, but it did not authorize a personal judgment to be rendered for such future installments; nevertheless, such a judgment was rendered. This was held to be erroneous, but not void.<sup>7</sup> A justice's court in Canada rendered judgment in favor of a seaman for wages before the voyage had terminated or the seaman had been discharged. This was decided to be void because "the justices could not give themselves jurisdiction in this case by finding as a fact that which was not a fact."<sup>8</sup> The justices were compelled to hear the evidence bearing on the point of the wages being due, and why they could not decide it, I cannot understand. See section 260, *supra*.

§ 567. **Naturalization.**—A judgment naturalizing an alien and conferring upon him the right of citizenship, which recites that due proof of all necessary facts was made, cannot be contradicted collaterally.<sup>9</sup> Such a record is conclusive collaterally in respect to its own validity,<sup>10</sup> and is not void because it fails to show any previous declaration of intention to become a citizen,<sup>11</sup> and extrinsic proof is not admissible to show that no such declaration was

1. *Ivy v. Barnhart*, 10 Mo. 151.

2. *Connelly v. Woods*, 31 Kan. 359,

364.

3. *Carr v. Hunt*, 14 Iowa 206.

4. *Gaylord v. Scarff*, 6 Iowa 179, 184.

5. *Cornwell v. Hungate*, 1 Ind. 156.

6. *Succession of Quin*, 30 La. Ann. Cranch 420.

7. *Eaton v. Youngs*, 36 Wis. 171.

8. *The Haidee*, 10 Lower Canada 101, 108.

9. *McCarthy v. Marsh*, 5 N. Y. 263.

10. *Spratt v. Spratt*, 4 Peters 393.

11. *Stark v. Chesapeake Ins. Co.*, 7

made,<sup>1</sup> or that he had not resided in the country the requisite length of time.<sup>2</sup>

§ 568. **Newly discovered evidence.**—The validity of an assignment of a legacy was litigated in a Pennsylvania probate court between the assignee and an attaching creditor of the legatee, and decided in favor of the assignee; in a subsequent proceeding in another court, the attaching creditor again attempted, on newly discovered evidence, to show that the assignment was fraudulent, but it was held that he could not thus impeach the first judgment.<sup>3</sup> So, newly discovered evidence is no defense to a suit on an award.<sup>4</sup>

**NON-SUIT.**—The record of a justice of the peace showed a non-suit. Parol evidence was held inadmissible to show that the justice announced his judgment for defendant before plaintiff elected to be non-suited.<sup>5</sup>

**ORDINANCE.**—A conviction for the violation of a city ordinance is not void because there was, in fact, no violation,<sup>6</sup> nor can that fact be shown on *habeas corpus* to procure a discharge from imprisonment.<sup>7</sup>

§ 569. **Payment before suit or judgment** cannot be shown collaterally to avoid a judgment, because an opportunity was given to make that defense.<sup>8</sup> An *allowance* made by a county court,<sup>9</sup> or an *award*,<sup>10</sup> or a *foreclosure*,<sup>11</sup> or a judgment on a *note*,<sup>12</sup> even when payments are indorsed upon it and not allowed;<sup>13</sup> or a judgment

1. *Banks v. Walker*, 3 Barb. Ch. 438, 449; *People ex rel. Brackett v. McGowan*, 77 Ill. 644, 646; *State v. Hoeflinger*, 35 Wis. 393, 400.

2. *The Acorn*, 2 Abb. (U. S.) 434, 444.

3. *Otterson v. Middleton*, 102 Pa. St. 78.

4. *White Water Valley Canal Co. v. Henderson*, 3 Ind. 3, 7.

5. *Stewart v. Nunemaker*, 2 Ind. 47.

6. *Willis v. Havemeyer*, 12 N. Y. Super. (5 Duer) 447.

7. *Darrah v. Westerlage*, 44 Tex. 388.

8. *Allen v. Jones*, 1 Ind. App. 63 (27 N. E. R. 116); *Stephens v. Howe*, 127 Mass. 164; *Barnett v. Reed*, 51 Pa. St. 190 (88 Am. D. 574); *Harrison v. Sim-*

*mons*, Busbee Law 80; *Chambers v. Patton*, 1 Bailey 130; *Kirklan v. Brown*, 4 Humph. 174 (40 Am. D. 635); *Huddleston v. Asbugg*, Finch 204 (A. D. 1674). So a decree that a mortgage was paid is not void because it was not paid. *Cannon v. Wright*, — N. J. Eq. — (23 Atl. R. 285).

9. *Cope v. Collins*, 37 Ark. 649.

10. *Swan v. Scott*, 11 Serg. & Rawle 155, 166.

11. *Massie v. Brady*, 41 La. Ann. 553 (6 S. R. 536).

12. *Stuart v. Peay*, 21 Ark. 117, 122.

13. *Hathaway v. Hemingway*, 20 Conn. 191, 197; *Hanson v. Manley*, 72 Iowa 48 (33 N. W. R. 357); *Weeks v. Thomas*, 21 Me. 465; *Morton v. Chandler*, 7 Me. 44—computation too high; *Loring v. Mansfield*, 17 Mass.

of *revivor*,<sup>1</sup> or a decree foreclosing a *street assessment*,<sup>2</sup> or confirming a *tax sale*,<sup>3</sup> or foreclosing a *tax lien* on service by publication,<sup>4</sup> or posting,<sup>5</sup> is not void because the claim had been paid.

TAX JUDGMENT IN MINNESOTA.—The Minnesota statute in relation to judgments for taxes provided, that payment should be a defense, and that a sale might be set aside on proof “that the court rendering the judgment pursuant to which the sale was made, had not jurisdiction to render the judgment;” and that “the same presumption in favor of the regularity and validity of said judgment shall be deemed to exist as in respect to judgments in civil actions in said court.” It was held that the fact that the taxes had been paid did not affect the jurisdiction of the court, nor make the judgment void.<sup>6</sup> But Mr. Justice Vanderburgh dissented upon the ground that the statute required the auditor to file with the clerk of the court “a list of the delinquent taxes upon real estate within his county,” with a description of each parcel so delinquent, upon which, after notice, judgment was to be rendered for a sale. He contended that the *delinquency* was what gave the court jurisdiction, and that where the taxes had been paid, the judgment and sale were void. He said: “The subject of probate jurisdiction will afford a familiar illustration in this case. Probate courts are given jurisdiction, not over estates generally, but over the estates of *deceased* persons. Should administration be granted upon the estate of a person living, the proceedings would be set aside or held invalid, on his application, for want of jurisdiction, however complete the record might be.” The reasoning of the learned judge is sound. If the judgment of a probate court appointing an administrator for a person actually in life, is void because the law only authorizes the appointment to be made for *deceased*

394; Tilton v. Gordon, 1 N. H. 33; Barnett v. Reed, 51 Pa. St. 190 (88 Am. D. 574); Huffer v. Allen, L. R., 2 Exch. 15, 18 (4 H. & C. 634; 36 L. J. Exch. 17; 12 Jur. N. S. 930; 15 L. T. N. S. 225); Marriott v. Hampton, 7 D. & E. 269; *contra*, Rowe v. Smith, 16 Mass. 306.

1. Braddee v. Brownfield, 4 Watts 474; McVeagh v. Little, 7 Pa. St. 279.

2. Ward v. Dougherty, 75 Cal. 240 (17 Pac. R. 193); Brooks v. Mayor of New York, 10 N. Y. Supp. 773.

3. Wallace v. Brown, 22 Ark. 118 (76 Am. D. 421).

4. McCarter v. Neil, 50 Ark. 188 (6 S. W. R. 731); Jones v. Driskell, 94 Mo. 190 (7 S. W. R. 111); Hill v. Sherwood, 96 Mo. 125 (8 S. W. R. 781).

5. Williamson v. Mimms, 49 Ark. 336 (5 S. W. R. 320, 325); Cadmus v. Jackson, 52 Pa. St. 295, 304—a judgment for taxes previously paid. See section 582, *infra*.

6. Chauncey v. Wass, 35 Minn. 1 (30 N. W. R. 826, 842).

persons, then a judgment ordering land to be sold for a tax that has been paid, is void, where the law only authorizes such judgment in case the tax is *delinquent*. But for reasons given in section 608, *infra*, I do not think his premise is correct. In the English case of *Huffer v. Allen*, cited on page 597, a part of the claim was paid after suit brought, but the plaintiff, on default, signed judgment for the whole amount, and issued a *ca. sa.*, upon which the defendant was arrested, and for this arrest it was decided that he was not liable in damages.

§ 570. **Perjury** never makes a judgment void;<sup>1</sup> and such a judgment will bar a new suit on the same cause of action,<sup>2</sup> and will protect the successful party from an action for damages in procuring it;<sup>3</sup> nor is the fact that it was procured by perjury any reason for excluding it when offered in evidence to prove a fact in another case.<sup>4</sup> So, a judgment discharging a garnishee is not void because procured by his fraud and perjury, acting in collusion with the principal debtor, and it bars a new action against him.<sup>5</sup> The fact that a judgment is obtained by such means in the absence of the defendant, does not change the rule.<sup>6</sup>

§ 571. **Place of occurrence of event in civil causes.**—Sometimes the jurisdiction of a court is limited to causes of action which arise or mature within the district where it sits. When suit is brought upon a cause not so arising or maturing, the record almost invariably fails to show that fact; and, in accordance with the principle considered in section 526, *supra*, it would be invulnerable against a collateral attack. In the seventh year of the reign of Queen Anne, a court had no jurisdiction of causes of action arising outside of a prescribed territorial district in which it sat; but suit was brought upon such a cause and the defendant was arrested, and judgment rendered, upon which he was imprisoned. The sheriff suffered him to escape, and sought to protect himself

1. *Reeve v. Kennedy*, 43 Cal. 643, 651; *Demeritt v. Lyford*, 27 N. H. (7 Foster) 541, 546; *Ross v. Wood*, 15 N. Y. Supr. (8 Hun) 185.

2. *Gusman v. Hearsey*, 28 La. Ann. 709 (26 Am. R. 104); *Verplanck v. Van Buren*, 18 N. Y. Supr. (11 Hun) 328; *M'Cafferty v. O'Brien*, 1 Cincinnati 64.

3. *Dunlap v. Glidden*, 31 Me. 435; *Smith v. Abbott*, 40 Me. 442; *Sailesbury v. Cresswell*, 21 N. Y. Supr. (14 Hun) 460, 463.

4. *Krekeler v. Ritter*, 62 N. Y. 372.

5. *Lyford v. Demeritt*, 32 N. H. 234.

6. *Farrington v. Bullard*, 40 Barb. 512, 517.

when sued by showing the want of jurisdiction over the original cause of action, but it was decided that he could not do so.<sup>1</sup>

A summons in garnishment from a justice in Iowa was served on a person residing in another county. He appeared and answered, and judgment was rendered against him. The court said: "The *res* in this case was the indebtedness" due from the garnishee. "We are of the opinion that it was not before the court for the reason" that the action of the constable in the other county was void.<sup>2</sup> The record did not show the defect. There was no defect in the jurisdiction over the *res*, but merely in regard to the person; and this might have been pleaded in abatement, but was not. The court did not seem to be aware of the case just cited from Comyn. The case is contrary, in principle, to a later one in the same court, which held that where a judgment was rendered upon an acceptance of service indorsed on the summons, it could not be shown collaterally by a stranger that the acceptance was made out of the state.<sup>3</sup>

§ 572. *Place of occurrence of event in criminal causes.*—On the trial of a criminal cause, it must be proved that the crime was committed within the territorial jurisdiction of the court, as alleged in the pleading, in order to secure a conviction. The allegation that it was so committed gives the court jurisdiction to hear the evidence, and that necessarily carries with it the power to decide; and a conviction in such a case, even by an inferior court, is conclusive collaterally in respect to the place where the crime was committed.<sup>4</sup> But in Massachusetts, a justice of the peace punished a person for a contempt committed during a criminal trial, and he sued the justice for damages and was allowed to recover upon showing that the crime on trial before the justice was committed outside of his territorial jurisdiction.<sup>5</sup> In a subsequent case, the same court said: "There is a broad distinction between *Piper v. Pearson* and one where the magistrate possesses the requisite judicial authority, but in the exercise of that authority fails to secure by proper proceedings jurisdiction of the person of the defendant."<sup>6</sup>

1. *Higginson v. Sherif*, 1 Comyn's R. 153.

2. *Gage v. Maschmeyer*, 72 Iowa 696 (34 N. W. R. 482).

3. *Wright v. Mahaffey*, 76 Iowa 96 (40 N. W. R. 112).

4. *In re Newton*, 16 Com. Bench 97.

5. *Piper v. Pearson*, 2 Gray 120 (61 Am. D. 438).

6. *Hendrick v. Whittemore*, 105

Mass. 28.

That learned court was laboring under the notion—mistaken as it seems to me—that the jurisdiction over the subject-matter depended on the facts instead of the allegations.

§ 573. **Place of existence of thing—Assets of decedent in county.**—The statutes concerning the appointment of administrators, authorize it to be made, in certain cases, in any county where the decedent left assets. On the presentation of a petition asking for an appointment in such a case, it becomes a question of fact to be determined from the evidence, whether or not the decedent did leave assets in that county, and an erroneous decision is conclusive in a collateral proceeding in Florida,<sup>1</sup> Georgia,<sup>2</sup> Iowa,<sup>3</sup> Kentucky<sup>4</sup> and New York;<sup>5</sup> and no court now holds to the contrary, so far as I can discover.

**ASSETS, NONE IN STATE.**—The same rule holds in respect to assets in the state, and it cannot be shown collaterally that none were left in order to invalidate the appointment.<sup>6</sup> On the contrary, it has been decided in Kansas<sup>7</sup> and Massachusetts<sup>8</sup> that, in a suit by an administrator, an answer that the decedent was a non-resident and left no assets in the state, was a defense. I think these cases are unsound.

§ 574. **Section 573 continued—Court, place of holding.**—A person was tried and convicted in Georgia, and this was affirmed in the supreme court. He then brought *habeas corpus* proceedings and sought to contradict the record, which appeared regular on its face, by showing that his trial was had in the basement of the court house before a special judge, while the regular judge and jury were engaged in another cause in the court room, but it was held that he could not do so.<sup>9</sup> Of course the affirmance by the supreme court added nothing to the power of the trial court. So, where a judgment by confession appeared regu-

1. Robinson v. Epping, 24 Fla. 237 (4 S. R. 812, 822).

2. Arnold v. Arnold, 62 Ga. 627, 636.

3. Murphy v. Creighton, 45 Iowa 179, 182; *Contra*, Christy v. Vest, 36 Iowa 285.

4. Gilchrist's Ex'rs v. Williams' Adm'r, 1 B. Mon. 133.

5. O'Connor v. Higgins, 113 N. Y. 511 (21 N. E. R. 184), *affirming* 1 N. Y. Supp. 377 (16 N. Y. St. Rep'r 130);

Sullivan v. Fosdick, 17 N. Y. Supr. (10 Hun) 173, 180.

6. Rogers' Ex'r v. Duvol, 23 Ark. 77, 80; *dictum* in Jeffersonville R. R. Co. v. Swayne's Adm'r, 26 Ind. 477, 483.

7. Perry v. Saint Joseph, etc., R. R. Co., 29 Kan. 420.

8. Crosby v. Leavitt, 4 Allen 410.

9. Daniels v. Towers, 79 Ga. 785 (7 S. E. R. 120).



larly upon the record as of January 14, it was held that another creditor could not show that the order for the entry was made on the papers by the judge *at his residence*, at ten o'clock that night, and that no court was in session on the 14th.<sup>1</sup> So, in an English case, where an order of commitment by the master of the rolls was regular on its face, it was decided that it could not be shown on *habeas corpus* that it was made out of court. Lord Chief Justice Denman, in speaking of the place where the master made the order, said: "I think, therefore, that affidavits to show where he was actually sitting for the purpose of this objection, would be of no avail. The order states that the prisoner was brought to the bar of the court. Suppose affidavits were offered to show that the master of the rolls made his order elsewhere than in the place where his court usually sits; they could not be received for the purpose of proving that what he *adjudged to be the bar of his court was not so*. The adjudication of any competent authority, deciding on facts which are necessary to give it jurisdiction, is sufficient. . . . Here we are concluded by his decision on the fact necessary to his decision, giving the same credit to him that we should to the humblest minister of the law. . . . When the master of the rolls pronounces the place at which the prisoner comes before him to be the bar of his court, that is an adjudication which we must credit and hold conclusive."<sup>2</sup> In an early case in North Carolina, it was held to be competent to prove collaterally that a justice of the peace sat outside of his county when he rendered a judgment, and thus to show it to be void.<sup>3</sup>

§ 575. Section 573 continued—**Highway, location of.**—The Indiana statute in relation to highways authorized the board of county commissioners to establish them throughout the county generally, and a later statute gave cities and towns exclusive jurisdiction to establish them within their limits. On a petition giving the *terminii*, courses and distance of a proposed highway, after due notice, the board made an order establishing it. This order was held not void because one terminus was, in fact, within a town.<sup>4</sup> The petition did not show that fact, and the town ought to have made defense. So, where a court of petty sessions, in England,

1. *MacVeagh v. Locke*, 23 Ill. App. 606.

2. In *Matter of Clark*, 2 Ad. & El. N. S. 619, 633 (42 E. C. L. 835, 842).

3. *Hamilton v. Wright*, 4 Hawks 283 (A. D. 1826).

4. *Sparling v. Dwenger*, 60 Ind. 72, 80.

on a contest between two parishes over the repair of a highway, decided that a specified part four hundred and seventy-eight yards in length, was within the parish of Hickling, and ordered it to keep that part in repair, it was decided that, upon a criminal prosecution for non-repair, the parish could not be permitted to show that this part was not within its boundaries.<sup>1</sup>

§ 576. Section 573 continued—Land or sea.—A libel in a federal court of admiralty against certain bales of cotton, alleged that they were seized on the Mississippi river, and a decree of condemnation was passed. This was held void because the cotton was, in fact, seized upon the land, and therefore not subject to admiralty jurisdiction.<sup>2</sup> The principle involved in this and kindred decisions seems to be, that, where the subject-matter under some circumstances—*e. g.*, goods captured at sea—is within the jurisdiction of the court, and under other circumstances—*e. g.*, goods captured on land—is not within the jurisdiction, the sentence of the court of admiralty does not establish, as a fact, that the capture was at sea, and that it may be shown, collaterally, that the capture was on land, and the sentence void. On the same principle, if the common-law court should then seize and condemn the same goods as having been captured on land, it could be shown collaterally that they were captured at sea, and thus defeat that adjudication; and so *ad infinitum*, as a void judgment, or one which may be alleged to be void on account of matters *aliunde*, can never be used as an estoppel. The trouble with all such decisions is, as it seems to me, that they confound the doctrines of *res judicata* and collateral attack, as explained in section 17, *supra*. When the defendant appears and is defeated on the merits concerning any fact, the cases universally hold him estopped collaterally. They fail to see that the law only guarantees to him an *opportunity* to make defense, and that the judgment must necessarily have the same force, so far as the matter sued upon is concerned, whether he takes advantage of the opportunity or not. In considering the validity of a capture in the waters off Alaska and condemnation by a federal admiralty court, where the contention was that the seizure took place on the high seas outside of the jurisdiction of the United States, the same court said: "The court had power *to inquire into the fact upon which jurisdiction depended*, and its

1. Regina v. Inhabitants of Hickling, 7 Ad. & El. N. S. 880, 888 (53 E. C. L. 870 886).

2. United States v. Winchester, 99

U. S. 372.

maintenance of jurisdiction involved the conclusion necessary to sustain it.”<sup>1</sup> This case is in accord with cases cited in section 17, *supra*. If a court sitting in Alaska can effectually determine that a vessel was seized on the high seas within the limits of the United States, I am unable to see why another federal court cannot just as effectually determine that a bale of cotton was seized on the water, or a New Jersey court that a vessel was seized within the limits of a particular county.<sup>2</sup>

§ 577. Section 573 continued—**Railroad, location of.**—The Indiana statute in case of donations to railroads, provided that the board of county commissioners should make an order placing the donation on the tax duplicate whenever “the railroad to be constructed shall have been permanently located, and work thereon done and paid for by the company equal to the amount of the donation then made.” The order of the board placing the tax on the duplicate was held conclusive, collaterally, that the railroad had been duly located.<sup>3</sup> In an earlier case on the same point, it was decided that the order of the board levying the tax was a conclusive adjudication concerning the location, and that evidence to show that it was not so organized as to extend into the township taxed, was inadmissible.<sup>4</sup>

§ 578. Section 573 continued—**Spring, location of.**—A Missouri statute authorized the county court to appoint an extra justice of the peace for towns within five hundred yards of any medical spring. On *quo warranto* to oust such an appointee because there was no such spring within that distance of the town, the order of the county court was held to be conclusive.<sup>5</sup>

**TAXABLE PROPERTY, LOCATION OF.**—The action of the taxing officers in New York is judicial,<sup>6</sup> yet the assessment of a furnace in one town when it stood in another, was held to be void.<sup>7</sup> This case seems to me to be unsound.

§ 579. **Pre-emption.**—A statute of the United States prohibited the pre-emption of lands “which may have been appropriated for any purpose whatsoever.” The register and receiver of a land office, who acted judicially, decided that a tract was subject to

1. *In re Cooper*, 143 U. S. 472, 509.

2. *Thompson v. Whitman*, 18 Wall. 457, holds that it cannot. See section 389, pages 376–378, *supra*.

3. *Nixon v. Campbell*, 106 Ind. 47, 50 (4 N. E. R. 296, and 7 id. 258).

4. *Brokaw v. Board of Commissioners*, 73 Ind. 543, 545.

5. *State ex rel. Rice v. Simmons*, 35 Mo. App. 374, 381.

6. *Peyser v. Mayor*, 70 N. Y. 497.

7. *People ex rel. Witherbee v. Board of Supervisors*, 70 N. Y. 228, 233.

pre-emption and sold it. The Supreme Court of the United States decided that it had been appropriated for other purposes, and held the sale void collaterally, reversing the supreme court of Illinois.<sup>1</sup> This case seems to me to be erroneous.

**PRIORITY.**—A judgment erroneously awarding priority to one judgment over another in the same court,<sup>2</sup> or to one lien over another,<sup>3</sup> or quieting title against a superior lien,<sup>4</sup> is conclusive collaterally.

§ 580. **Revivor.**—In a proceeding to revive a judgment, it cannot be shown that it was wrong on the merits,<sup>5</sup> nor that the original cause was usurious,<sup>6</sup> nor that a contract had been made releasing the defendant from the original cause of action before it was put into judgment.<sup>7</sup> So, a judgment of revivor against heirs is not void because the original judgment did not bind them;<sup>8</sup> and a bankrupt's discharge, granted after the rendition of a judgment, although a defense to a proceeding to revive, if not then used, is no defense to a second proceeding to revive, as the first judgment of revivor is conclusive that no cause existed why it should not be rendered.<sup>9</sup> A recital made in a cause that a suit had been duly revived is conclusive, collaterally, that it was made on sufficient evidence.<sup>10</sup> But it is held in Louisiana, that a judgment of revivor only bars defenses of prescription, and that the defendant may show in a new action that it was paid before revival.<sup>11</sup>

**SECOND SUIT WHILE FIRST IS PENDING.**—Unless the first suit is pleaded in abatement of the second, the court can know nothing about it, and proceeds with the case under a mistake of fact; and if it renders the first judgment, that, when properly pleaded, will bar further proceedings in the first case just the same as any other final settlement would. The defendant was called upon to show any cause why the judgment should not be rendered, and

1. Wilcox v. Jackson, 13 Peters 498, 511.

2. Yerkes s Appeal, 8 Watts & Serg. 224.

3. Factors' and Traders' Ins. Co. v. DeBlanc, 31 La. Ann. 100, 103.

4. Buckmaster v. Rider, 12 Ill. 207, 214.

5. Huffsmith v. Levering, 3 Whar-  
ton 110, 115; Pittsburg C. and St. L.  
Ry. Co. v. Marshall, 85 Pa. St. 187,  
190.

6. Lysle v. Williams, 15 Serg. &  
Rawle, 135.

7. Cardesa v. Humes, 5 Serg. &  
Rawle 65, 68.

8. Warren v. Hall, 6 Dana 450.

9. Stewart v. Colwell, 24 Pa. St. 67.

10. Cannon v. Cooper, 39 Miss. 784  
(80 Am. D. 101).

11. Hayden v. Sheriff, 43 La. Ann,  
385 (8 S. R. 919).

one cause was the pendency of the former suit. Thus, it was held in Maryland, that the discharge of an insolvent on a second petition during the pendency of the first, was not void.<sup>1</sup> So, although the pendency of proceedings in bankruptcy in a federal court is ground to stay a suit in a state court until they are terminated, yet if that be or be not done, still the discharge in bankruptcy, if first granted, must be pleaded in bar of the judgment in the state court, because it will be conclusive that no defense existed.<sup>2</sup> After a person was indicted for assault and battery in a district court of Texas, he was arrested and convicted before a justice of the peace, and pleaded the conviction in bar in the district court. But the judgment of the justice was held to be a nullity because the district court first obtained jurisdiction.<sup>3</sup> This case seems to me to be clearly wrong.

"SETTLED AS PER AGREEMENT FILED," recited in the record of a cause, concludes the parties in another action from showing that it was not so done.<sup>4</sup>

§ 581. *Specific performance.*—It cannot be shown collaterally to impeach the title, that a decree of specific performance was pronounced on insufficient evidence.<sup>5</sup>

*SPIRITUOUS LIQUOR.*—A statute of the United States made it a crime to introduce "spirituous" liquor into the Indian Territory. Upon an affidavit charging a person with "introducing ten gallons of beer into the Indian country, the same being spirituous liquor," a commissioner convicted and imprisoned him. On *habeas corpus*, it was held to be incompetent to introduce evidence to show that the beer was not "spirituous."<sup>6</sup>

*SPLITTING CAUSE OF ACTION.*—The jurisdiction of justices of the peace in Virginia was limited to fifty dollars; and, where a person owing one hundred and twenty-six dollars executed three bonds of forty-two dollars each, upon which, after all were due, three separate judgments were recovered before a justice of the peace, they were all decided to be void for want of jurisdiction.<sup>7</sup> Each judgment appeared to be perfect on its face, and to overturn them collaterally by evidence *aliunde*, overturned the law as I understand it.

1. *Bowie v. Jones*, 1 Gill. 208, 217.  
See section 527, page 541, *supra*.

2. *Boynton v. Ball*, 121 U. S. 457.

3. *Burdett v. State*, 9 Tex. 43.

4. *Berks, etc., Co. v. Hendel*, 11 Serg. & Rawle 123.

5. *Thacker v. Chambers*, 5 Humph. 313 (42 Am. D. 431).

6. *In re Boyd*, 49 Fed. R. 48—Caldwell, Shiras and Thayer, J. J.

7. *James v. Stokes*, 77 Va. 225—Richardson, J., *dissenting*.

§ 582. **Tax-judgments in Illinois.**—The doctrine maintained by the supreme court of Illinois in respect to the collateral validity of judgments for taxes is, to say the least, peculiar. In deciding upon the validity of such a judgment where the attack was collateral, that court said: "The owners of the property did not appear and file objections to the application for judgment in the county court. The decisions of this court have been such *in number*, and upon such due consideration, some of them, that a judgment for taxes, where there was no personal appearance, is not conclusive, and is subject to collateral attack, that we must adhere thereto as the settled doctrine of the court."<sup>1</sup> In *Belleville Nail Co. v. People*, it is said that, as the company did not appear in the county court and contest the rendition of the judgment, it was of no binding force against it collaterally.<sup>2</sup> It relies on the statute which makes the deed *prima facie* evidence of certain things. This decision is approved in a later case.<sup>3</sup> In *McLaughlin v. Thompson*, it is said: "The evidence shows that this county tax entered into and formed a part of the judgment, and the sum for which the land sold. That tax being illegal, appellant, or those under whom he claims, were not required to pay it, nor did the law impose the duty of redeeming from the sale. And it has been repeatedly held that if any portion of the tax is illegal, *or the judgment is too large*, only to the extent of a few cents, the sale and tax deed will be void."<sup>4</sup> It cites no authority. The court admits that if the owner appears and contests, the judgment will bind him.<sup>5</sup>

The principle established by these decisions is, that the validity of the judgment depends upon the option of the defendant. It is strange that the supreme court of the third state in the Union will adhere to a line of decisions so destitute of principle, which confound the doctrines of *res judicata*, and collateral attack. Especially is this so, when to overrule them would simply result in confirming the titles of a few *bona fide* purchasers. The United States circuit court sitting in that state refused to follow these cases, and held that a judgment for taxes was not void

1. *Gage v. Busse*, 114 Ill. 589, 593; *accord*, *Riverside Co. v. Howell*, 113 Ill. 256, 263—*Craig and Scholfield, J. J., dissenting*.

2. *Belleville Nail Co. v. People*, 98 Ill. 399, 403.

3. *Gage v. Bailey*, 102 Ill. 11, 14.

4. *McLaughlin v. Thompson*, 55 Ill. 249, 251; *accord*, *Gage v. Lyons*, — Ill. — (28 N. E. R. 832)—where 17 cents of costs were not due.

5. *Graceland Cem. Co. v. People*, 102 Ill. 619.

because a portion was illegal.<sup>1</sup> In one of the last reported cases in that court, where the validity of a tax-judgment was collaterally in question, a village had made a levy which included the salaries of two officers which it had no power to pay, and this added a small sum to the taxes for which judgment was rendered. The statute of 1879, then in force, provided that "the judgment itself shall be conclusive evidence of its regularity and validity in all collateral proceedings, except in cases where the tax or special assessments have been paid, or the real estate was not liable to the tax or assessment." Applying this statute to the case in hand, the court felt constrained to hold that the whole judgment and the sale and deed were void.<sup>2</sup> The court ought to have been astute in circumventing a statute which permitted rogues to shift their taxes on to honest men, and tended to reduce the courts to the level of ministerial bodies. This statute did not say that if any part of the tax was illegal the whole judgment should be void, and the court might well have held that it only applied to cases where the whole tax was paid or illegal. But, on strict legal principles, this judgment was not void. The duplicate or assessment roll, which served as a petition or declaration, showed on its face that one or more of the causes of action was legal, and one or more illegal of which the court had no jurisdiction; and a late case in Wisconsin holds that a justice's judgment founded on a complaint containing two causes of action, one being within the jurisdiction of the justice and the other not, is not void.<sup>3</sup> The doctrine of the supreme court of Illinois is denied in Minnesota and Missouri.<sup>4</sup> So, the supreme courts of Alabama<sup>5</sup> and Arkansas,<sup>6</sup> hold tax-judgments just as conclusive as any others. See section 569, *supra*, where the effect of previous payments in Arkansas, Minnesota, Missouri and Pennsylvania, are considered. So also, it was held in California that a tax-judgment enforcing a lien on real estate,

1. *Chicago Theological Seminary v. Gage*, 12 Fed. R. 398—*Blodgett, J. v. Ray*, 96 Mo. 542 (10 S. W. R. 153); *Boyd v. Ellis*, — Mo. — (18 S. W. R. 29).

2. *Drake v. Ogden*, 128 Ill. 603 (21 N. E. R. 511, 513).

3. *Johnson v. Iron Belt Min. Co.*, 78 Wis. 159 (47 N. W. R. 363).

4. *Coffin v. Estes*, 32 Minn. 367 (20 N. W. R. 357); *Kipp v. Dawson*, 31 Minn. 373 (17 N. W. R. 961); *Allen*

*v. Ray*, 96 Mo. 542 (10 S. W. R. 153); *Boyd v. Ellis*, — Mo. — (18 S. W. R. 29).

5. *Driggers v. Cassady*, 71 Ala. 529, 533.

6. *Doyle v. Martin*, — Ark. — (17 S. W. R. 346); *Burcham v. Terry*, — Ark. — (18 S. W. R. 458)—illegal taxes included.



was not void because it erroneously included the taxes on personalty.<sup>1</sup>

§ 583. **Title to land before justice of the peace.**—A statute of New York forbade a justice of the peace to proceed further with a trial when it appeared by the evidence that the title to land was in dispute; but in such a case his further proceeding was held to be merely erroneous and not void, because it was a question for him to determine whether or not the title was in dispute.<sup>2</sup> Of course this rule would not apply where the title was brought into dispute by a plea, as its allegations would oust the jurisdiction by the very terms of the statute.<sup>3</sup> See section 233, 5th *citation*, and section 518, page 528, *supra*.

**TITLE TO LAND BEFORE SUPERIOR COURT.**—Where a superior court in Illinois had no jurisdiction to try a question of title to land, its erroneous decision that the title was not involved cannot be overhauled collaterally.<sup>4</sup>

**QUIETING TITLE.**—Where title is quieted under the Illinois "Burnt Record Act," it cannot be controverted in ejectment;<sup>5</sup> and, although a court of equity has no rightful jurisdiction to make valid a defective title resting upon the official acts of taxing officers, yet its decree quieting title in such a case, is not void.<sup>6</sup>

**REPLEVIN.**—Where the record in replevin shows that the title to the property was determined, the point cannot be contradicted in a new proceeding.<sup>7</sup>

§ 584. **Tort or contract.**—The fact that the evidence before a justice of the peace did not warrant a judgment in tort (on which the defendant could be arrested), cannot be shown in an action for his escape.<sup>8</sup> So, a judgment is never void because the claim sued upon was *unfounded*;<sup>9</sup> or *unconscionable*;<sup>10</sup> nor does an *unlawful preference* make a discharge in bankruptcy void.<sup>11</sup>

**UNREASONABLE.**—The court of sessions in Maine, in a pro-

1. *Reeve v. Kennedy*, 43 Cal. 643, 653.

2. *Koon v. Mazuzan*, 6 Hill 44—a direct attack.

3. *Striker v. Mott*, 6 Wend. 465; *Wilmington v. Jenks*, 20 Wend. 96.

4. *Miller v. Pence*, 115 Ill. 576 (4 N. E. R. 496, 498).

5. *Bradish v. Grant*, 119 Ill. 606 (9 N. E. R. 332, and 11 id. 258).

6. *Stevenson v. Bonesteel*, 30 Iowa 286, 288.

7. *Landers v. George*, 49 Ind. 309, 320.

8. *Wesson v. Chamberlain*, 3 N. Y. 331.

9. *Smith v. Keen*, 26 Me. 411, 423.

10. *Heggie v. Building and Loan Ass'n*, 107 N. C. 581 (12 S. E. R. 275).

11. *Fenlon v. Lonergan*, 29 Pa. St. 471.

ceeding to lay out a highway, adjudged that the selectmen of the town had laid out the highway, and that the town *unreasonably* refused to approve and allow it, and it was therefore ordered to be laid out by the court. This order was held to be conclusive collaterally, that the town did unreasonably refuse its approval.<sup>1</sup>

USURY in the cause of action does not make the judgment void, and it cannot be recovered back;<sup>2</sup> nor can it be used as a defense, either to a creditor's bill to enforce the judgment,<sup>3</sup> or to a suit to foreclose a mortgage given to secure its payment.<sup>4</sup> The same rule applies where the judgment is by confession.<sup>5</sup>

§ 585. **Will probated by reason of a mistake of fact.**—When a petition is presented to the proper court alleging that the decedent left a will, and praying that a judgment of probate be entered, whether the allegations are true or not, is a question of fact which the court is competent to decide; and the probate is not void because made on insufficient proof;<sup>6</sup> nor because the record shows that the probate was granted on the testimony of one witness when the statute required two,<sup>7</sup> nor because it appears that the witness was incompetent.<sup>8</sup> The probate is conclusive in respect to the capacity of the testator and the due execution of the will,<sup>9</sup> and bars all controversy in any other court,<sup>10</sup> and concludes the heir in an action of ejectment for land devised.<sup>11</sup> Where an action of ejectment in Pennsylvania was based on a foreign will duly admitted to probate in that state, the fact that the copy of the will presented for probate was not properly authenticated, was held to be no defense.<sup>12</sup> A Tennessee probate record showed that one of the three witnesses had signed in the presence of the testator, and a copy of this record had been duly admitted to

1. Goodwin v. Inhabitants, 12 Me. 271, 275.

2. Footman v. Stetson, 32 Me. 17; Charles v. Davis, 62 N. H. 375; Heath v. Frackleton, 20 Wis. 338 (320) (91 Am. D. 405)—an action to recover treble damages under a statute.

3. Bank of Wooster v. Stevens, 1 O. St. 233.

4. Thatcher v. Gammon, 12 Mass. 267.

5. Twogood v. Pence, 22 Iowa 543.

6. Jourden v. Meier, 31 Mo. 40, 43.

7. Dilworth v. Rice, 48 Mo. 124, 131.

8. Halliday v. Ward, 19 Pa. St. 485; Caulfield v. Sullivan, 85 N. Y. 153, 160—evidence insufficient or not legal.

9. Strong v. Perkins, 3 N. H. 517; Ives v. Salisbury, 56 Vt. 565—an Indiana probate; Vermont Baptist State Convention v. Ladd's Estate, 59 Vt. 5 (9 Atl. R. 1).

10. Ryno v. Ryno, 27 N. J. Eq. (12 C. E. Green) 522, 524.

11. Newman v. Waterman, 63 Wis. 612 (23 N. W. R. 696).

12. Lovett's Ex'rs v. Mathews, 24 Pa. St. 330.

probate in Alabama. In a collateral assault on the Alabama probate, it was held that the decision of the probate court on the sufficiency of the copy was conclusive.<sup>1</sup> Where it was claimed in Rhode Island, that the probate of a will in Illinois was void because not sufficiently proven, it was said: "The matter before the court was the probate of a will. . . . The question before the court was not one of jurisdiction, but of fact; and upon the finding of fact the whole proceeding depended."<sup>2</sup>

**CODICIL.**—Where three instruments were admitted to probate by an English court as a will and codicils, the order was held to be conclusive collaterally, that they were distinct and separate.<sup>3</sup>

**REVOCATION.**—The admission of a will to probate is conclusive that it had not been revoked for any cause—such as a subsequent marriage;<sup>4</sup> and where a will was admitted to probate with cross lines drawn in ink over the bequests of certain legacies, this was held to be conclusive collaterally, that the cross lines were drawn before the will was executed.<sup>5</sup> So, the probate of a revoked will and acts done under it, are not void when the later one is found;<sup>6</sup> and the probate of the later will does not enable any one to question a sale made under the probate of the first one;<sup>7</sup> nor can it be shown in a suit by an administrator that the decedent left a will appointing an executor.<sup>8</sup> The statute of Louisiana provided that the birth of a legitimate child after the execution of a will should revoke it; but, notwithstanding the statute, the executor procured an order and sold land, and this sale was decided not to be void;<sup>9</sup> but, in an earlier case in the same court, which was a suit to recover a legacy under a probated will, it was held to be a defense that a legitimate child had been born after the will was executed, thus holding the probate void.<sup>10</sup> This case is opposed to the later one, and seems unsound. A decree holding a will void because the property devised was

1. Dickey v. Vann, 81 Ala. 425, 431.

2. Loring v. Arnold, 15 R. I. 428, 333.  
430 (8 Atl. R. 335).

3. Russell v. Dickson, 1 Connor & Lawson, 284, 288.

4. Douglas v. Cooper, 3 Mylne & Keene, 378, 381.

5. Gann v. Gregory, 3 DeG. M. & G. (52 Eng. Ch.) 777.

6. Landon v. Wilmington and Wil-  
den R. R. Co., 88 N. C. 584.

7. Cochran v. Young, 10 Pa. St. 4

333.

8. Quidort v. Pergeaux, 18 N. J. Eq.  
(3 C. E. Green) 472, 477; *contra*,  
Graysbrook v. Fox, Plowden 275.

This case is not law.

9. Green v. Baptist Church, 27 La.  
Ann. 563—Ludeling, C. J., *dissenting*.

10. Lewis v. Hare, 8 La. Ann. 378.

communal, cannot be assailed, collaterally, by showing that it was not communal;<sup>1</sup> nor does *undue influence* in obtaining a will make the probate void.<sup>2</sup> The "Land Commission," a judicial tribunal established by statute in the Sandwich Islands, made a final decree, in 1845, settling the title to land. This decree was held to bar the probate of a will made before 1845, which would settle the title differently.<sup>3</sup>

§ 586. **Comments on sections 526 to 585.**—If Lord Chief Justice Denman was right when he said that jurisdiction "was determinable on the commencement, not at the conclusion, of the inquiry,"<sup>4</sup> it follows that a judgment is never void because of a mistake of fact, or because the allegations are false in fact, as that does not appear at the commencement of the inquiry. The careful reader will have noticed that even the New York and English decisions, which are the most strenuous in holding judgments void where jurisdiction was taken on a mistake of fact, are not entirely consistent and harmonious. Thus, the early New York cases, cited in section 529, *supra*,<sup>5</sup> which held that the heir could not recover land sold by an administrator by proving that the personal assets were sufficient to pay the debts, are inconsistent with this idea, because the probate court has no *rightful* jurisdiction to sell the land or to exercise any power over it, unless there is a deficiency of personal estate. So, the late English case, cited in section 531, *supra*,<sup>6</sup> which held that where a county court had jurisdiction for the recovery of possession by a landlord only in cases where the rent reserved did not exceed twenty pounds per year, its decision that the rent reserved did not exceed that sum was conclusive, is inconsistent with the idea that a court cannot obtain jurisdiction by deciding that it has it. I do not overlook the distinction which many cases draw, that the jurisdictional facts are settled when they constitute a part of the merits of the cause, otherwise not, but deny its soundness. It is a distinction which distinguishes nothing, as no two courts can agree on its application. But the rule I contend for, that when the record

1. *Miller v. Texas and Pacific Ry.* 132 U. S. 662, 671 (10 S. C. R. 206).

2. *Wilson v. Gaston*, 92 Pa. St. 207.

3. *Estate of Kekauluohi*, 6 Hawaiian Report 172, 178.

4. *Reg v. Bolton*, 1 Ad. & El. N. S. 66, 72 (41 E. C. L. 439, 442). See section 60, *supra*, for abstract.

5. *Jackson v. Robinson*, 4 Wend. 436; *Jackson v. Crawford*, 12 Wend. 533; *Atkins v. Kinnan*, 20 Wend. 241 (32 Am. D. 534).

6. *Brown v. Cocking*, L. R. 3 Q. B. 672, 675.

exhibits a cause within the jurisdiction of the court, and shows that an opportunity to defend was given, it will withstand all collateral assaults, is simple and easily understood, and is sustained by the best considered cases, as I believe. It is probable that the American cases which permit judgments to be overturned collaterally by showing a want of jurisdictional facts, all depend upon the old case of *Starbuck v. Murray*,<sup>1</sup> wherein it was said: "Unless a court has jurisdiction, it can never make a record, which imports uncontrollable verity to the party over whom it has usurped jurisdiction, and he ought not, therefore, to be estopped, by any allegation in that record, from proving any fact that goes to establish the truth of a plea alleging want of jurisdiction." Mr. Black<sup>2</sup> thinks this is good logic, but I do not. It assumes that arbitrary power has no place in the courts, while the reverse is necessarily true. Witnesses could be called to show that a quorum was not present when a statute was enacted, in contradiction of the legislative records, with as much propriety as to show that the record of a court is false. Persons build their titles and rights upon the faith of the records of the legislature and the courts, and it is against public policy to permit them to be questioned on matters of fact. Take the question of titles to real estate in New York and Indiana, for illustration. The ease with which judgments are overthrown in New York on questions of jurisdiction over the person, on account of mistakes of law or fact, must cause much uneasiness about titles depending on judicial proceedings; while in Indiana, where the record is absolutely invulnerable on the facts, and unimpeachable on the law if there was *any* notice, no matter how defective, the holders of such titles never give them a thought. In my opinion, the New York cases of *Kinnier v. Kinnier* and *Jones v. Jones*, commented upon in section 651, *infra*, show that all the cases in that state which hold judgments void because of mistakes of fact, do so by confounding the doctrines of *res judicata* and collateral attack.

1. *Starbuck v. Murray*, 5 Wend. 148  
(21 Am. D. 172).

2. *Black on Judgments*, § 276.

## CHAPTER XIII.

### JURISDICTION TAKEN OVER THE PARTY OR PERSON (AFTER DUE APPEARANCE OR SERVICE) BY REASON OF A MISTAKE OF LAW OR FACT.

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| <p>§ 587. Scope of, and principle involved in, Chapter XIII.</p> <p>588. Administrator, guardian, etc.—Appointed, recognized or removed by a mistake of law or fact—Officer <i>de facto</i>.</p> <p>589. Section 588, continued — Appointment of administrator, etc., irregular—Appointment omitted—Usurper — Natural guardian acting.</p> <p>590. Section 588, continued — Appointment of wrong person.</p> <p>591. Section 588, continued — <i>De facto</i> officer—Contrary cases.</p> <p>592. Section 588, continued—Notice of application to remove, wanting—Practice and procedure in appointing, and in suits by and against—Misjoinder—Non-joinder—Plaintiff in petitions to sell land, quiet title, etc.—Administrator sued in wrong court.</p> <p>593. Section 588, continued — Successor appointed without removing the incumbent — Guardians.</p> <p>594. Age of criminal.</p> <p>595. Age of soldier.</p> <p>596. Age of ward.</p> <p>597. Alien enemy — Bankrupt trader.</p> <p>598. Capacity of party, dual—Administrator.</p> <p>599. Capacity of party misdescribed or not described.</p> <p>600. Consent of father to enlistment of son—Consent of husband</p> | <p style="text-align: right;">—Consent to use of property<br/>—Contractor of prison labor.</p> <p>601. Corporation organized.</p> <p>602. Dead person treated as living—Principle involved.</p> <p>603. Death of party before suit brought — Proceedings not void.</p> <p>604. Death of party before suit brought — Proceedings void — (Corporation <i>de facto</i>—Service incomplete).</p> <p>605. Death of defendant pending suit for land.</p> <p>606. Death of defendant pending suit for damages.</p> <p>607. Death of plaintiff pending suit.</p> <p>608. Death wrongfully assumed, or administrator of living person.</p> <p>609. Section 608, continued — Proceedings not void.</p> <p>610. Section 608, continued — Proceedings void.</p> <p>611. Distributees, errors concerning their rights—(Distributees in criminal proceedings — Fees of surveyor)—Female imprisoned.</p> <p>612. Heirs, errors concerning their rights.</p> <p>613. Husband, exempt from wife's debt—Indian, exempt.</p> <p>614. Infant defendants.</p> <p>615. Infant plaintiffs — Disabilities removed.</p> <p>616. Insane persons.</p> <p>617. Landlord and tenant—Legal estate.</p> |
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## § 618. Legatees.

619. Married woman, coverture erroneously adjudicated not to exist.

620. Married woman, coverture not shown by the record.

621. Married woman, coverture shown by the record, but disregarded—(Suretyship—Will).

622. Married woman, disabilities removed.

623. Married woman, liability of not shown by the record—Married woman as plaintiff.

624. Minister of the gospel—Orphan.

625. Owner or occupant of land—Owner of personalty.

626. Ownership of cause of action, or plaintiff or petitioner, improper—Legal owner of cause of action.

627. Section 626, continued—Official plaintiff, wrong—(Bastardy proceedings—Criminal proceedings—Overseer of highway—Tax proceedings).

628. Section 626, continued—Partition plaintiff, wrong.

629. Section 626, continued—Petitioners in special proceedings, improper or too few in fact.

630. Section 626, continued—Petitioners in special proceedings, improper or too few as shown by the record.

631. Partitioners, errors concerning.

632. Poor persons.

633. Privies in contract, errors concerning.

634. Residence in attachment and garnishment proceedings.

635. Residence in bankruptcy, insolvency and *capias* proceedings.

636. Residence in criminal proceedings.

637. Residence of decedent or ward—Principle involved.

§ 638. Residence of decedent or ward in Alabama, California and Colorado.

639. Residence of decedent or ward in Connecticut and Georgia.

640. Residence of decedent or ward in Illinois and Indiana.

641. Residence of decedent or ward in Kentucky and Louisiana.

642. Residence of decedent or ward in Maine, Maryland, Massachusetts, Mississippi and Missouri.

643. Residence of decedent or ward in New York.

644. Residence of decedent or ward in North Carolina, Oregon and Rhode Island.

645. Residence of decedent or ward in Tennessee and Texas.

646. Residence of decedent or ward in Vermont, Virginia and Wisconsin.

647. Residence of decedent or ward in United States courts and in England.

648. Residence in divorce—Principle involved.

649. Resident of a state procuring a divorce in another state, by default, upon constructive service, validity of, in state of residence.

650. Resident of a state procuring a divorce in another state, by default, upon constructive service, validity of, in state where procured.

651. Resident of a state procuring a divorce in another state after a contest.

652. Residence in general civil proceedings in inferior courts—Judgments not void.

653. Residence in general civil proceedings in inferior courts—Judgments void.

654. Residence in general civil proceedings in superior courts.

655. Residence in tax proceedings—Principle involved, and cases.



§ 656. Residence in United States courts.

657. Revivor in name of wrong plaintiff—Servant or laborer—Slave or white man.

§ 658. Soldier or civilian.

659. Widows, errors concerning.

§ 587. **Scope of, and principle involved in, Chapter XIII.**—In the cases considered in this chapter, there was no want of power to grant the relief prayed for or given, and no want of service on the party or person, but the mistake was one of fact concerning his or their age, character or condition, death, disability, identity, number, ownership or residence, or one of law in assuming to act where the record showed the existence of such a defect. On principle, the defects herein considered can never make the proceeding void. If the mistake is one of fact, the proceeding is invulnerable collaterally, because the record cannot be contradicted. Neither is the judgment void when the defect appears in the record. The court having power to grant the relief sought, there is no want of jurisdiction over the subject-matter, and the party is before it; and the fact that the court is denied the right to proceed either for or against him, is a matter of convenience or expediency, which does not touch its power.

§ 588. **Administrator, guardian, etc. — Appointed, recognized or removed by a mistake of law or fact—Officer de facto.**—Jurisdiction is obtained over the estates of decedents, wards, bankrupts and insolvents, by the filing of a petition containing certain allegations, with a prayer, express or implied, for the appointment of an officer to take charge of the estate. This officer is variously called an administrator, executor, curator, guardian, tutor, assignee, trustee, commissioner or receiver. The duties of all being the same—namely, to settle and distribute the estate under the orders of the court—the principle governing the validity of their appointment, when collaterally assailed, must be the same in all. The statutes generally prescribe the order of appointment among the relatives or creditors; but, on principle, a deviation from such order will not make the order appointing void, for two reasons—namely. First: The subject-matter involved is the rights of the various persons in the estate. At present, we assume those persons to be in court, and the *power to declare and fix their rights* constitutes the jurisdiction over the subject-matter. The appointment of persons to carry out the orders and directions of the court, in the process of settling those rights,

is simply a part of the procedure necessary to conduct the proceedings to a final conclusion in an orderly manner, *where the jurisdiction is unquestionable*. Second: Whether A, B, or C, is thus appointed to assist the court, in no manner affects the merits of the cause, and courts should hesitate long before holding their proceedings void, to the detriment of innocent persons, on account of non-meritorious matters. These officers are merely agents or servants of the court, like the clerk and sheriff, appointed to carry out and enforce its orders. They have no actual interest in the matter. By being appointed or recognized by the court, they become officers *de facto*, with the power of the state at their command, the same as the clerk or sheriff, and, on principle, no error in their appointment or removal can make the subsequent action of the court void.

§ 589. Section 588 continued—Appointment of administrator, etc., irregular.—The appointment of a tutor in Louisiana without the advice of a family meeting, in violation of the statute, is not void;<sup>1</sup> and the same ruling was made in Vermont where an administrator was appointed without the proper request of the next of kin;<sup>2</sup> but where a guardian was appointed in New York for a ward over fourteen years of age without his consent, contrary to the statute, it was held to be void.<sup>3</sup> In an action in Vermont by an administrator to recover land from an adverse holder, it was decided that no question could be made concerning his appointment;<sup>4</sup> nor is such an appointment void because the petition was made by one who had no right to do so,<sup>5</sup> or because it omitted to give the names and places of residence of the heirs, and to state that no will was left.<sup>6</sup> See section 527, *supra*.

APPOINTMENT OMITTED—USURPER.—It is held in Alabama that granting an order to sell land upon the application of a person alleging himself to be administrator, is an adjudication that he is such, and that the order cannot be collaterally assailed by showing that he was not.<sup>7</sup> The supreme court of Texas

1. Hoover v. Sellers, 5 La. Ann. 180; Cailleteau v. Ingouf, 14 id. 623, 625. 5. Pick v. Strong, 26 Minn. 303 (3 N. W. R. 697).

2. Lawrence v. Englesby, 24 Vt. 42. 6. Riley's Adm'r v. McCord's Adm'r, 24 Mo. 265.

3. Sherman v. Ballou, 8 Cowen 304.

4. McFarland v. Stone, 17 Vt. 165 (44 Am. D. 325). 7. Landford v. Dunklin, 71 Ala. 594, 604; *approved*, May v. Marks, 74 Ala. 249, 253; Clancy v. Stephens, 92 Ala. 577 (9 S. R. 522).

said: "It is settled by repeated decisions of this court that, where the fiduciary character of one acting as administrator, has been recognized by the probate court, as between the heirs and those dealing with the acting administrator, his authority cannot be thus drawn in question, in a collateral action, for the purpose of invalidating his lawful acts, done in the course of administration."<sup>1</sup> So, in Arkansas, where an appointment of a guardian by the clerk in vacation was not confirmed by the court, as required by statute, yet granting him an order to sell land was held to be an implied confirmation of his appointment, and his sale was not void;<sup>2</sup> and where a return in Pennsylvania showed service on "Francis Bright, guardian of the minor children of Albert Miller," it was held that the judgment was not void because they had no guardian.<sup>3</sup> The supreme court of Virginia said: "But let it be conceded that the court proceeded in the name of a former guardian, after he had resigned his office, does that fact invalidate the decree and the title of an innocent purchaser in a collateral suit?" The court said that it did not.<sup>4</sup> On the contrary, it has been decided in California, Indiana and Minnesota, that the acts of a person never appointed as administrator or guardian, were void.<sup>5</sup> In the Indiana case, the statute authorized the court, after a full hearing in the presence of any person, to adjudge him insane and to appoint a guardian for him having the same general duties and powers as a guardian of a minor. A person was duly appointed as guardian of a minor, and after the minor became of age, he being insane from birth, the guardian filed a petition to sell his land, describing himself as "guardian for N. Coon, an idiot," procured an order, and made a sale.

In the Minnesota case, an assumed guardian filed his petition in the probate court, a court of general jurisdiction, alleging that he, as such guardian, had agreed to sell a described parcel of the

1. *Shannon v. Taylor*, 16 Tex. 413, 417, decided in 1856; *accord*, *Poor v. Boyce*, 12 Tex. 440, 449; *Bartlett v. Cocke*, 15 Tex. 471, 478.

2. *Shumard v. Philips*, 53 Ark. 37 (13 S. W. R. 510).

3. *Levan v. Milholland*, 114 Pa. St. 49 (7 Atl. R. 194); *contra*, *Geier's Appeal*, 101 Pa. St. 412, 415—holding that an order to mortgage land granted to

one as guardian who had never been appointed, was void.

4. *Pennypacker v. Switzer*, 75 Va. 671, 685.

5. *Pryor v. Downey*, 50 Cal. 388, 399 (19 Am. R. 656); *Coon v. Cook*, 6 Ind. 268; *Burrell v. Chicago, M. & St. P. Ry. Co.*, 43 Minn. 363 (45 N. W. R. 849).

ward's land for a certain price to a railway company, according to the statute, and presented a deed and asked the court to approve the sale and indorse the same on the deed, which the court did, and the deed was delivered. In trespass by the alleged wards, it was shown that the pretended guardian was never appointed at all, but was simply administrator of their father's estate, and the sale was decided to be void. It was said that the probate court merely confirmed the sale, and that that was not an adjudication that he was guardian. But it did more than that. It passed on his petition, and adjudged that *he* was entitled to the relief prayed for. The last three cases seem to me to be unsound. A petition for the sale of land purported to be made by several persons as guardians while only one of them was such. But this was decided not to make the sale void.<sup>1</sup>

NATURAL GUARDIAN ACTING.—The father, in Arkansas, as natural guardian had the care and custody of the persons of his minor children, but no right to manage their estate. As such natural guardian he applied for and procured an order to sell, and sold their land without being appointed statutory guardian or giving bond. This sale was held void.<sup>2</sup> Assuming that the infants were in court and properly represented, and that the petition alleged a statutory cause for the sale, then we have the common case where the plaintiff or petitioner has no legal interest in or ownership of the cause of action sued upon. But that does not touch the jurisdiction. It is simply a cause of defense. If there was any statute making guardian's sales void where no bond was given, the decision is right; otherwise, I think it is wrong.

During the pendency of a suit in Maine, the plaintiff died and his foreign administrator was substituted as plaintiff, and recovered a judgment upon which the seisin of land was delivered to him. In an action for its possession, the court said that if the defendant had shown in this action that the administrator who recovered the former judgment had not been appointed in Maine, the judgment would not have been binding.<sup>3</sup> But this *dictum* is wrong, because there was an opportunity to make that defense in the first action.

§ 590. Section 588 continued—Appointment of wrong person.—The appointment of the wrong person,<sup>4</sup> such as a non-resi-

1. Graeter v. Wise, 5 Blackford, 402.

2. Gynn v. McCauley, 32 Ark. 97, 104.

3. *Dictum* in Pierce v. Strickland, 26 Me. 277, 294.

4. Brubaker v. Jones, 23 Kan. 411, 412; Emery v. Hildreth, 2 Gray 228; Pick v. Strong, 26 Minn. 303, 305 (3 N. W. R. 697); Garrison v. Cox, 95 N. C. 353, 355; Ramp v. McDaniel,

dent,<sup>1</sup> or a stranger before the widow had renounced her right,<sup>2</sup> or an alien,<sup>3</sup> as administrator, is not void, and his acts are binding after his removal. So, where the statute provided that letters of administration should issue to the widow, or to the person she might select, the appointment of a person selected by the alleged widow was not void because she had another husband living and was not the lawful widow.<sup>4</sup> But where a statute of Ohio forbade the appointment of an administrator as guardian of any minor interested in the estate, and the widow was first appointed administratrix, and then guardian of one of the children, the appointment was held void.<sup>5</sup> The decision was put upon the ground that "the record contained no finding of facts expressly showing jurisdiction." But assuming to act was an adjudication of jurisdiction, and the petition to be appointed guardian would not show that she was administratrix. A statute of Texas provided that letters of administration should be issued on the estates of soldiers of the republic massacred at Goliad, to the next of kin only, or upon their authority. Letters were granted in such a case to a stranger, on his petition showing that the deceased was a transient person having no kin in the state. The inventory filed showed that his sole estate consisted of a land warrant issued to his estate, and that he was a soldier massacred at Goliad. This land warrant was sold by the administrator, and the heirs were permitted to recover the land thirty-nine years afterward, on the ground that the administrator was not next of kin.<sup>6</sup> The petition did not show that decedent was a soldier, and it was regular on its face, and the court was compelled to make the appointment, which was not void because matters were subsequently brought into the record which showed it to have been erroneous. The supreme court of Tennessee decided that the appointment of the wrong person as administrator, even when that appeared on the face of the record, was not void.<sup>7</sup> The Indiana statute requires the court to appoint

12 Or. 108 (6 Pac. R. 456); *Semine v. Semine*, 2 Levinz 90; *Wilson v. Packman*, Cro. Eliz. 459 (38 Eliz.); *Hobson v. Ewan*, 62 Ill. 146, 149.

1. *Martin v. Tally*, 72 Ala. 23, 29—case of a guardian; *Maybin v. Knighton*, 67 Ga. 103.

2. *Lyle v. Siler*, 103 N. C. 261 (9 S. E. R. 491.)

3. *Berney v. Drexel*, 12 Fed. R. 393 —Wallace, J.

4. *Francisco v. Chicago, M. & St. P. Ry. Co.*, 35 Fed. R. 647.

5. *Scobey v. Gano*, 35 O. St. 550.

6. *Templeton v. Falls Land & Cattle Co.*, 77 Tex. 55 (13 S. W. R. 964).

7. *State v. Anderson*, 84 Tenn. (16

officer *de facto*; <sup>1</sup> and such seems to be the rule in Louisiana, where it was held that the appointment of an under-tutor for a minor was not void because the appointment of a prior under-tutor had not expired.<sup>2</sup> And while the supreme court of Alabama now denies the doctrine that there can be any such officer as an administrator *de facto*, its reasoning accords with such doctrine. It held in a late case, that the rule which prohibits a grant of letters *de bonis non* when there is no vacancy in the administration, is intended for the *protection of the incumbent*; and that if he, without formally resigning, accepts a grant of letters *de bonis non* jointly with another person, such acceptance amounts to a relinquishment or resignation of his former letters.<sup>3</sup> That case gives the true reason. No one is interested in opposing a removal but the incumbent; and his sole interest is his fees and commissions. But, like any other officer who is ousted he must prosecute the intruder and recover his office and fees wrongfully taken.

CONTRARY CASES.—Upon an application in Alabama for an appointment as administrator *de bonis non*, the record recited that "the adm'r is absent from the state in the army of the Confederate states, and said applicant, tendering his bond," it was approved and he was appointed, and sold land. In a collateral proceeding concerning the title to this land, the purchaser sought to maintain his rights upon the ground that the appointee who made the sale was an officer *de facto*, but the court overruled a previous case, and said that the *de facto* doctrine applied only to public offices, and did not apply to property, because the law would not permit the rights of the legal owner (the administrator, in this case) to be affected by the acts of a wrongdoer.<sup>4</sup> The same doctrine is maintained in Georgia. The statute required letters of guardianship to be granted at a regular term of court; but it was done by a judge at chambers, and the guardian acted and sold land by order of the court. This sale was held void in ejectment, the court saying that there was no such thing as a guardian or admin-

1. Green v. Scarborough, 49 Ala. 137.

2. Keller, Succession of, 39 La. Ann. 579 (2 S. R. 553).

3. Turner's Ex'r v. Wilkins, 56 Ala. 173, 176.

4. Hooper v. Scarborough, 57 Ala. 510, 514—*overruling* Green v. Scar-

borough, 49 Ala. 137; *in accord*, that the appointment of an administrator *de bonis non*, when there is no vacancy, and all acts done by him, are void, are Gravett v. Malone, 54 Ala. 19, 22; Allen v. Kellam, 69 Ala. 442, 446; Bean v. Chapman, 73 Ala. 140, 144.

istrator *de facto*; that that doctrine only applied to public officers who were removable on *quo warranto*.<sup>1</sup> Just why the manner of removing the intruder should determine his character, the court did not point out. The wrongful appointment invested the appointee with all the indicia of authority. When the court met in regular term, having complete and exclusive jurisdiction over that guardianship, the person appointed filed a petition claiming to be the guardian and asked for an order to sell the ward's real estate. The court examined his credentials, pronounced them genuine, and granted his request. Of course the court made a mistake, but the question was one which it was competent to decide, and the only remedy was some direct proceeding.

§ 592. Section 588 continued—Notice of application to remove, wanting.—In a late case in the court of last resort in New York, the public administrator had been appointed and had proceeded with the trust. Afterwards, a sister of the decedent made application, showing that she was the proper person to be appointed, and an order was made appointing her as administratrix without the removal of the public administrator, who was entirely ignored in her proceeding. The statute provided that the decree in such a case should not be void where "the necessary parties were duly cited or appeared." It was held that her appointment was not void for failure to cite the public administrator, because her petition showed that there was no person having a prior right;<sup>2</sup> and the same ruling was made in Louisiana, where the disability of a minor was removed upon the advice of a family meeting illegally organized for want of notice to the under-tutor.<sup>3</sup> But a different rule prevails in Indiana. Its statute requires a notice to be served upon a guardian to appear and show cause against an application for his removal, and the supreme court has uniformly held that a removal without notice was void.<sup>4</sup> Upon the whole, I do not think the decisions of any state in the Union in respect to the collateral validity of judgments depending on defective process or service, are as correct as those of Indiana; yet, for the

1. Bell v. Love, 72 Ga. 125; *approved*, 354 (27 N. E. R. 474), *affirming*, 12 N. Dooley v. Bell, 87 Ga. 74 (13 S. E. R. Y. Supp. 25.

284). The Supreme Court of the United States holds that there may be a *de facto* soldier. See section 595, page 630, *infra*.

3. Jeannet v. Ricker, 10 La. Ann. 66.

4. Dibble v. Dibble, 8 Ind. 307; Martin v. Beasley, 49 Ind. 280; Colvin v. State, 127 Ind. 403 (26 N. E. R.

888).



reasons given in the last four sections, I think these cases are wrong. They are inconsistent with the well-considered case of *Dequindre v. Williams*,<sup>1</sup> cited in the last section, which maintains the *de facto* doctrine.

PRACTICE AND PROCEDURE IN APPOINTING, AND IN SUITS BY AND AGAINST.—Error of law in appointing one executor to act alone when the others have not declined to act;<sup>2</sup> or the appointment of a succeeding administrator after the death of the first, by a court which did not appoint the first;<sup>3</sup> or the designation of a personal representative in his letters as executor instead of administrator;<sup>4</sup> or the granting of general letters of administration instead of letters *de bonis non* to a second administrator;<sup>5</sup> or the appointment of a curator who fails to take the oath prescribed for the performance of his duties,<sup>6</sup> is not void.

MISJOINDER.—A guardian's petition to sell land made jointly by two guardians of different wards, and a joint sale ordered and made;<sup>7</sup> or a wrongful joinder of devisees in remainder as defendants with an administrator *de bonis non*,<sup>8</sup> does not make the proceedings void.

NON-JOINDER.—An order to sell land and the sale made, are not void because one co-administrator,<sup>9</sup> or co-guardian,<sup>10</sup> did not join in the proceeding.

PLAINTIFF IN PETITIONS TO SELL LAND, QUIET TITLE, ETC.—A statute of Virginia gave creditors the right to go into a court of equity and procure a sale of a decedent's lands to pay their claims, but it gave no such right to an administrator; nevertheless, such a decree gotten by him was held valid collaterally;<sup>11</sup> but precisely the contrary was held in Texas;<sup>12</sup> and in Alabama and Mississippi, where the statutes authorized a sale of the lands of a decedent for purposes of partition on a petition by an heir,

1. *Dequindre v. Williams*, 31 Ind. 444, 457.

2. *Kane v. Paul*, 14 Peters 33, 41.

3. *Burnley's Representatives v. Duke*, 2 Rob. (Va.) 102, 129.

4. *Sullivan v. Rabb*, 86 Ala. 433 (5 S. R. 746, 748).

5. *Grande v. Herrera*, 15 Tex. 533, 536.

6. *Ball v. Ball*, 15 La. 173, 183 (8 La. N. S. 112, 118).

7. *Walker v. Hill*, 111 Ind. 223 (12 N. E. R. 387).

8. *Levan v. Milholland*, 114 Pa. St. 49 (7 Atl. R. 194).

9. *DeBardelaban v. Stoudenmire*, 48 Ala. 643, 645; *Melms v. Pfister*, 59 Wis. 186 (18 N. W. R. 255); *contra dictum* in *Gregory v. McPherson*, 13 Cal. 562, 578.

10. *Fitzgibbon v. Lake*, 29 Ill. 165 (81 Am. D. 302).

11. *Peirce v. Graham*, 85 Va. 227 (7 S. E. R. 189, 194).

12. *Miller v. Miller*, 10 Tex. 319, 333.

it was held that such a sale on a petition by the administrator was void.<sup>1</sup> In Illinois, an administrator has authority only to sell the rights of the decedent, and none to file a bill to remove a cloud upon his title, yet a decree in his favor removing a cloud and quieting title before the sale of land, is merely erroneous and not void.<sup>2</sup> So also, in another case in the same court, it was held that whether or not an administrator with the will annexed had such an interest in a trust estate under the will as enabled him to maintain a suit to enforce it, was a question of law for the court to decide, and that an erroneous decision would not make the decree in his favor, void collaterally.<sup>3</sup>

ADMINISTRATOR SUED IN WRONG COURT.—Where the statute gave exclusive jurisdiction to the probate court over actions against an administrator, a judgment against one in another court, was held void;<sup>4</sup> and the same ruling was made when the judgment was rendered against him and another over whom the court did have jurisdiction,<sup>5</sup> or when rendered by consent.<sup>6</sup> I do not think there is any want of jurisdiction in such cases, but merely an improper exercise of it. The administrator should have all such cases dismissed at the cost of the plaintiff.

§ 593. Section 588 continued—**Successor appointed without removing the incumbent.**—An administrator was appointed in Texas, but did nothing except to dispose of some personal effects. Afterwards, letters were taken out in another county where the decedent left lands. The right was concurrent in both counties. The last administrator sold land and settled the estate without interference from the first, but his sales were decided to be void.<sup>7</sup> An administrator in California tendered his resignation in writing, and the court made an order reciting that fact and ordering him to turn over the effects in his hands to the public administrator, and to make settlement. Afterwards, he made a final report of his doings, to which exceptions were taken; after that, the court revoked the order for him to turn over the effects to the public

1. *Johnson v. Ray*, 67 Ala. 603; 418, 420—a J. P. judgment; *Werneck v. Kenyon*, 66 Mo. 275, 284.  
*Washington v. McCaughan*, 34 Miss. 304, 308.

2. *Shoemate v. Lockridge*, 53 Ill. 503, 508.  
 5. *Julian v. Ward*, 69 Mo. 153, 155; *Wernse v. McPike*, 76 Mo. 249, 251.

3. *Wenner v. Thornton*, 98 Ill. 156, 165.  
 6. *In re Radde's Estate*, 9 N. Y. Supp. 812 (30 N. Y. St. Rep'r 741).

4. *Harmon v. Birchard*, 8 Blackford  
 7. *Grand v. Chaves*, 15 Tex. 550. Substantially *in accord*, is *Lovering v. McKinney*, 7 Tex. 521, 524.

administrator, and then another person filed a petition to be appointed administrator *de bonis non*, and, without any notice to the first administrator, or any express order of removal, his petition was granted. The statute authorized an administrator to resign "provided he shall first settle his accounts and deliver up all the estate to such person as may be appointed by the court." The administrator *de bonis non* sold land. The heirs brought ejectment, and the question was whether or not the first administrator was ever removed or the successor lawfully appointed. It was held that the orders of the court amounted to an acceptance of the resignation of the first administrator; that such acceptance was contrary to the statute and erroneous, but not void collaterally, and that the error did not affect the title to the land sold.<sup>1</sup> On a second appeal, the court, while holding itself concluded by the former judgment, disapproved the point, saying that there was, in fact, no removal, and that the appointment of a successor could not be construed into one.<sup>2</sup> But in a subsequent case in the same court, it was held that the appointment of an administrator with the will annexed, superseded, *per se*, all former administrations of the estate without any formal removal.<sup>3</sup> How there could be any doubt on such a proposition, it is difficult to understand. Each step taken in a proceeding assumes and implies that all prior steps necessary to warrant it, have been taken. Hence, the appointment of a successor in office necessarily implies the removal of the predecessor. Thus, where an Alabama record showed that the sureties of an administrator had withdrawn, and that he, after notice, had failed to furnish new ones, the order appointing a successor was held to be an implied removal, when assailed collaterally.<sup>4</sup> So, where the record read: "It is ordered that the resignation of Jane C. Brewer (late Gray) be received and recorded. It is ordered that William Brewer be appointed administrator of the estate of John Gray, deceased," this was held to be an approval of her resignation;<sup>5</sup> and where an administrator had left the state of South Carolina, a grant of letters to another was held, collater-

1. Haynes v. Meeks, 10 Cal. 110, 117 (70 Am. D. 703).

2. Haynes v. Meeks, 20 Cal. 288, 311.

3. McCauley v. Harvey, 49 Cal. 497, 505.

4. Ragland v. King's Adm'r, 37 Ala. 80.

5. Gray's Adm'r v. Cruise, 36 Ala. 559, 564.

ally, to be a revocation of the first appointment.<sup>1</sup> The old cases hold that the appointment of an executor vests in him the legal title to the personal property, and that a subsequent appointment of an administrator without his removal, is void.<sup>2</sup> But for the reasons given in section 591, *supra*, I think these cases are wrong. Where a citation was issued in New York to an administratrix to give further security, to which she appeared and requested further time, which was granted, at the expiration of which she again appeared and admitted that she could not give any further security, and assented to the form of an order for her removal, the court of appeals decided that this order of removal was not void because the probate court did not enter an order for her to give further security.<sup>3</sup>

**GUARDIANS.**—The cases generally hold that the appointment of a guardian while a former one is acting,<sup>4</sup> and without his removal,<sup>5</sup> is void. So, where a female guardian in Kentucky married and abandoned the guardianship and turned over the effects to a person appointed as her successor without any formal resignation or removal, upon the erroneous view that her marriage was a revocation of her letters, the second appointment was held void upon the ground that there could not be two separate guardians at the same time.<sup>6</sup> A Missouri statute provided that the marriage of a female guardian should “operate as a revocation of her appointment.” Such a guardian obtained an order to sell land and then married, and afterwards made a sale and report in her original name, and the sale was confirmed. This was decided to be valid collaterally, and a bar to a recovery of the land by the ward.<sup>7</sup>

Proceedings were duly instituted in Louisiana by a person who was father and guardian, residing in Alabama, to partition lands against his minor children by a sale, and one Girdner was appointed dative tutor for the minors and represented them, and the sale was ordered and made, and the purchaser compelled to accept the title. In a collateral suit, this sale was held not to divest the title

1. *M'Laurin v. Thompson*, Dudley *dictum* in *Fridge v. State*, 3 Gill & J. (S. C.) 335 (A. D. 1838). 103 (20 Am. D. 463).

2. *Griffith v. Frazier*, 8 Cranch 9, 5. *Thomas v. Burrus*, 23 Miss. 550 (57 Am. D. 154).  
24; *Kane v. Paul*, 14 Peters 33, 40; *Creath v. Brent*, 3 Dana 129.

3. *Kelly v. West*, 80 N. Y. 139, 144. 6. *Cotton's Guardian v. Wolf*, 14 Bush 238, 245.

4. *Justices v. Selman*, 6 Ga. 432, 442; 7. *Carr v. Spannagel*, 4 Mo. App. 284, 287.

of the minors because the appointment of a "dative tutor" was illegal. The holding seems to be that a special tutor or under-tutor ought to have been appointed; that, as the father was guardian, another guardian (dative tutor) could not be appointed.<sup>1</sup> This last case seems to me to conflict with an earlier one, where it was held that the appointment of an under-tutor for a minor was not void because the appointment of a prior under-tutor had not expired.<sup>2</sup> But there may be some distinction in that state between dative tutors and under-tutors which I do not understand. The probate court in Florida had a general power to remove guardians. It was agreed between the administrator of an estate and the guardian of the children, that the guardian should get a discharge, and that the administrator should be appointed as guardian, which was done by an order of the court discharging the guardian on his application and appointing the administrator as guardian on his application. It was held that the court had jurisdiction so to do, and that the discharge of the first guardian was not void.<sup>3</sup>

UNLAWFUL CAUSE—REMOVAL FOR.—The mere erroneous removal of an administrator,<sup>4</sup> or a removal based on reasons not good in law,<sup>5</sup> such as "maladministration,"<sup>6</sup> or absconding from the state,<sup>7</sup> or the acceptance of the renunciation of an executor on insufficient reasons,<sup>8</sup> is not void. But where a court in New York accepted the resignation of an administrator and removed him for an insufficient reason—namely, because he was about to remove from the village—this action of the court, and its appointment of a successor, were held void.<sup>9</sup> This case is contrary to the last two, and wrong on principle. Some of the cases which have assailed collaterally the right of an administrator, guardian, etc., to act because some other person was not lawfully removed, were actions concerning the title to land sold by him in states where the legal title was in the heirs or wards, and where he had nothing but a contingent power, to be exercised only under the order of the court. In all such cases, where the legal

1. *James v. Meyer*, 41 La. Ann. 1100 (7 S. R. 618).

2. *Keller, Succession of*, 39 La. Ann. 579 (2 S. R. 553).

3. *Simpson v. Gonzalez*, 15 Fla. 9, 46.

4. *Buehler v. Buffington*, 43 Pa. St. 278, 293.

5. *Simpson v. Cook*, 24 Minn. 180, 188.

6. *Hart v. Bostwick*, 14 Fla. 162, 174.

7. *Harrison v. Clark*, 87 N. Y. 572.

8. *Mitchell v. Adams*, 1 Ired. Law 298, 302.

9. *Flinn v. Chase*, 4 Denio 85, 90.

title rests in third persons, a collateral attack on the sale cannot possibly raise any question in regard to the legality of the appointment or qualifications of the alleged officer who made the sale; because in all such cases his petition to sell alleged or assumed that he was such officer, which the holders of the legal title had the opportunity to dispute; and the granting of the prayer of the petition necessarily adjudicated that facts existed which warranted such relief, one of which was that the petitioner was the lawful officer.

§ 594. **Age of criminal.**—The statutes of several states authorize the courts, upon the conviction of a person under sixteen years of age, to sentence him to a reform school instead of the state prison. Such sentence to the reform school is not void because the person was seventeen,<sup>1</sup> or twenty-one<sup>2</sup> years of age, or too old.<sup>3</sup> A statute of Missouri forbade the imprisonment of persons under eighteen years of age in the state prison. A person under eighteen was convicted and given two years in the state prison, without raising the question of age. It was held that he could not be released on *habeas corpus*, and that the question of his age, and the sentence he was to receive, were for the trial court.<sup>4</sup> A New York statute provided that persons under sixteen years of age should be imprisoned in one of two prisons named. Such a person was convicted, and, failing to call attention to his age, he was sentenced to another prison. He applied for a release on *habeas corpus* on a showing that he was only four-fourteen years of age, but his petition was denied.<sup>5</sup>

§ 595. **Age of soldier.**—A statute of the United States authorized persons between the ages of sixteen and thirty-five to enlist as soldiers. A recruiting officer claimed that a person had enlisted, and so reported. He never actually entered the service, but was arrested as a deserter, convicted and imprisoned. On *habeas corpus*, it was proved that he was forty years old, and this was held to show that he could not lawfully become a soldier, and that the military court had no jurisdiction over the subject-matter, and he was released.<sup>6</sup> But the court-martial had jurisdiction to punish desertion, and the defendant

1. *Buchanan v. Mallalieu*, 25 Neb. 201 (41 N. W. R. 152).      *Cabe v. Superintendent*, 8 Abb. Pr. N. S. 112.

2. *Matter of Mason*, 8 Mich. 70.

4. *Ex parte Kauffman*, 73 Mo. 588.

3. *Ex parte Williams*, 87 Cal. 78 (24 Pac. R. 602); *People ex rel. Mc-* 494.

5. *People v. Keeper*, 37 How. Pr. 1.

6. *In re Grimley*, 38 Fed. R. 84.

was before it charged with that offense. If for any cause he was not guilty, then was the time to show it. According to this case, when a confessed deserter is brought before a court-martial and asked what defense he has, he may say: "Gentlemen: Please give me your names so I can sue you. I demand that you release me *instanter* and pay me for wrongs already suffered." And he may then sue the judges and prove before a jury that he was thirty-five years old when he enlisted, and recover damages. Since this criticism was written, the Supreme Court of the United States reversed the case upon the ground that his contract of enlistment changed his status and made him an actual or *de facto* soldier.<sup>1</sup>

§ 596. **Age of ward.** — A statute of Alabama authorized a guardian to make a final settlement "upon the ward coming of age," and the supreme court, overruling an earlier case, held that a final settlement and discharge before the ward came of age, was void.<sup>2</sup> A Michigan statute provided that, upon a petition for the appointment of a guardian for a minor over fourteen years of age, he should be cited to appear and choose one. A petition alleged that the minor was under fourteen years of age, and a guardian was appointed without citation, and sold land, which the ward was allowed to recover in ejectment by showing that he was over fourteen years of age when the petition for the appointment of the guardian was filed.<sup>3</sup> The opinion admitted that if the minor had been cited and the court had erroneously determined that he was under fourteen, and denied his right to choose, the judgment would not have been void. An Ohio statute provided that, when a female ward should arrive at the age of twelve years she might choose a guardian such as the court should approve, and that, if she neglected to do so after notice, the court should appoint one for her. A guardian was appointed in such a case on a petition showing the ward to be nine years old. Three years afterwards, the guardian filed a petition to sell her land, alleging her to be twelve years old, and a sale was ordered and made. She was permitted to recover in ejectment by showing that when the petition to sell was filed, she

1. *In re Grimley*, 137 U. S. 147, 150 overruling *Spencer v. Spencer*, 50 Ala. (11 S. C. R. 54). 445.

2. *Lewis v. Allred*, 57 Ala. 628, 631,

3. *Palmer v. Oakley*, 2 Doug. (Mich.) 433 (47 Am. D. 41, 54, 56).



was twelve years and eight months old.<sup>1</sup> These cases seem wrong. In each case the ward was allowed to contradict the record on a matter of fact. In partition proceedings, where there was a report that the land could not be divided, the statute authorized a sale if any heir was of age. Where the record showed, inferentially, that one heir was of age, and a sale was ordered and made, the Supreme Court of the United States held it incompetent to show collaterally in order to defeat the title, that none of the heirs were of age.<sup>2</sup>

§ 597. **Alien enemy.**—A privateer captured some slaves in territory in the possession of the English during the revolutionary war, and carried them into North Carolina, where they were condemned and sold by a court of admiralty. The original owners brought trover and offered to prove that they were not alien enemies, but friends detained by the enemy, but this evidence was held to be inadmissible.<sup>3</sup>

**BANKRUPT TRADER.**—Where an old English statute authorized commissions in bankruptcy to issue against traders, but did not include victualers, a commission issued against a victualer was held to be void. The court said: "The party in this case is no trader, there is no foundation to build a commission upon, the commissioners had no power at all."<sup>4</sup> So, where a California statute provided for the discharge of insolvent debtors, but denied relief to those who failed to pay as bankers, a discharge granted was held void when the petition showed that some of the debts of the applicant were created as a banker.<sup>5</sup> These last two cases seem to me unsound. Those matters were defenses to the original proceedings.

§ 598. **Capacity of party—Dual.**—Where the same person has been both plaintiff and defendant, or represented both, serious questions have arisen collaterally concerning the validity of the proceedings.

**ADMINISTRATOR.**—Where the same person was administrator of an estate in Georgia and also administrator of one of the heirs, a decree rendered in his favor settling the original estate in a suit against all the heirs and himself as administrator of the

1. *Lessee of Perry v. Brainard*, 11 O. 442.

2. *Thompson v. Tolmie*, 2 Peters 157, 164.

3. *Jenkins v. Putnam*, 1 Bay 8 (1 Am. D. 594).

4. *Perkins v. Proctor*, 2 Wilson 382, 384 (A. D. 1768).

5. *Cohen v. Barrett*, 5 Cal. 195, 210.

In a suit by her for partition, this decree was held not to affect her rights as widow, because they were marital and not held as an heir.<sup>1</sup> It seems to me that both these Indiana cases are unsound for the reasons above given; but the case last cited is wrong on another ground—namely, the complaint alleged that she was an heir, and the decree conclusively so determined. Nor would she be at liberty to show collaterally that she was both widow and heir, because that would be a partial defense to the original proceeding which she had an opportunity to make.

§ 600. **Consent of father to enlistment of son.**—Where a New York statute authorized the enlistment of minors in the militia upon the written consent of the father, and a minor was enlisted upon papers apparently regular, and afterwards was fined and imprisoned for a delinquency by a court-martial, this sentence was held void upon proof that the alleged written consent of the father was a forgery. The court said: "The existence of such an enlistment thus constitutes a part of the subject-matter of the jurisdiction of the delinquency court, and in its absence the court has no authority whatever over the offense or the person proceeded against."<sup>2</sup> This case makes jurisdiction depend on the existence of a fact instead of on the allegation in regard to it. The allegation was that he was a duly enlisted soldier and had disobeyed a lawful order, and that gave the court jurisdiction over the subject-matter; and as the defendant was before it, it had to proceed and hear the evidence. If the defendant was not a duly enlisted soldier, then was his time to make that defense. The case also seems to me to confuse the distinction between the subject-matter and the person. The power to grant the relief demanded in any proper case constituted the jurisdiction over the subject-matter, and the actual production of the body of the defendant before the court constituted the jurisdiction over his person.

**CONSENT OF HUSBAND.**—A wife could make a will in New Hampshire with the assent of the husband. The probate of such a will was held to be conclusive that he had given his assent, and to be a bar to an action by him against the executor for personal property bequeathed.<sup>3</sup> So, where a married woman in

1. *Unfried v. Heberer*, 63 Ind. 67, 69. *versing* 41 N. Y. Supr. (34 Hun) 393.

2. *People ex rel. Frey v. Warden*, See section 658, *infra*.  
100 N. Y. 20 (2 N. E. R. 870, 873); *re-*

3. *Cutter v. Butler*, 25 N. H. 343 (57 Am. D. 330, 339).

Alabama could act as administratrix by consent of her husband, his consent was presumed when her acts were attacked collaterally.<sup>1</sup> Nor can a decree against her by consent of counsel be collaterally attacked by showing that she did not consent.<sup>2</sup>

CONSENT TO SALE BY OWNER OF PARTICULAR ESTATE, WANTING.—A statute of New York authorized remaindermen to have a partition subject to the rights of the owner of the particular estate, but provided that no sale should be made except by his written consent, and that if a division were impracticable, and he would not give his consent, the cause should be dismissed. Nevertheless, a sale ordered and made without his consent, was held to be erroneous merely and not void.<sup>3</sup>

CONSENT TO USE OF PROPERTY.—A decree of confiscation of property was rendered upon the allegation that its owner had consented to its use in aid of the rebellion. In another suit involving the title to the property, it was held to be incompetent to show that its owner did not consent to such use.<sup>4</sup>

CONTRACTOR OF PRISON LABOR.—A statute of Arkansas authorized the county court to contract for the labor of prisoners with a resident of the county, or in case that could not be done, then it was authorized to make such a contract "with the contractor of any other county." The court of county C, being unable to make a contract with any resident, made a contract with one Cross, who was found and adjudged to be the "county contractor of St. Francis county," and the prisoner was placed in his charge. On *habeas corpus*, it was held that the judgment was not void because Cross was not the county contractor of St. Francis county.<sup>5</sup>

§ 601. Corporation organized. — An Indiana statute provided "that any *organized* plank, macadamized, or gravel road company" might, by petition to the board of county commissioners, procure an assessment to raise funds to build its road. These assessments were allowed to be overturned collaterally by showing as a fact, that the company was not *organized* when the petition was filed.<sup>6</sup> In the first case cited, it was held that where the necessary five miles of length was made up of four miles of

1. *English's Ex'r v. McNair's Adm'r*, 34 Ala. 40.

2. *Williams v. Simmons*, 79 Ga. 649 (7 S. E. R. 133, 136).

3. *Prior v. Prior*, 56 N. Y. Supr. (49 Hun) 502.

4. *Pasteur v. Lewis*, 39 La. Ann. 5 (1 S. R. 307).

5. *State ex rel. Burrows v. Cross*, — Ark. — (18 S. W. R. 170).

6. *Green v. Beeson*, 31 Ind. 7; *Rhodes v. Piper*, 40 Ind. 369, 373.

new road and one mile already constructed by another corporation and abandoned, the whole organization was void, notwithstanding that it was urged that the action of the board was conclusive on that point. In the second case cited, the court said that the action of the board was not conclusive as to the organization of the company, because it did not have to pass upon that point. But in each of these cases, the petition alleged that the company was duly organized, and the granting of the relief prayed for necessarily adjudicated that its allegations were true. These cases confound the doctrines of *res judicata* and collateral attack, as explained in section 17, *supra*.

§ 602. **Dead person treated as living — Principle involved.** — Jurisdiction over the parties being shown by the record, any movement for or against them is an implied finding that they are in life and legally competent to protect their rights. The recital usually is that the parties, either in person or by attorney, are present, or neglect, after due notice, to be present. Those are matters to be determined from the evidence; and the determination is not void because the evidence was false or insufficient. As was well said by the supreme court of Maryland: "The judgment concludes all persons from denying the fact of the party's existence at the time of its entry." <sup>1</sup> So, where it was contended that the decree of a Virginia court against a non-resident upon service by publication, was void because he was dead before the suit was brought, the court said: "The record is conclusively presumed to speak the truth, and can be tried only by inspection. This results from the power of the court to pass upon every question which arises in the cause, including the facts necessary to the exercise of its jurisdiction, and as to which, therefore, its judgment . . . is binding, until reversed, on every other court. . . . The defendant, Martin, was proceeded against as a person in being and as a non-resident of the state. An order of publication was accordingly made, and duly and regularly executed. Its effect, therefore, is equivalent to an averment on the record that he had, in fact, been summoned—an averment which in this *collateral* proceeding, cannot be contradicted." <sup>2</sup> And in Pennsylvania, where the contention was that a judgment entered on a warrant of attorney in favor of the payee of the note after his death, was void, the court said: "No authority has been

1. Trail v. Snouffer, 6 Md. 308, 314.

2. Wilcher v. Robertson, 78 Va. 602, 616.

shown for the position taken in this case, that judgment taken or entered in favor of a deceased party is a nullity. Even a judgment against a deceased party is not so. . . . This was an *attempt to go behind the judgment*. This he could not do, as all the cases show. In fact, to have allowed it would have been to impugn the record, which imported that the judgment was in favor of a living party." <sup>1</sup>

§ 603. **Death of party before suit brought—Proceedings not void.**—In a proceeding in Indiana to establish a drain, constructive notice given to the record owner of land is sufficient to withstand a collateral attack, although he was then dead—the plaintiff being ignorant of that fact.<sup>2</sup> A bank in Louisiana holding a mortgage, instituted a suit after the death of the mortgagor, and, in accordance with the law of that state, issued a writ of seizure and sale, on which the property was sold. The purchasers then obtained a writ of monition citing all persons to appear and show cause why the sale should not be confirmed (homologated). The executrix appeared and showed that, at the time the suit was instituted, the mortgagor, her husband, was dead, and that there were many irregularities in respect to the notice of seizure, etc. These objections were all overruled and the sale was confirmed. A prior purchaser from the executrix then brought ejectment in the United States court for the same land. Being a prior purchaser, he was not barred by the decree of confirmation against the executrix. He raised the same objections that the executrix had, and claimed that the whole proceedings of sale and confirmation were void because the mortgagor was dead before the suit was brought. But the Supreme Court of the United States held that the monition act of Louisiana invited all the world to come in and show cause and concluded him.<sup>3</sup> The statute of Maine required notice of the desire of a poor debtor to take the oath for relief, to be served upon the creditor *if alive* and in the state. Where a debtor was discharged upon due return of service, it was held to be incompetent to prove collaterally that the creditor was *dead* before the notice was issued.<sup>4</sup> A judgment of revivor on a writ of *scire facias* is not void because the defendant was dead when the writ issued;<sup>5</sup> nor is the foreclosure of a

1. Carr v. Townsend's Executors, 63 Pa. St. 202.

2. Otis v. DeBoer, 116 Ind. 531 (19 N. E. R. 317).

3. Jeter v. Hewitt, 22 How. 352.

4. Waterhouse v. Cousins, 40 Me.

333.  
5. Warder v. Tainter, 4 Watts 270.

mortgage by *scire facias* on two returns of *nihil* void, because the mortgagor, a guardian, was dead when the suit was begun.<sup>1</sup> It was also decided in Texas, that the death of the defendant,<sup>2</sup> and in West Virginia that the death of the plaintiff,<sup>3</sup> before the suit was brought, did not make the judgment void.

§ 604. **Death of party before suit brought—Proceedings void.**—Where a suit was brought in Massachusetts by attachment against a non-resident, and a debt owing him garnished, and final judgment rendered and paid, this was held to be no protection to the garnishee, when sued by the administrator of the attachment defendant, upon proof that he was dead before the attachment suit was commenced.<sup>4</sup> The same point was decided the same way in England.<sup>5</sup> These two cases seem to me to be wrong in principle. The innocent garnishee had received no notice of the transfer of the claim, and was compelled to admit the debt, and he paid it over by a command which he could not resist. The supreme courts of Missouri and South Carolina have also decided that a judgment rendered against a person dead before the action was begun, was void.<sup>6</sup>

**CORPORATION DEFUNCT.**—A township was dissolved, in Iowa, and two new townships made from its territory. Afterwards suit was brought against the original township and a judgment recovered. It had no assets, and the plaintiff tried to make one of the new townships pay, but it was held that he could not do so.<sup>7</sup> A Dominican corporation was dissolved by that government on March 25. On April 8, a creditor commenced a suit against it in New York, and prosecuted it to judgment. This was held void in Massachusetts.<sup>8</sup>

**SERVICE INCOMPLETE.**—It was held in New York that the death of the defendant after the commencement of service by

1. *Murray v. Weigle*, 118 Pa. St. 159 (11 Atl. R. 781).

2. *Taylor v. Snow*, 47 Tex. 462 (26 Am. R. 311).

3. *Watt v. Brookover*, 35 W. Va. 323 (13 S. E. R. 1007); *McMillan v. Hickman*, — W. Va. — (14 S. E. R. 227, 231).

4. *Loring v. Folger*, 7 Gray 505.

5. *Matthey v. Wiseman*, 18 Com. Bench N. S. (114 Eng. C. L.) 657, 677.

6. *Bollinger v. Chouteau*, 20 Mo. 89 —a foreclosure by publication; *Williams v. Hudson*, 93 Mo. 524, 528 (6 S. W. R. 261); *Bragg v. Thompson*, 19 S. C. 572, 576.

7. *District Township v. Independent District*, 63 Iowa 188 (18 N. W. R. 859).

8. *Remington v. Samana Bay Co.*, 140 Mass. 494, 501 (5 N. E. R. 292).

publication but before its completion, made the judgment void, upon the theory that there was no service at all until it was completed.<sup>1</sup>

§ 605. **Death of defendant pending suit for land.**—It was held in North Carolina, that a judgment rendered in ejectment against a defendant who died during the pendency of the action, without making his heirs parties, was not void against them,<sup>2</sup> and the same ruling was made in Ohio and Virginia where land was attached.<sup>3</sup> A contrary ruling was made in Missouri concerning a judgment setting aside a fraudulent conveyance,<sup>4</sup> and also in New York in respect to a decree in partition.<sup>5</sup> The supreme court of Texas held that the death of one defendant in partition did not make the decree void.<sup>6</sup> So, it was decided by a divided court in Michigan, that the death of a mortgagor after sale and before confirmation, did not make the confirmation void in ejectment.<sup>7</sup> A committee was appointed for a lunatic, who afterwards died. After that, a petition was filed for the sale of his land, and it was sold. The appointment of the committee was held to have conferred jurisdiction over the subject-matter so as to bring the whole matter into court, and that the sale was not void.<sup>8</sup>

§ 606. **Death of defendant pending suit for damages.**—That the death of a defendant pending a suit for damages, after service or appearance, does not make the judgment against him void, has been held in Florida, Illinois, Massachusetts, North Carolina, Ohio, Oregon, Texas, Vermont, Virginia and West Virginia, and by the courts of the United States;<sup>9</sup> while the contrary has been held

1. *Barron v. South Brooklyn Saw Mill Co.*, 18 Abb. New Cases 352.

2. *Knott v. Taylor*, 99 N. C. 511 (6 S. E. R. 788).

3. *Lessee of Cochran v. Loring*, 17 O. 409, 433; *Allan v. Hoffman*, 83 Va. 129 (2 S. E. R. 602).

4. *Voorhis v. Gamble*, 6 Mo. App. 1, 5.

5. *Requa v. Holmes*, 16 N. Y. 193, and 26 N. Y. 338.

6. *Howard v. McKenzie*, 54 Tex. 171, 189.

7. *Hochgraf v. Hendrie*, 66 Mich. 556 (34 N. W. R. 15).

8. *Yaple v. Titus*, 41 Pa. St. 195 (80 Am. D. 604).

9. *Collins v. Mitchell*, 5 Fla. 364, 367; *Clafin v. Dunne*, 129 Ill. 241 (21 N. E. R. 834); *Reid v. Holmes*, 127 Mass. 326; *Wood v. Watson*, 107 N. C. 52 (12 S. E. R. 49); *Swasey v. Antram*, 24 O. St. 87, 96; *Mitchell v. Schoonover*, 16 Or. 211 (17 Pac. R. 867, 870); *Mills v. Alexander*, 21 Tex. 154, 162; *Giddings v. Steele*, 28 Tex. 733 (91 Am. D. 336, 344); *Dictum* in *Fleming v. Seeligson*, 57 Tex. 524, 531; *Snow v. Carpenter*, 54 Vt. 17, 21; *Evans v. Spurgin*, 6 Gratt. 107 (52 Am. D. 105); *Pugh v. McCue*, 86 Va. 475 (10 S. E. R. 715)—imports that he is living, and this cannot be contradicted. *King v. Burdett*, 28 W. Va. 601 (57



in Alabama, Louisiana, Mississippi, New York and Tennessee.<sup>1</sup> In the Louisiana case of *McCloskey v. Wingfield*, a suit was prosecuted against a partnership, as such, and one member died pending the suit, which dissolved the partnership, and the judgment afterwards taken against it was decided to be void. In the New York case cited (11 Hun 136), an action was pending against a corporation which was dissolved pending the suit by the expiration of the time fixed in its charter, and the judgment afterwards rendered against it was held void. It was said by the supreme court of Illinois that, at common law, a judgment against a defendant dying pending the suit was absolutely void.<sup>2</sup> The court said that the law was changed by 17 Car. II, chapter 8, section 1, by enacting that the death of neither party between verdict and judgment should be *assigned for error*. The court relied on *Randall's Case*,<sup>3</sup> which is a mere *dictum* of three lines, and 1 Salk. 8 (case 21), which was a direct proceeding in which the court refused to arrest the judgment on account of the death of the defendant before the term began. Both cases were decided long subsequently to the statute of 17 Car. II. The court also cited 2 Saunders 71, 72, note *m*.<sup>4</sup> This note reads: "And, lastly, as to *death*; which may be considered either as it happens before or after final judgment. At common law, the death of the plaintiff or defendant, at any time before *final* judgment, would have *abated the suit*. But now, by statute 17 Car. II, chapter 8, section 1, it is enacted that 'in all actions . . . the death of either party betwixt the verdict and judgment shall not be alleged for error,' " etc. It will be seen that the authorities cited do not warrant the *dictum* of that learned court.

§ 607. **Death of plaintiff pending suit.**—It has been decided in Illinois, Iowa, Kentucky, Louisiana, Missouri, Nebraska and Vermont, that the death of the plaintiff pending the suit does not

Am. R. 687)—death of a joint defendant pending suit, and judgment taken against him. *Beard v. Roth*, 35 Fed. R. 397; *New Orleans v. Gaines' Adm'r*, 138 U. S. 595, 612 (—S. C. R. —).

1. *Meyer v. Hearst*, 75 Ala. 390; *Norton v. Jamison*, 23 La. Ann. 102—death before issue joined. *McCloskey v. Wingfield*, 29 La. Ann. 141; *Edwards v. Whited*, id. 647—death pending appeal in supreme court. *Gerault*

*v. Anderson, Walker* (Miss.) 30 (12 Am. D. 521); *Parker v. Horne*, 38 Miss. 215; *Strugis v. Drew*, 18 N. Y. Supr. (11 Hun) 136; *Kelly v. Hooper*, 11 Tenn. (3 Yerger) 394—a Mississippi judgment; *dictum* in *Carter v. Carri-ger*, id. 411 (24 Am. D. 585).

2. *Dictum* in *Life Association of America v. Fassett*, 102 Ill. 315, 325.

3. *Randall's Case*, 2 Mod. 308.

4. *Underhill v. Devereux*, 2 Saunders 71, 72, note *m*.

make the judgment void ;<sup>1</sup> and a like ruling was made in Illinois concerning a judgment where one copartner plaintiff died during that time.<sup>2</sup> On the contrary, it was held in Tennessee, that the death of one joint plaintiff in ejectment before judgment in his favor, made it void in respect to him, but that the survivors were entitled to the benefit of the entire recovery ;<sup>3</sup> and in New York that the death of the plaintiff in a foreclosure suit before judgment, made it void.<sup>4</sup> So, it was held in an old case in Pennsylvania, that a confession of judgment by defendant in a pending cause after the death of the plaintiff and before the substitution of his personal representative as plaintiff—the defendant knowing all those facts—was void as to the defendant, and that the judgment could not be used by him in bar of another action.<sup>5</sup> In the Louisiana case of *Stackhouse v. Zuntz*, the appellant died pending an appeal to the supreme court, and his succession and legal representatives were made parties, but on affirmance the judgment was rendered against the dead appellant by name. This was held binding on his succession and legal representatives. An administrator in Tennessee died between the time of the granting of the order to sell land and the sale. The sale was made by the clerk as provided by law, and all the facts reported to the court, which confirmed it without any revivor, and made a decree divesting the title of the heirs and vesting it in the purchaser. This was decided to be void.<sup>6</sup> But the death of one of the complainants in partition proceedings in Maryland to sell land, after the decree and before the sale, does not make the confirmation void.<sup>7</sup>

**§ 608. Death wrongfully assumed, or administrator for living person.**—A disappears. A dead body is found, and identified and buried as his. Suspicion falls upon B, who is arrested, tried, convicted and hanged for his murder. An administrator is appointed for

1. *Dictum* in *Davies v. Coryell*, 37 Ill. App. 505, 509; *dictum* in *Gilman v. Donovan*, 53 Iowa 362 (5 N. W. R. 560); *Case v. Ribelin*, 1 J. J. Marsh. 29; *Spalding v. Wathen*, 7 Bush 659, 663; *Stackhouse v. Zuntz*, 41 La. Ann. 415 (6 S. R. 666, 670); *Coleman v. McNulty*, 16 Mo. 173 (57 Am. D. 229); *Jennings v. Simpson*, 12 Neb. 558, 565 (11 N. W. R. 880); *Holt v. Thacher*, 52 Vt. 592.

2. *Stoetzell v. Fullerton*, 44 Ill. 108, 111.

3. *Rhodes v. Crutchfield*, 75 Tenn. (7 Lea) 518, 535.

4. *Gerry v. Post*, 13 How. Pr. 118.

5. *Finney v. Ferguson*, 3 Watts & Serg. 413.

6. *Wheatley's Lessee v. Harvey*, 31 Tenn. (1 Swan) 484.

7. *Schley's Lessee v. Mayor, etc., of Baltimore*, 29 Md. 34, 46.

A, who sells his property, pays his debts, distributes the surplus, and is discharged. A now returns. Many courts hold that the administration proceedings are void, and that he may recover his property. To those courts which hold that the subject-matter in such a proceeding, is *the estate of a dead person*, and that the appointment of an administrator was void because A was not *dead*, I would suggest that, upon the same reasoning, the subject-matter in a prosecution for murder is the *killing of a person*, and that if the person was not *dead*, there was no subject-matter, and therefore all concerned in the conviction and hanging of B were guilty of manslaughter, and liable civilly to his administrator for damages. The statute in regard to murder is just as positive that the victim must be *dead* as the statute in regard to administration is. If *death* is the subject-matter under the administration statute, it is equally so under the murder statute. To those courts which hold that there was no jurisdiction over the *person* of A because no steps were taken to obtain service on him, I would suggest that the court, in all cases, has to hear the *ex parte* evidence of the plaintiff, and issue (or ratify) such process as his evidence warrants; and when his evidence shows the adverse party to be dead, he cannot be warned to appear; hence, the writ of administration issues and his property is seized, and notice is given to all the world to come in and have their rights with the alleged decedent settled. As is shown in section 60, *supra*, the jurisdiction depends upon the *allegations*, and the allegation in each court was that A was dead. The decisions which hold the appointment and acts of an administrator void in such cases, violate the rule that a judicial record must be tried solely by inspection.

§ 609. Section 608 continued—*Proceedings not void.*—To an answer in Indiana, that the supposed decedent had left and had not been heard from in two years, and that, without any proof of his death, letters of administration were issued on his estate, and that he was in fact alive, a demurrer was sustained. This was held correct. The court said: "It is conclusively presumed, in a collateral proceeding, that a man is dead when letters of administration are granted on his estate by the proper tribunal."<sup>1</sup> An old man was last seen in Louisiana crossing a lake in a pirogue. On a petition for the appointment of an administrator alleging his death, the court heard the evidence and made the appointment. In a collateral suit, the question was raised that the

<sup>1</sup> Jenkins v. Peckinpaugh, 40 Ind. 133, 136.

appointment was void because he was not, in fact, *dead*. The court said: "The parish judge having jurisdiction, heard the evidence touching his death; and, on the proof adduced, he solemnly decided that Kees was dead, and appointed an administrator of his succession. No appeal has been taken, none can now be taken from that judgment, and it cannot be questioned collaterally. Until that judgment is set aside, other tribunals must accept it as conclusive, and assume that Kees is dead."<sup>1</sup> Letters of administration were granted by an orphans' court in New Jersey, on evidence showing the absence of the alleged decedent, and inquiries made for him and inability to find him. To a suit by the administrator, the defense was, that the alleged decedent was not dead, and the right was claimed to go into the evidence again and show that the orphans' court reached a wrong conclusion. The court said: "Looking at the foregoing statement of facts, it is manifest that the orphans' court, on the occasion in question, had jurisdiction of the subject-matter involved in the application for authority to administer the estate of Philip McMahon, as that of a deceased intestate. Such matter was as actually before that tribunal for its adjudication as it was possible for it to be. We might perhaps have doubts whether the court deduced the correct conclusion from the testimony before it *as to the fact of the death* of the alleged decedent, or as to its right to grant administration, under the conditions of the case, to the plaintiff, but it seems illogical to deny the power of the court to take cognizance of the affair and to proceed to judgment. In the case of *Grove v. Van Duyn*, 15 Vroom (44 N. J. L.) 654, the test of jurisdiction, so far as relates to courts having a general cognizance over a class of cases, was declared by the court of errors to be the colorable presentation before it of the facts necessary to constitute the case a member of such class. In the present case there was plainly some proof of the death of the supposed intestate, and likewise of the fact that he was not, at the time of his decease, a resident of this state, and therefore, even if the court fell into error, which I do not intend to indicate, such error might have led, in a proper course of law, to a reversal of the judgment, but it can have no bearing against the right of the court to adjudicate upon the facts before it. Upon this assumption, that this power of judicature existed, it is apparent that the defendant in this instance must stand on the proposition

1. *Davis v. Greve*, 32 La. Ann. 420, 425.

that he has a right to show that the orphans' court decided incorrectly with respect to the evidence relating to jurisdictional facts. But such a contention is opposed to fundamental rules of law."<sup>1</sup> In a suit by an administrator in New York, the defendant offered evidence tending to show that the alleged decedent was not dead. The supreme court said: "A tribunal, specially charged with the duty has decided that Cleveland is dead. This offer is an attempt to have this court come to a different conclusion on the same evidence, or a part of the same."<sup>2</sup> If the jurisdiction does depend upon the fact of death, then the foregoing decisions are wrong. If it depends upon the allegation of death, as I think it does, then they are right. Each of these decisions is an adjudication that an order appointing an administrator is conclusive collaterally in respect to the death of the alleged decedent.

§ 610. Section 608 continued — **Proceedings void.** — The doctrine that the appointment of an administrator for a living person is void collaterally, was first placed in the books by the *dicta* of three very distinguished judges—Buller, Marshall and Duncan. Mr. Justice Buller, in speaking of the probate of a forged will, said: "Then this case was compared to a probate of a supposed will of a living person; but in such a case the ecclesiastical court have no jurisdiction, and the probate can have no effect; their jurisdiction is only to grant probates of the wills of dead persons."<sup>3</sup> A *dictum* of Mr. Chief Justice Marshall is to the same effect.<sup>4</sup> So Mr. Justice Duncan, of Pennsylvania, in a case concerning the collateral validity of a judgment vesting title in the wrong person as widow, said: "The matter which gives the orphans' court jurisdiction is the *death* of the owner *intestate*, . . . for if administration were taken out of the effects of a living man, or of one who died testate, the administration itself would be void."<sup>5</sup> Following these *dicta*, it has been held in Alabama, California, Illinois, Kansas, Kentucky, Louisiana, Massachusetts, North Carolina, Pennsylvania, South Carolina, Tennessee, Texas and Wisconsin, and by two circuit courts of the United States, that

1. *Plume v. Howard Savings' Institution*, 46 N. J. L. (17 Vroom) 211, 227 —Beasley, Ch., J.

2. *Parhan v. Moran*, 11 N. Y. Supr. (4 Hun) 717, 720.

3. *Dictum* of Buller, J., in *Allen v. Dundas*, 3 T. R. 125, 130.

4. *Dictum* of Marshall, C. J., in *Griffith v. Frazier*, 8 Cranch 9, 23.

5. *Dictum* of Duncan, J., in *McPherson v. Cunliff*, 11 Serg. & Rawle 422 (14 Am. D. 642).

the appointment of an administrator for a living person, is void.<sup>1</sup> All these cases but one are based upon the idea that the jurisdiction of probate courts extends only to the estates of *dead* persons, and some of them need special notice.

In the Illinois case of *Thomas v. People*, a person was absent and unheard of for seven years, and letters of administration were issued upon his estate, and a claim due to him was paid to the administrator. The alleged decedent returned and sued his debtor to collect the claim a second time. It was held that the appointment was void, and that he could recover. In this case, the counsel pressed the point that, when the application was presented, the court had to hear the evidence; that the judicial mind was set in motion, and that the final conclusion was not void because erroneous in fact. In answer to this, the court said: "Jurisdiction in the general and most appropriate sense of that term, as applied to the subject-matter of a suit at law or in equity, is always conferred by law, and it is a fatal error to suppose the power to decide in any case rests solely upon the averments in a pleading. It is true that a court is not permitted, on its own motion, to institute a suit between the parties to a controversy. As claimed by appellant, there must be a properly framed complaint or other pleading showing a cause of action within the jurisdiction of the court, before it can lawfully proceed to adjudicate. But behind all this, there must be power in the court, conferred by law, *to act in a real case of the character of the one supposed by the pleading or complaint*, and if there is not, the whole proceeding, and all acts done under it, will be inoperative and void." That is certainly a correct statement of premises and a correct conclusion is reached; but after the court has reached a correct conclusion, logically, it misapplies it to the case in hand. Of course the court must "have power to act in a real case of the character of

1. *Duncan v. Stewart*, 25 Ala. 408, 413; *Stevenson v. Superior Court*, 62 Cal. 60 (47 Am. R. 465, note); *Thomas v. People*, 107 Ill. 517 (47 Am. R. 458); *dictum* in *Perry v. Saint Joseph, etc., R. R. Co.*, 29 Kan. 420; *French v. Frazier's Adm'r*, 7 J. J. Marsh 425, 427; *Burns v. Van Loan*, 29 La. Ann. 560; *Jochumsen v. Suffolk Savings Bank*, 3 Allen 87; *State v. White*, 7 Ired. 116; *Devlin v. Com.*, 101 Pa. St. 273 (47 Am. R. 710); *Moore v. Smith*, 11 Rich. L. 569, 575; *D'Arusement v. Jones*, 4 Lea 251 (40 Am. R. 12); *dictum* in *Martin v. Robinson*, 67 Tex. 368 (3 S. W. R. 550, 553); *Melia v. Simmons*, 45 Wis. 334 (30 Am. R. 746); *Lavin v. Emigrant Industrial Savings Bank*, 1 Fed. R. 641; *United States v. Payne*, 4 Dill. 387.



the one supposed by the complaint," or its proceeding will be void. But, conversely, if the court does have such power, it necessarily follows that its conclusion will not be void. When the complaint is presented the court has no discretion; it *must* proceed and hear the evidence. The court also quoted from the opinion of Chief Justice Marshall in *Rose v. Himely*<sup>1</sup> where he says: "Upon principle it would seem that the operation of every judgment must depend on the power of the court to render that judgment—or, in other words, on its jurisdiction over the subject-matter which it has determined. In some cases that jurisdiction unquestionably depends as well on the state of the thing as the constitution of the court. If, by any means whatever, a prize court should be induced to condemn, as prize of war, a vessel which was never captured, it could not be contended that this condemnation operated a change of property." To this the court added: "With equal propriety it may be said, if by any means a probate court should grant letters of administration upon the estate of one still living, the title of the owner of such estate could not thereby be affected." To this I would answer: "With equal propriety it may be said, if by any means a court should issue a writ of attachment to seize the estate of one still a resident, and proceed to judgment, the title of the owner of such estate could not thereby be affected." The cases put are exactly the same, and yet all the decisions hold that the attachment is not void. The attachment laws do not touch honest resident debtors any more than the administration laws touch living persons, nor will the courts seize the goods of honest resident debtors by their writs of attachment, or the goods of living persons by their writs of administration *unless deceived in regard to the facts*. If a "decendent's estate" is the subject-matter in administration proceedings then a "non-resident's estate" is the subject-matter in attachment proceedings. The power of the court to grant the relief prayed for, which relief is the same in both cases—namely, an order to seize the property of the alleged debtor and appropriate it to the payment of his debts—constitutes the jurisdiction over the subject-matter, and jurisdiction over the person is obtained by such notice as the law prescribes for such a supposed case.

To the case put by Chief Justice Marshall, I would say that if a prize court condemns a vessel, of course it will pass the title,

1. *Rose v. Himely*, 4 Cranch 269.



captured or uncaptured. How is the owner to contradict the record if it recites the capture, monition, trial and condemnation? Of course, if he can keep it out of the jurisdiction of the court, the decree cannot be enforced, because he can dispute the jurisdiction in a foreign court; but suppose that, after the false condemnation, he brings it within the jurisdiction of the court and the marshal seizes it with his writ and sells it to an innocent purchaser, can he sue him for a conversion and recover upon proof that his vessel never was captured? Certainly not, unless a record fair on its face can be overturned collaterally by parol. The supreme court of Illinois failed to notice that its decision in this case is in conflict with a prior and well-considered case extensively quoted from in section 526, *supra*. The case cited from 1 Federal Reporter 641, was this: A person was absent, and upon a petition alleging that he was dead, letters of administration were granted. He was, in fact, alive. The proceedings were held to be void because wanting in "due process of law." This was based on the fact that no steps were taken to notify the alleged decedent. The court failed to notice that all courts must necessarily issue such process as the *ex parte* evidence of the plaintiff may warrant, and when his evidence shows the adverse party to be dead, none can issue.

§ 611. **Distributees—Errors concerning.**—Questions in respect to the distribution of funds are frequently troublesome; but a decree ordering a claim due a decedent to be distributed to the next of kin instead of delivered to the administrator, although erroneous, is not void;<sup>1</sup> and, in general, a probate decree distributing funds to the wrong person is not void and protects the administrator.<sup>2</sup> But contrary to these cases, is a late decision of the Supreme Court of the United States, which held an erroneous common-law order requiring a removed administrator to pay the moneys in his hands to the administrator *de bonis non*, instead of the creditors, void for want of jurisdiction, and that the administrator *de bonis non* could not recover on the bond of the administrator for a failure to comply with the order.<sup>3</sup> But with great deference to that learned tribunal, I would suggest that the court had all the parties before it, and as the adminis-

1. *Com. v. Steacy*, 100 Pa. St. 613.

3. *United States v. Walker*, 109 U.

2. *Kellogg v. Johnson*, 38 Conn. S. 258, 266 (3 S. C. R. 277).

trator had been removed and had money in his hands, the duty rested upon it to order him to pay it over to the proper party; that duty necessarily carried with it the power to decide who the proper party was. The court did not lack jurisdiction; but having jurisdiction, it simply erred in its conclusions. Thus, where the statute of Kentucky required the court, upon the sale of an infant's land, to order the money to be paid to the statutory guardian, an order to pay it to the general guardian, who was made to secure it subject to the control of the court, was decided to be valid collaterally.<sup>1</sup> So, where the proceeds of real estate sold in Pennsylvania were distributed to the holder of a purchase-money bond upon the erroneous view that he had a lien by law, this was held conclusive collaterally, and a bar to an action by a creditor to recover it back.<sup>2</sup>

**DISTRIBUTEES IN CRIMINAL PROCEEDINGS.**—A statute of Maine provided that one-half of a fine should inure to the prosecutor and one-half to the town, but a justice of the peace awarded it to the state, and this was held not void and not to entitle the defendant to be released on *habeas corpus*.<sup>3</sup>

**FEES OF SURVEYOR.**—An Indiana statute provided that the surveyor's fees in ditch proceedings should be paid out of the county treasury, but an order for their payment out of the ditch assessment was held valid collaterally.<sup>4</sup>

**FEMALE IMPRISONED.**—An order to imprison a female on civil<sup>5</sup> or *mesne*<sup>6</sup> process, in violation of a statute, has been held void.

§ 612. **Heirs—Errors concerning.**—The heirs of an estate in Connecticut had made a partial distribution, and confirmed the titles of each other to the distributed portions. One of them afterwards procured an order from the probate court to sell a parcel of the land which he had confirmed to another, to pay a claim, and a sale was made and he himself became the purchaser, and this was confirmed by the court. In ejectment by the other heir, it was held that he ought to have made his defense in the probate court.<sup>7</sup> A person had inherited land in Indiana,

1. McKee's Heirs v. Hann, 9 Dana 526, 540.

2. Gratz v. Lancaster Bank, 17 Serg. & Rawle 278.

3. Phinney, Petitioner, 32 Me. 440.

4. State v. Morris, 103 Ind. 161, 164 (2 N. E. R. 355).

5. *Dictum* in Peoples v. Cowles, 34 How. Pr. 481, 488.

6. Adams v. Whitcomb, 46 Vt. 708, 712.

7. Seymour v. Seymour, 22 Conn. 272, 280.

partly from his father and partly from his mother. The administrator of his father filed a petition to sell all the land, alleging that it belonged to the father, and he was named as a defendant generally, and not simply as the heir of his father, and an order to sell was made upon default and the land was all sold. This was held to pass the title he inherited from both father and mother.<sup>1</sup> So, in North Carolina, where, in an administrator's proceeding to sell land that had descended to the heirs from their father, land descended to them from their brother was included and sold, the sale was decided to be valid, collaterally.<sup>2</sup> After the death of a woman in Kansas, land was patented to her heirs. It seems that she had paid for it in her life-time, and although she did not die seized of it, and never had the legal title, yet the administrator supposed that it was liable to be made assets to pay her debts, and applied to the probate court for license to sell it, making the heirs parties, and an order to sell was made and carried out. The heirs brought ejectment, and were allowed to recover.<sup>3</sup> The case does not show what the petition to sell alleged, nor what the mistake made was. But the court had power to order a sale in a proper case, and the heirs were before it, and no error of law or fact in adjudging the case before it to be a proper one for a sale could make the order void. It is probable that the probate court in that state had no jurisdiction to settle the title to land, but that did not affect the question, because the heirs were called upon to set up any claim they had, and the order to sell was an adjudication that they claimed nothing.

A statute of Indiana provided that "If a widow shall marry a second or any subsequent time, holding real estate in virtue of any previous marriage, such widow may not, during such marriage, with or without the consent of her husband, alienate such real estate, and if during such marriage, such widow shall die, such real estate shall go to her children by the marriage in virtue of which such real estate came to her, if any there be." Under this and other sections of the statute, the supreme court had decided that the widow held such real estate by a fee simple title, but that at her death during the subsequent marriage, it descended to the children of her former marriage as her forced heirs and free

1. *Bumb v. Gard*, 107 Ind. 575 (8 N. E. R. 713).

2. *Jones v. Coffey*, 97 N.C. 347 (2 S. E. R. 165).

3. *Coulson v. Wing*, 42 Kan. 507 (22 Pac. R. 570).

from her debts. Land having so descended from the mother to the children, her administrator filed a petition to sell it to pay her debts, alleging that she died the owner of it in fee simple, and the children were made parties as her heirs and were duly served with process, and being infants, a guardian *ad litem* was appointed for them, who answered in denial. The court heard the evidence and granted the prayer of the petition, and their land was sold to pay their mother's debts. It was held that this sale was not void, and that they could not recover the land on coming of age.<sup>1</sup> Under this statute, where the mother during a subsequent marriage had mortgaged the land, and then died, by virtue of which it descended to the children free from the mortgage, yet a subsequent foreclosure to which they were parties was held to be valid collaterally, and to bar their rights.<sup>2</sup> The mother, even during the subsequent marriage, held the fee simple title, and the children, during her life had no interest in it whatever—nothing but an expectancy like an heir presumptive. In that state of the law, a woman thus holding real estate, and her second husband and the children of the former marriage, united in a conveyance of it to one Taylor. This deed was void as to the wife and former widow because prohibited by the statute, and also void as to the children because they had no interest to convey. Taylor then brought a suit against all the grantors in his deed to quiet title, and after due service, procured a decree to that effect. After the death of the mother, the children brought an action to quiet their title, claiming that Taylor's decree against them was void. But the court held that, although they then had no interest, they had an opportunity to litigate the validity of her deed, and that as she would be estopped, they would be estopped. The case also held that the decree quieting Taylor's title might have been based on the fact that the children had received and retained all the purchase money, or on the fact that the widow's share had been set off to her in other lands, and that she had no interest in the lands conveyed, and that the children owned it all in fee.<sup>3</sup> This case seems to me to be inconsistent with three earlier cases in the same court, which it does not notice, namely: Where a

1. *Lantz v. Maffett*, 102 Ind. 23 (26 N. E. R. 195).

2. *Craighead v. Dalton*, 105 Ind. 72 (4 N. E. R. 425).

3. *Hawkins v. Taylor*, 128 Ind. 431 (28 N. E. R. 1117). See section 659.

*infra*, Indiana cases.

husband died leaving a fourth wife as widow, and children by a former marriage, and his administrator filed a petition to sell all his land to pay debts, making the widow and children parties, and procured an order to sell it all subject to the *life* estate of the widow, it was decided that, under the statute just considered, the court had no power to sell any part of the widow's share, which was the one-third in fee, and that, as the children then had no title to her one-third, they owned nothing to bar, and that upon her death the fee in her one-third descended to them, and that they could recover it.<sup>1</sup> For the same reasons, where a wife in such a case brought a suit in partition against the children and procured a decree setting off her share *in fee simple*, this was held void and no bar to their recovery after her death.<sup>2</sup> It seems to me that both of these cases are wrong. The jurisdiction of the court was ample to determine *everything* connected with the case. And when it determined in the one case that the widow had a *life* estate in the one-third, and that the children *then* owned the fee, and in the other that the widow owned the one-third *in fee simple*—not merely a base or qualified fee which she could not dispose of for a longer term than her life—it looks to me like giving the children two days in court to permit them to recover.

A statute of Massachusetts declared that, in certain cases, property should descend to the brothers and sisters. In a petition by an administrator for an order to distribute in such a case, the mother was named as one of the heirs; and after due notice, an order was made for the payment of a portion to her. It was held that this order could not be overthrown collaterally.<sup>3</sup> In a case in Texas, the separate real estate of a deceased husband was partitioned between the widow and minor heirs as *community* property, and a certain part set off to the widow as such. She sold the land and died, and the heirs brought ejectment on the ground that it was the separate estate of their father; but they were held to be concluded by the judgment.<sup>4</sup> So, a decree in partition awarding a share to an illegitimate child is erroneous, but not void.<sup>5</sup>

1. Flenner v. Travellers' Ins. Co., 89 Ind. 164.

2. Thorp v. Hanes, 107 Ind. 324, 329; accord, Avery v. Atkins, 74 Ind. 283, 289.

3. Pierce v. Prescott, 128 Mass. 140, 142.

4. Davis v. Wells, 37 Tex. 606, 609.

5. Persinger v. Jubb, 52 Mich. 304 (17 N. W. R. 851).

§ 613. **Husband, exempt from wife's debt.**—A husband being liable generally for the debts of his wife, a judgment of a justice of the peace against him for an ante-nuptial debt of hers is not void,<sup>1</sup> although neither any statute nor the common law ever made him thus liable.

INDIAN, EXEMPT.—The laws of New York did not extend over or bind the Seneca Indians within its borders, and for that reason an order appointing an administrator for a deceased one was held void.<sup>2</sup> A statute of New York provided that “no person shall maintain any action against an Indian . . . upon any contract,” and a judgment by default upon such a contract was decided to be void;<sup>3</sup> and where the federal statutes gave to the courts of the Indian Territory jurisdiction over Indians only, a person convicted as an Indian was discharged on *habeas corpus* upon showing that he was not an Indian.<sup>4</sup> The reason why the one federal court was more competent to decide that question of fact than the other, was not made very clear.

§ 614. **Infant defendants.**—As early as the year 1650, it was decided in England that an infant could not avoid a common recovery collaterally, by entry, but that he must resort to a writ of error; and the same point was recently decided the same way in Pennsylvania.<sup>5</sup> Persons who do not appear by the record to be infants cannot show that fact collaterally, as that would contradict the record.<sup>6</sup> A confession by an infant,<sup>7</sup> or a judgment against him before a justice,<sup>8</sup> is not void. But a recent case in Michigan held that a confession given in the firm name by one partner when the other partner was an infant, was void, and could not be used as a basis to attack a fraudulent assignee of the firm property;<sup>9</sup> but this case is out of line with all the others cited, and seems to me to be wrong.

§ 615. **Infant plaintiffs.**—A judgment is not void because the suit was conducted by an infant in his own name,<sup>10</sup> or by his non-

1. Babb v. Bruere, 23 Mo. App. 604, 610.

2. Dole v. Lusk, 2 Barb. 639, 641.

3. Hastings v. Farmer, 4 N. Y. 293, 295.

4. *Ex parte* Kenyon, 5 Dillon 385, 390.

5. Ailet v. Watless, Style 246; *accord*, Wood v. Bayard, 63 Pa. St. 320.

6. Andrews v. Andrews, 54 Tenn. (7 Heisk.) 234, 246.

7. Kemp v. Cook, 18 Md. 130 (79 Am. D. 681).

8. Blake v. Douglas, 27 Ind. 416; Ludwick v. Fair, 7 Ired. L. 422 (47 Am. D. 333).

9. Soper v. Fry, 37 Mich. 236.

10. Rutter v. Puckhofer, 22 N. Y. Super. (9 Bosw.) 638.

resident guardian instead of by next friend,<sup>1</sup> or by next friend, when the statute required it to be done by a special guardian.<sup>2</sup> But where a Kentucky statute authorized the circuit court to sell the real estate of infants on the sworn petition of their guardian, stating that in his opinion a sale "will redound to their advantage," a sale made on a petition of the infants by their next friend, was held void, in ejectment.<sup>3</sup> But in a later case, where the petition was by next friend, and the guardian was a defendant and united in the prayer for a sale, a contrary ruling was made;<sup>4</sup> and in another case, it was held that the word "guardian" in the statute included the father as natural guardian.<sup>5</sup> A suit was begun on behalf of infants by their father as "natural guardian" instead of as next friend. He died pending the suit, and the court appointed a successor to carry on the suit as "*guardian ad litem*" instead of as next friend; but this proceeding was held to be invulnerable, collaterally;<sup>6</sup> and the same ruling was made where an infant remainderman applied for the sale of his land by his guardian instead of in his own name by next friend as required by the statute.<sup>7</sup> So, where an infant heir was made a co-plaintiff instead of a defendant in a proceeding by a trustee to sell land,<sup>8</sup> and where an infant joined with others in a petition to have a trust estate sold and the direction of the fund somewhat changed, which was done,<sup>9</sup> these irregularities did not make the proceedings void.

DISABILITIES REMOVED.—A statute of Arkansas authorized the probate court, in its discretion, upon the petition of any minor, to authorize him to transact business in general, or any particular business specified, in like manner and with the same effect, as if done by an adult. Three minors filed their petition showing themselves to be, respectively, seven, ten and twelve years of age; that they were the owners of a certain described tract of land, and asking to be authorized to sell and convey it, and the court made an order as prayed, and they made a sale and

1. Tate v. Mott, 96 N. C. 19 (2 S. E. R. 176).

2. Wygal v. Myers, 76 Tex. 598 (13 S. W. R. 567).

3. Vowles's Heirs v. Buckman, 6 Dana 466.

4. Lampton v. Usher's Heirs, 7 B. Mon. 57, 63.

5. McKee's Heirs v. Hann, 9 Dana 526, 533.

6. Martin v. Weyman, 26 Tex. 460, 468.

7. Newbold v. Schlens, 66 Md. 585 (9 Atl. R. 849).

8. McGavock v. Bell, 3 Coldwell 512, 519.

9. Clark v. Platt, 30 Conn. 282.



conveyance. On coming of age they brought ejectment, and it was decided that the order was void, and that they could recover. The statute was unlimited in terms, but the court held that it must have a reasonable construction, and that it could not apply to minors too young to understand their own business, and the court fixed fourteen years as the earliest age.<sup>1</sup> Such an unlimited statute seems dangerous, and the act of the probate court was indiscreet, yet it was a question for it to decide—a question it was compelled to decide—and its decision may have been of advantage to the minors. Of course they were represented by friends who evidently thought the sale a good one; and any one of a contrary opinion, could have removed the proceeding to a higher court and prevented the sale.

§ 616. **Insane persons.**—Where a judicial record is fair on its face, it cannot be shown, collaterally, that any party was insane at the time the proceeding was commenced or judgment rendered, because that will contradict the record. That such a proceeding is not void, has been decided in Georgia,<sup>2</sup> Illinois,<sup>3</sup> Indiana,<sup>4</sup> Maryland,<sup>5</sup> Missouri,<sup>6</sup> Nebraska,<sup>7</sup> New Hampshire,<sup>8</sup> North Carolina,<sup>9</sup> Pennsylvania<sup>10</sup> and Texas.<sup>11</sup> In the case from 60 Texas, the defendant became insane pending the suit and was put into an asylum, but no notice was taken of that fact and a consent decree was entered. In the 101 Pennsylvania State case, an insane guardian obtained an order to mortgage land, and in the 99 North Carolina case, an insane widow joined in an administrator's petition to sell land and waived her dower, and a sale was ordered to be made, free from dower. These proceedings were all held valid, collaterally.

§ 617. **Landlord and tenant.**—An alleged landlord brought an action before a justice of the peace in Louisiana against an

1. *Doles v. Hilton*, 48 Ark. 305 (3 S. W. R. 193).

2. *Foster v. Jones*, 23 Ga. 168.

3. *Speck v. Pullman Palace Car Co.*, 121 Ill. 33 (12 N. E. R. 213); *Maloney v. Dewey*, 127 Ill. 395 (19 N. E. R. 848).

4. *Woods v. Brown*, 93 Ind. 164; *Boyer v. Berryman*, 123 Ind. 451 (24 N. E. R. 249).

5. *Tomlinson's Lessee v. Devore*, 1 Gill 345; *Stigers v. Brent*, 50 Md. 214, 219 (33 Am. R. 317).

6. *Heard v. Sack*, 8 Mo. 610, 615.

7. *McCormick v. Paddock*, 20 Neb. 486 (30 N. W. R. 602).

8. *Lamprey v. Nudd*, 29 N. H. (9 Foster) 299, 303.

9. *Brittain v. Mull*, 99 N. C. 483 (6 S. E. R. 382, 385); *Thomas v. Hunsucker*, 108 N. C. 720 (13 S. E. R. 221).

10. *Henry v. Brothers*, 48 Pa. St. 70; *Wood v. Bayard*, 63 Pa. St. 320; *Grier's Appeal*, 101 Pa. St. 412, 415.

11. *Denni v. Elliott*, 60 Tex. 337.

alleged tenant for possession of land and recovered a judgment by default, by virtue of which the defendant was ousted. He then sued for damages and attempted to show that the relation of landlord and tenant did not exist, and that the judgment was void because it passed on the title to real estate; but it was decided that the evidence was inadmissible to contradict the record.<sup>1</sup> The same point was decided the same way by the supreme court of New York,<sup>2</sup> while a case in the superior court of that state is contrary. A lease of a room was made by the board of supervisors to a military body. For failure to pay rent, the lessor brought an action for possession before a justice of the peace and recovered. In another action the lessee was allowed to show that the lease was *ultra vires*, and did not create the relation of landlord and tenant, and that the judgment was void.<sup>3</sup> This case seems unsound.

LEGAL ESTATE.—Where a bill alleged that a married woman was the owner of lands described as her separate estate, and had made a charge on them in favor of the plaintiff, the decree in his favor is not void, because, in fact, she had simply a legal estate which could not be charged.<sup>4</sup>

§ 618. *Legatees*.—An Alabama statute authorized the probate court to order the executor to sell personal property of the testator, the title to which had not been divested from him. In a case where the testator had bequeathed certain personal property to a legatee, who, by the consent of the executor, had taken and held possession for thirteen years, when the court, upon the petition of the executor, ordered him to sell it, which he did, it was decided that he could not be charged with the proceeds realized because the sale was void.<sup>5</sup> The court reasoned that the consent of the executor to so long a possession by the legatee had passed the title to him, and that as the executor did not own it, an order to sell it was void, and did not make it assets. In all this I conceive that learned court to be wrong. As all persons in interest are in the probate court in Alabama all the time, the petition of the executor to sell called on the legatee to

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1. *Huyghe v. Brinkman*, 34 La. Ann. 831.      York, 40 N. Y. Super. (8 Jones and Spencer) 523, 534.

2. *Imbert v. Hallock*, 23 How. Pr. 456.      4. *Hope v. Blair*, 105 Mo. 85 (16 S. W. R. 595).

3. *Boller v. Mayor, etc., of New*      5. *Whorton v. Moragne*, 62 Ala. 201, 205.

show cause against it, and the passing of the order was a conclusive adjudication that the executor owned it and that the legatee did not. Again: The executor claimed to own it, procured an order to sell it as executor, and sold it as such, and it did not lie in his mouth to say that he did not own it when called on to account for the proceeds, *unless by authority of the legatee*. If the legatee did not complain, as between the estate and the executor, it belonged to the estate.

§ 619. **Married woman—Coverture erroneously adjudicated not to exist.**—If a married woman pleads her coverture as a defense and is defeated, the adjudication is necessarily conclusive, collaterally, that she was not married. Thus, in a late English case, a married woman was sued as a *feme sole* and pleaded her coverture, but as she offered no evidence in support of the plea, a verdict and judgment went against her. She was arrested on a *ca. sa.* and applied for a release because she was *in fact* a married woman, but it was held that her application must be denied because the verdict and judgment found that she was not a married woman, which she could not dispute.<sup>1</sup> It was said in an early Pennsylvania case that “if a *feme covert* be sued as a *feme sole*, the sheriff shall take in execution, though she be a *feme covert*, and have another name, because she is estopped by the judgment until it is reversed;”<sup>2</sup> and in Maine, where a complaint described the defendant as a “single woman,” upon which judgment was rendered by default, and execution issued by virtue of which she was arrested, the judgment was held to be a protection to the plaintiff, although the statute prohibited the arrest of a married woman.<sup>3</sup> It was also decided in Indiana that a judgment by default against a married woman on a complaint falsely alleging that the mortgage described was given to secure purchase money, was not void.<sup>4</sup>

§ 620. **Married woman—Coverture not shown by the record.**—In a large majority of the cases where judgments have been assailed collaterally by married women because of their coverture, the record has been silent in regard to that fact. But a record which appears to be valid on its face can no more be shown to be

1. *Poole v. Canning*, 2 L. R. C. P. 241, 243; *Gambette v. Brock*, 41 Cal. (15 Atl. R. 596). 78, 87, is in accord.

2. *Lewis, J., in Warden v. Eichbaum*, 3 Grant's (Pa.) Cases 42, 45, citing 1 Rol. 869.

3. *Winchester v. Everett*, 80 Me. 535

4. *McCaffrey v. Corrigan*, 49 Ind. 175.

invalid by adding matters to it than by directly contradicting it. Thus, in Pennsylvania, a confession of judgment was made by a man to a woman. His creditors, in order to avoid it, sought to show that they were husband and wife. Their contention was that there was a legal unity between the husband and wife making them one person in law, and that, therefore, the same person, namely, the husband—was both plaintiff and defendant. In answer to this, the court said: "But the argument begs the question *by assuming the marriage*. *Non constat* by the record, that there is a marriage."<sup>1</sup> So in Maine, where there was an attempt to reverse a joint judgment against a man and woman, by a writ of error, upon the ground that they were husband and wife, the court said: "Nothing can be assigned for error *in fact*, which the party might have pleaded to the action, but neglected so to do."<sup>2</sup> That a judgment against a married woman upon an invalid cause of action, is not void for that reason, is held in Georgia,<sup>3</sup> Indiana,<sup>4</sup> Iowa,<sup>5</sup> Michigan,<sup>6</sup> Montana,<sup>7</sup> New York,<sup>8</sup> North Carolina,<sup>9</sup> Ohio,<sup>10</sup> South Carolina,<sup>11</sup> Tennessee<sup>12</sup> and Texas,<sup>13</sup> while the opposite is held in Kentucky,<sup>14</sup> Louisiana,<sup>15</sup> Maryland,<sup>16</sup> Massachusetts,<sup>17</sup> Missouri,<sup>18</sup> Pennsylvania<sup>19</sup> and West Virginia.<sup>20</sup> In an early case

1. Willams' Appeal, 47 Pa. St. 307, 312.

2. Weston v. Palmer, 51 Me. 73.

3. Mashburn v. Gouge, 61 Ga. 512; Wingfield v. Rhea, 73 Ga. 477.

4. McDaniel v. Carver, 40 Ind. 250; Wagner v. Ewing, 44 Ind. 441; Landers v. Douglas, 46 Ind. 522; Burk v. Hill, 55 Ind. 419, 422; Wright v. Wright, 97 Ind. 444.

5. Van Metre v. Wolf, 27 Iowa 341, 344.

6. Wilson v. Coolidge, 42 Mich. 112 (3 N. W. R. 285).

7. Vantilburg v. Black, 3 Mont. 459, 467.

8. Baldwin v. Kimmel, 24 N. Y. Super. (1 Rob't.) 109, 120; Roraback v. Stebbins, 33 How. Pr. (N. Y. Ct. of App.) 278 (4 Abb. App. Dec. 100, 104; 3 Keyes 62).

9. Green v. Branton, 1 Dev. Eq. 500, 504; Vick v. Pope, 81 N. C. 22, 27.

10. Lessee of Pillsbury v. Dugan, 9 O. 117, 120; McCurdy v. Baughman, 43 O. St. 78 (1 N. E. R. 93, 95).

11. Surtell v. Brailsford, 2 Bay. 333, 338; United States v. Gayle, 45 Fed. R. 107—court sitting in South Carolina.

12. Howell v. Hale, 73 Tenn. (5 Lea) 405, 410.

13. Howard v. North, 5 Tex. 290 (51 Am. D. 769).

14. Parsons v. Spencer, 83 Ky. 305, 312; Stevens v. Deering. — Ky. — (9 S. W. R. 292); Spencer v. Parsons, — Ky. — (13 S. W. R. 72).

15. Bowman v. Kaufman, 30 La. Ann. 1021, 1024.

16. Griffith v. Clark, 18 Md. 457, 463.

17. Morse v. Toppan, 3 Gray 411.

18. Weil v. Simmons, 66 Mo. 617; Holton v. Towner, 81 Mo. 360, 366; Coe v. Ritter, 86 Mo. 277, 283.

19. Brunner's Appeal, 47 Pa. St. 67; Schlosser's Appeal, 58 Pa. St. 493; Swayne v. Lyon, 67 Pa. St. 436, 441; Hugus v. Dithridge Glass Co., 96 Pa. St. 160.

20. Tavenner v. Barrett, 21 W. Va.

in Pennsylvania, a married woman gave a bond and warrant of attorney on which a judgment was entered, and this judgment was revived by *scire facias*, and the latter judgment was held void;<sup>1</sup> and a later case holds that a judgment entered on her bond and warrant of attorney, is void;<sup>2</sup> and the same ruling was made in Kentucky where her appearance was entered by virtue of a power of attorney.<sup>3</sup>

§ 621. **Married woman—Coverture shown by the record, but disregarded.**—Of course, all those courts which hold that a married woman or her privies may overturn a judgment collaterally when the record is silent concerning her coverture, would hold it void when the record shows the coverture. The supreme court of Pennsylvania has so ruled in respect to a confession on a cognovit.<sup>4</sup> In the later case cited, the court said that she could not interpose for redress or protection; that her will was in the keeping of her husband; that she could do no act for her relief for which the law would hold her responsible; that, in law, she speaks and acts through her husband, who has dominion over her acts and wishes, her rights and duties. It seems to me that the court sacrificed a substantial right for a matter that existed in imagination only. It may be doubted whether the married women in Pennsylvania are so absolutely under the control of their husbands as the language of the court would indicate. It seems that the particular one in question had actual freedom enough to get into debt and to execute a bond and cognovit to secure it. The same reasoning might be applied with nearly as much force to infants and with greater force to lunatics and infants not advanced to years of understanding, as they lack actual, as well as ideal, power to act. The supreme court of Indiana decided twice that a wrongful judgment against a married woman on a complaint which showed her coverture, was not void.<sup>5</sup> A case decided on the federal circuit was this: A married woman conveyed her undivided interest in certain land to one Scott, which conveyance was invalid because her husband did not join. Scott brought a suit

656, 692; *White v. Foote*, 29 W. Va. 385 (1 S. E. R. 572).

1. *Dorrance v. Scott*, 3 Wharton 309, 314 (31 Am. D. 509). This case is doubted in *Mellon v. Guthrie*, 51 Pa. St. 116.

2. *Christner v. Hochstetler*, 109 Pa. St. 27.

3. *Jenkins v. Crofton's Adm'r* — Ky. — (9 S. W. R. 406).

4. *Dorrance v. Scott*, 3 Wharton 309 (31 Am. D. 509); *Caldwell v. Walters*, 18 Pa. St. 79 (55 Am. D. 592).

5. *Hinsey v. Feeley*, 62 Ind. 85, 87; *Gall v. Fryberger*, 75 Ind. 98, 101.

in partition against all the co-tenants, making the husband and wife parties, claiming her share by virtue of her deed, which he filed with his bill, and the court awarded him her share and this was held valid, collaterally.<sup>1</sup> The petition in a proceeding in attachment in Missouri against non-residents showed that they were husband and wife and that they were indebted to the plaintiff for necessities furnished their children at their request. There was due publication and judgment and sale. This was held void, because she was not competent to employ an attorney.<sup>2</sup> But in Pennsylvania, it was held that a judgment rendered on a mortgage made by a married woman, which was invalid because not properly acknowledged, was not void;<sup>3</sup> and the same ruling was made in respect to a foreclosure of a void mechanics' lien,<sup>4</sup> and of a mortgage which was invalid because her husband did not join in its execution.<sup>5</sup> The reason given was that a foreclosure is a proceeding *in rem*, and not *in personam*. Another case in the same state lays it down as a rule, that any judgment against her is void except it be founded upon an agreement to pay for land made at the time she receives the deed.<sup>6</sup> Thus, a married woman gave a mortgage on a leasehold interest which she had power to do, and also upon any renewal of the lease, which she had no power to do; and a foreclosure upon a renewal was held to be void.<sup>7</sup> A decree erroneously barring her rights in land in Indiana was held valid, collaterally,<sup>8</sup> and the same ruling was made in Mississippi in respect to a judgment by default, at law, in favor of a married woman against her husband.<sup>9</sup>

**SURETYSHIP.**—The record of a foreclosure in Michigan showed that an infant married woman had mortgaged her land to secure her husband's debt, and that she was still an infant, for whom a guardian *ad litem* was appointed, but who failed to answer, and that no day was given her to show cause after she became of age. Upon the ground that her contract of suretyship was abso-

1. Beattie v. Wilkinson, 36 Fed. R. (93 Am. D. 679); Butterfield's Appeal, 646. 77 Pa. St. 197.

2. Higgins v. Peltzer, 49 Mo. 152, 157; accord, for same reason, Griffith v. Clarke, 18 Md. 457, 464.

3. Michaelis v. Branley, 109 Pa. St. 7.

4. Shryock v. Buckman, 121 Pa. St. 248 (15 Atl. R. 480).

5. Hartman v. Ogborn, 54 Pa. St. 120

6. Quinn's Appeal, 86 Pa. St. 447.

7. Dorris v. Erwin, 101 Pa. St. 239, 244.

8. Dill v. Vincent, 78 Ind. 321;

9. Simmons v. Thomas, 43 Miss. 31 (5 Am. R. 470).

lutely void, she was permitted to recover the land after she became of age.<sup>1</sup> But the supreme court of Louisiana decided that a decree foreclosing a chattel mortgage was not void because it was made by a married woman to secure a debt of her husband, although the contract of suretyship was void.<sup>2</sup> This case seems to me to be sound, and the case from Michigan unsound.

WILL.—Although a married woman had no power to make a will, yet it was held in Connecticut, Massachusetts, New Hampshire and Virginia that a probate of a will was not void because it was made by a married woman.<sup>3</sup>

§ 622. **Married woman—Disabilities removed.**—Where an Alabama statute authorized the chancellor, upon petition, “to relieve married women of the disabilities of coverture, as to their statutory and other separate estates, so far as to invest them with the right to buy, sell, hold, convey and mortgage real and personal property, and to sue and be sued as *femes sole*,” the relief granted in such a case was held to be void because the petition failed to allege that she had any estate, statutory or otherwise.<sup>4</sup> But where the petition alleged that she had a “separate estate,” the decree was not void because the separate estate was equitable. This was said to be a formal defect.<sup>5</sup> The first decision seems to me to be wrong. The statute did not say that she must then have a separate estate. Whether or not it should be so construed was a question for the chancellor.

§ 623. **Married woman—Liability of, not shown by the record.**—There have always been a few matters of contract, both at common law and by statute, for which a married woman was liable, and upon which a judgment could lawfully be rendered. Thus, to an action on a Mississippi judgment in Arkansas, it was held that a plea of coverture existing at the time the action was brought in Mississippi, was bad, because there were some contracts, namely, those made before marriage, for which the wife might be sued at common law, and the presumption was that the cause of action sued upon was one of that kind.<sup>6</sup> The statutes of Maryland and Mississippi authorized actions to be brought

1. Chandler v. McKinney, 6 Mich. 217.

2. Waddell v. Judson, 12 La. Ann. 13.

3. Judson v. Lake, 3 Day 318, 326; Parker v. Parker, 11 Cush. 519; Poplin v. Hawke, 8 N. H. 124, 126; Robinson v. Allen, 11 Gratt. 785, 787.

4. Cohen v. Wollner, 72 Ala. 233, 238.

5. Meyer v. Sulzbacher, 76 Ala. 120, 126.

6. Ellis v. Clarke, 16 Ark. 420.



against married women upon certain specified contracts, and in each state it was decided that the failure of the record of a justice of the peace to show that the contract upon which she was sued, was one of those specified by the statute, did not make the judgment void,<sup>1</sup> although several earlier cases in Mississippi were to the contrary,<sup>2</sup> and had been followed by the Supreme Court of the United States in administering Mississippi law in a case where there was a personal judgment, by default, upon pleadings which failed to show that she had a separate estate, and the judgment failed to order it sold.<sup>3</sup> It has been decided several times by the supreme court of Pennsylvania that such judgments are void;<sup>4</sup> but a later case makes an exception to or modifies the rule somewhat. The statute authorized a judgment against a married woman for necessities furnished for herself and family at her request, and for necessary improvements on her real estate. A justice's record showed that a judgment was rendered against her partly for necessities for herself and family furnished at her request, and partly for "the improvement of her separate estate"—being defective in failing to show what articles they were, or that they were "necessary" for such purpose; but these defects were held not to make the judgment void.<sup>5</sup> Under the general rule that a judgment is never void if by any possibility it might be valid, the cases from Pennsylvania and the earlier ones from Mississippi are wrong.

**MARRIED WOMAN AS PLAINTIFF.**—A judgment recovered by a married woman, in her own name, when the statute required her to sue by next friend, is not void.<sup>6</sup>

§ 624. **Minister of the gospel.**—A statute of New York exempted ministers of the gospel from taxation, but the property of one was assessed and he was compelled to pay. He then sued the assessors, but it was decided that he could not recover because they had judicially determined that he was not a minister of the gospel.<sup>7</sup>

**ORPHAN.**—Where a Mississippi statute authorized a guardian

1. *Ahern v. Fink*, 64 Md. 161; *Taggart v. Muse*, 60 Miss. 870.

2. *Cary v. Dixon*, 51 Miss. 593; *Griffin v. Ragan*, 52 Miss. 78; *Magruder v. Buck*, 56 Miss. 314.

3. *Bank v. Partee*, 99 U. S. 325.

4. *Hecker v. Haak*, 88 Pa. St. 238;

*Gould v. McFall*, 111 Pa. St. 66 (2 Atl. R. 403).

5. *Fenstermacher v. Xander*, 116 Pa. St. 41 (10 Atl. R. 128).

6. *Powles v. Jordan*, 62 Md. 499, 503.

7. *Vail v. Owen*, 19 Barb. 22, 29, *overruling Prosser v. Secor*, 5 Barb. 607.

to be appointed for "orphans," an appointment for infants whose father was living, and who were, not, therefore, "orphans," was held void.<sup>1</sup> But that defense ought to have been made in bar of the appointment.

§ 625. **Owner or occupant of land.**—The county court in Kentucky, an inferior court, had authority to grant a ferry license to a person owning land at the terminus of the ferry, on his *ex parte* application. An order was made in such a case granting a license, and reciting that the grantee was the owner of the land at the terminus. This was held to be a decree *in rem* from which any person might have a writ of error, and that it could not be shown on an application by another person for a license, that the grantee did not own the land at the terminus.<sup>2</sup> The North Carolina statute authorized an attachment against an absconding debtor, and in case his property was attached, it authorized a personal judgment for the debt. In such a case, the return was that property of defendant's was attached, and a personal judgment was rendered on constructive service, on which execution was issued and land sold. In ejectment for this land, the defendant in possession, a third person, contended that there was no jurisdiction to render the original judgment, because the property attached did not belong to the attachment defendant; but his contention was denied because it contradicted the record.<sup>3</sup>

In an old English case, a person was liable to be personally assessed with a poor rate for lands occupied by him. He was assessed for lands not occupied by him, and his goods were seized, and he brought replevin, and it was held he could recover because the assessment was outside of the jurisdiction of the assessors.<sup>4</sup> I think this case wrong. The congress of the United States organized a "Board of Land Commissioners" to adjudicate upon Mexican land grants. The action of the board in confirming a grant necessarily decided that the alleged grantee was the real grantee and competent to take, and its decision cannot be disputed collaterally.<sup>5</sup> See section 534, *supra*.

1. Earle v. Crum, 42 Miss. 165.

2. Churchill v. Grundy, 5 Dana 99;  
Everston v. Sanders, 6 J. J. Marsh.  
142.

3. Skinner v. Moore, 2 Dev. & Bat.

L. 138, 151 (30 Am. D. 155)—Ruffin,  
C. J.

4. Milward v. Caffin, 2 W. Bl. 1330.

5. Semple v. Hagar, 27 Cal. 163;

Bernal v. Lynch, 36 Cal. 135, 143;  
Beard v. Federy, 3 Wall. 478.

**OWNER OF PERSONALTY.**—A resident of New Jersey was in the actual possession of goods in New York as the agent of the New Jersey owners, and the goods were assessed to him personally as the owner. This was held to be erroneous but not void.<sup>1</sup> The laying of the assessment was a judicial act which settled the fact against the world, so far as the assessment was concerned, that he was the owner of those goods and liable to pay the taxes.

**§ 626. Ownership of cause of action, or plaintiff or petitioner, improper.**—Conceding that a cause of action exists or may exist against the defendant in favor of some person, it does not seem possible that the proceedings can be void because the plaintiff or petitioner is not that person. The court having the power to grant the relief sought, and the defendant being before it and owing that relief to some person, the sole and only point in controversy is whether or not he owes it to the plaintiff. That is a question which the court is competent to decide; and an erroneous conclusion will not be void. But the cases differ.

**LEGAL OWNER OF CAUSE OF ACTION.**—A judgment is not void because the cause of action sued upon was assigned to the plaintiff when it was not assignable by law.<sup>2</sup> One partner assigned his interest in a claim to the others, and they sued in their own names, at law, and recovered a judgment in proceedings by attachment after service by publication. The defect was held to be matter in abatement and not to make the judgment void.<sup>3</sup> A justice's judgment in favor of a person who did not own the note sued upon,<sup>4</sup> or a judgment in favor of a married woman upon a claim owned by her husband,<sup>5</sup> or a foreign judgment in favor of a woman upon a claim owned by the estate of her deceased husband,<sup>6</sup> is not void for that reason. So, an order of the probate court to sue an executor on his bond, is not void because the citation to settle was issued by one having no interest. The executor ought to have defended the motion, and cannot use that fact as a defense to the suit on the bond.<sup>7</sup> Two cases in Arkansas hold that a judgment before a justice on a note filed

1. *Matter of McLean v. Jephson*, 48 N. Y. Supr. (41 Hun) 479.      had assigned the claim before suit brought.

2. *Richtmeyer v. Remsen*, 38 N. Y. 206.      5. *Fisher v. Williams*, 56 Vt. 586.

3. *Hernandez v. Drake*, 81 Ill. 34, 38.      6. *Henderson v. Henderson*, 6 Ad. & El. N. S. (Q. B.) (51 E. C. L.) 288,

4. *Reid v. Spoon*, 66 N. C. 415; 298.

*Aderhold v. Bluthenthal*, — Ala. —      7. *Judge of Probate v. Mathes*, 60 N. (10 S. R. 230)—where the plaintiff H. 433.

as a cause of action, as permitted by statute, is void where the record fails to show that the plaintiff was the owner of the note.<sup>1</sup> But the implied allegation was that the plaintiff was the owner, and certainly the justice was competent to decide that question.

§ 627. **Section 626 continued—Official plaintiff, wrong—Bastardy proceedings.**—A statute of New York authorized the overseers of the poor of any town where a woman delivered of a bastard child “shall be,” to apply to a justice of the peace of the county to make inquiry into the facts, etc. In such a case, where the woman was in the town of M, the overseers of the town of P, in the same county, made application to a justice of the town of M, who examined her and issued a warrant for the arrest of the putative father. These proceedings were held void because conducted by the overseers of the wrong town.<sup>2</sup>

**CRIMINAL PROCEEDINGS.**—A conviction in Florida for a violation of a pilotage statute in the name of the commissioners of pilotage instead of in the name of the state, was decided to be void.<sup>3</sup>

**OVERSEER OF HIGHWAYS.**—A person assuming to be an overseer of highways in New York, complained of another for neglect of duty, and after due service, a fine was entered and goods seized. For this, the defendant was allowed to recover in trespass upon showing that the complainant was not, in fact, an overseer of highways.<sup>4</sup> No very cogent reason was given why he was not bound to defend the first action, nor why he should have two days in court.

**TAX PROCEEDINGS.**—A judgment for taxes before a justice of the peace in Michigan in favor of a wrong official plaintiff,<sup>5</sup> or in favor of the selectmen of a town in Vermont, instead of the town itself,<sup>6</sup> is not void.

§ 628. **Section 626 continued—Partition plaintiff, wrong.**—The New York statutes authorized partition of land to be made upon the petition of “a joint tenant or tenant in common,” but a decree in such a case made on the petition of one who was neither a joint tenant nor tenant in common,<sup>7</sup> or who had a vested future estate

1. *Levy v. Shurman*, 6 Ark. (1 Eng.) 182 (42 Am. D. 690); *Latham v. Jones*, id. 371.

2. *Sprague v. Eccleston*, 1 Lans. 74.

3. *Ex parte Nightingale*, 12 Fla. 272.

4. *Walker v. Mosely*, 5 Denio 102.

5. *Somers v. Losey*, 48 Mich. 294 (12 N. W. R. 188).

6. *Allen v. Huntington*, 2 Aiken 249 (16 Am. D. 702).

7. *Reed v. Reed*, 107 N. Y. 545 (14

only with no present right to possession,<sup>1</sup> or by a tenant by curtesy,<sup>2</sup> is simply erroneous and not void. The same ruling was made in Massachusetts in respect to an unauthorized partition by a life tenant against the remainderman.<sup>3</sup>

§ 629. Section 626 continued—**Petitioners in special proceedings, improper or too few in fact.**—An order re-locating a county seat made on a petition fair on its face but not in fact signed by the requisite number of voters;<sup>4</sup> or an order refusing to re-locate because the petition was not signed by the required number of qualified persons, when in fact it was so signed;<sup>5</sup> or an order incorporating a town,<sup>6</sup> or establishing a ditch,<sup>7</sup> or a gravel road,<sup>8</sup> or discharging an insolvent from his debts,<sup>9</sup> or granting a license to keep a dramshop,<sup>10</sup> or to issue bonds,<sup>11</sup> or levy an assessment in aid of a railroad,<sup>12</sup> or for the improvement of a street,<sup>13</sup> erroneous because the petition was not signed by the proper number of persons possessing the statutory qualifications, is not void for that reason. So, a court of equity cannot restrain a judgment at law because of an erroneous decision that a majority of taxpayers had signed a petition.<sup>14</sup> Many of these orders were made, not by courts, but by boards and municipal councils exercising judicial powers.

N. E. R. 442; 12 N. Y. St. Rep'r 481)—*affirming* 53 N. Y. Supr. (46 Hun) 212, 214 (11 N. Y. St. Rep'r 524).

1. *Blakeley v. Calder*, 15 N. Y. 617, 621.

2. *Cromwell v. Hull*, 97 N. Y. 209.

3. *Pierce v. Prescott*, 128 Mass. 140, 142.

4. *Board of Commissioners v. Markle*, 46 Ind. 96, 109.

5. *State v. Nelson*, 21 Neb. 572 (32 N. W. R. 589).

6. *State ex rel. Read v. Weatherby*, 45 Mo. 17, 19.

7. *Hume v. Little Flat Rock Draining Association*, 72 Ind. 499.

8. *State ex rel. Waggoner v. Needham*, 32 Ind. 325; *Rhodes v. Piper*, 40 Ind. 369, 373; *Stoddard v. Johnson*, 75 Ind. 20, 31; *Million v. Board of Commissioners*, 89 Ind. 5, 12; *Robinson v. Rippey*, 111 Ind. 112 (12 N. E. R. 141); *Strieb v. Cox*, 111 Ind. 299 (12 N. E. R. 481); *Ely v. Board of Com-*

*missioners*, 112 Ind. 361 (14 N. E. R. 236); *Hobbs v. Board of Commissioners*, 116 Ind. 376, 380 (19 N. E. R. 186).

9. *Cobbossee National Bank v. Rich*, 81 Me. 164 (16 Atl. R. 506, 510); *Betts v. Bagley*, 12 Pick. 572.

10. *State v. Evans*, 83 Mo. 319.

11. *Evansville, etc., R. R. Co. v. City of Evansville*, 15 Ind. 395, 421; *Calhoun v. Delhi and M. R. R. Co.*, 64 How. Pr. 291, 295; *Town of Cherry Creek v. Becker*, 123 N. Y. 161 (25 N. E. R. 369); *Commissioners of Knox County v. Aspinwall*, 21 How. 539.

12. *Goddard v. Stockman*, 74 Ind. 400, 407.

13. *City of Camden v. Mulford*, 26 N. J. L. 49, 59; *Martin v. Carron*, 26 N. J. L. 228, 231; *McEnery v. Town of Sullivan*, 125 Ind. 407 (25 N. E. R. 540).

14. *Ayres v. Lawrence*, 63 Barb. 454, 456.

CASES CONTRARY.—A California statute organized a “Board of Public Works” to make street improvements upon petitions signed by the majority of the owners in frontage of the property to be charged. A street improvement was ordered and made upon a petition purporting to be properly signed, and for failure to pay the assessment made on a parcel of land, it was sold and a deed made. The former owner brought ejectment and was allowed to recover upon showing that the petition was not properly signed;<sup>1</sup> and it is held in Kansas,<sup>2</sup> New York,<sup>3</sup> Ohio<sup>4</sup> and Wisconsin,<sup>5</sup> that an order establishing a highway can be overturned collaterally by the same evidence. So, a discharge granted to an insolvent in New York was said to be void if not, in fact, requested by the requisite number of creditors;<sup>6</sup> and in the same state, the action of the county judge in ordering bonds to be issued in aid of a railway was held void upon proof that the petitioners did not constitute the required number of the property owners.<sup>7</sup> An amended statute of New York made it the duty of the county judge on presentation of a petition for the issue of town bonds in aid of a railroad, “to take proof of the facts set forth in said petition, as to the number of taxpayers joining in said petition, and as to the amount of taxable property represented by them;” and it further provided that if it should “appear satisfactorily to him” that the petitioners represented a majority in number and amount, he should so “adjudge and determine and cause the same to be entered of record,” which should “have the same force and effect as other judgments and records in courts of record.” Under this statute, it was decided that an error of fact did not make the judgment void.<sup>8</sup> The court assumed that the statute added something to the power and duty of the judge, but that was a mistake. It was the sworn duty of the judge to grant or refuse the relief sought as the evidence might warrant, and his decision was necessarily conclusive.

1. Mulligan v. Smith, 59 Cal. 206.

2. Hovey v. Barker, — Kan. — (26 Pac. R. 591, 593). In this case the court declined to follow “numerous cases decided by the supreme court of the state of Indiana,” as well as the case of Quinlan v. Meyers, 29 O. St. 500.

3. People v. Com’rs of Highways, 27 Barb. 94.

4. Anderson v. Commissioners, 12 O. St. 635, 644.

5. Williams v. Holmes, 2 Wis. 129.

6. *Dictum* in Salters v. Tobias, 3 Paige 338, 343.

7. Town of Duanesburgh v. Jenkins, 40 Barb. 574.

8. Calhoun v. Delhi and M. R. R. Co., 64 How. Pr. 291, 295.

§ 630. Section 626 continued—Petitioners in special proceedings, improper or too few as shown by the record.—A Kansas statute required a petition to the board of county commissioners for an order to confine horses in the night time to have an affidavit attached “that the several petitioners are qualified electors of the township and themselves subscribed the same personally.” The affidavit to such a petition alleged that affiant “presented the within petition to the legal voters of Mission township, Shawnee county, Kansas, and that each of them who signed the same are legal voters and electors, and subscribed the same personally.” An order made thereon was decided to be void, because the affidavit failed to aver that they were qualified electors of Mission township.<sup>1</sup> An order to open a highway was held void in the same court because the petition failed to show that the signers were freeholders;<sup>2</sup> and the same ruling was made in New York where a petition to the county court requesting the issue of bonds in aid of a railroad failed to aver as required by statute that the petitioners were a majority of the taxpayers, exclusive of those taxed solely for dogs or highways.<sup>3</sup> In another case depending on the same statute, the bonds issued were held to be void in the hands of innocent holders because fifty of the two hundred petitioners signed upon the condition that the road should be located on a route named. The town was allowed to show that those who signed unconditionally did not constitute the majority of the taxpayers.<sup>4</sup> This decision made by four judges against three, seems to me to be indefensible on two grounds, namely: The statute was silent in respect to whether or not the petitioners might sign upon a condition, and when the petition was presented to the county judge, a question of law was raised concerning the proper construction of the statute which he was compelled to decide, and therefore, competent to do so; and if the town was not satisfied with his decision, it ought to have appealed. Again: As he had jurisdiction over both subject-matter and person, the presumption was conclusive, collaterally, that he found that the unconditional signers constituted a majority. That was a

1. *Kungle v. Fasnacht*, 29 Kan. 559.      *lowing Town of Mentz v. Cook*, 108

2. *Oliphant v. Atchison Co.*, 18 Kan. 386, 398.      N. Y. 504, 509 (15 N. E. R. 541);  
*accord*, *Town of Wellsboro v. New*

3. *Wilson v. Town of Caneadea*, 22 N. Y. Supr. (15 Hun) 218; *accord*,      *York, etc., R. R. Co.*, 76 N. Y. 182.

*Rich v. Mentz*, 134 U. S. 632, 644, con-      4. *Craig v. Town of Andes*, 93 N. Y. 505, 409.  
struing the New York statute, and fol-



mere matter of evidence. The Massachusetts statute provided that a discharge should not be granted an insolvent whose assets did not pay fifty *per centum* of the claims proved, unless a majority in number and value of his creditors who had proved their claims assented in writing. A discharge granted without the assent of the requisite number, was held void.<sup>1</sup> That fact would appear from the record, hence the discharge was granted by a mistake of law. So, where a Kansas statute required a petition for the location of a highway to be signed by "twelve freeholders of the county," a location made upon a petition of a township signed by its attorney, was held void.<sup>2</sup> Opposed to these decisions, is a case in Indiana which holds that an order establishing a ditch is not void because the petition failed to show that it was signed by the proper persons.<sup>3</sup> It seems to me that this case is sound and all the others unsound. The petition, although defective, is sufficient to set the judicial mind in motion, and the adverse parties are before the court and ought to make defense. Where the New York statute authorized the appointment of a receiver on the petition of a creditor, an appointment made on a petition by an attorney of a creditor was decided to be valid collaterally.<sup>4</sup>

§ 631. **Partitioners—Errors concerning.**—Errors of fact in stating the interests of the co-tenants do not make the order of sale void,<sup>5</sup> nor does including in the decree a parcel of land to which the tenants had no title render it void in respect to that which they did own;<sup>6</sup> and where the statute of Pennsylvania authorized lands of a decedent to be assigned to a child on a valuation, an assignment to the widow is simply erroneous and not void.<sup>7</sup> The Alabama statute required the petition for a partition to state the interest of each person, but a decree in such a case was decided not to be void because the petition alleged that one person owned the undivided half and two others the other undivided half, without saying that each owned a fourth.<sup>8</sup> But,

1. *Kelman v. Sheen*, 11 Allen 566.

2. *Shaffer v. Weech*, 34 Kan. 595, 602.

3. *Argo v. Barthand*, 80 Ind. 63.

4. *Bangs v. Duckinfield*, 18 N. Y. 592.

5. *Noble v. Cromwell*, 27 How. Pr. 289.

6. *Austin v. Charlestown*, 8 Metc. 196, 205 (41 Am. D. 497).

7. *Painter v. Henderson*, 7 Pa. St. 48, *overruling* *Messinger v. Kintner*, 4 Binney 97; *Foglesong v. Somerville*, 6 Serg. & Rawle 267; *Stoolfoos v. Jenkins*, 8 id. 167, 175.

8. *Whitlow v. Echols*, 78 Ala. 206, 208.

contrary to these cases, and wrong on principle, as it seems to me, is an early case in New York, where a decree in partition was held void because the plaintiff, as shown in his petition, had no interest in one of the tracts of land, although it was properly divided among the defendants who did own it.<sup>1</sup>

§ 632. **Poor persons.**—The county court in Tennessee had power to levy, collect and appropriate money for the support of “poor persons.” It was held that it could not be shown collaterally, in order to avoid the order, that the beneficiaries were not poor persons.<sup>2</sup>

§ 633. **Privies in contract—Errors concerning.**—A judgment is not void because the complaint shows a want of privity of contract between the plaintiff and defendant. A laborer brought a suit before a justice in Michigan against his employer who was the contractor for the erection of a building, and against the owner of the building, and recovered a judgment against both, on which land of the owner of the building was sold. The pleadings showed that there was no privity of contract between the plaintiff and the owner of the building, but the judgment was not void and the sale of the land was good, in ejectment.<sup>3</sup> The circuit court of Missouri had complete law and equity jurisdiction. An early statute, made before the courts of law and equity were merged, provided for foreclosing mortgages by petition at law, and allowed all persons interested to be made parties in order to foreclose and bar their rights. This petition was, in form and style, a declaration at law, and not a bill in equity. After the courts were merged under the code, the two species of practice were kept up, and mortgages were foreclosed by petition at law or by bill in equity. Such being the practice, a petition was filed in the circuit court to foreclose a mortgage against the mortgagor and his vendee, alleging that the vendee had assumed and agreed to pay the mortgage debt, and praying for a foreclosure against both, and for a personal judgment over against both for any deficiency. This was a petition at law and not a bill in equity. The statute, in such cases, authorized the court to render a personal judgment against the *mortgagor*, but made no provision for such a judgment against his vendee, even though he had assumed the debt. After due personal service, the court rendered

1. Jackson v. Myers, 14 Johns. 354.

3. Smith v. Pearce, 52 Mich. 370 (18

2. King v. Sullivan County, 67 Tenn. N. W. R. 111).

(8 Baxter) 329, 331.

a personal judgment against the vendee for any deficiency, which was reversed on error,<sup>1</sup> because the vendee was not a mortgagor. In the meantime, an execution had been issued on the personal judgment against the vendee and real estate sold to an innocent person. After the reversal, the vendee brought ejectment against the purchaser, and it was held that the personal judgment was unwarranted by the statute and void, and that he could recover. It was admitted that if the petition had been a bill in equity, the vendee could have been made liable for the deficiency, but held that at common law he would not have been liable at all for want of privity of the creditor with the contract between the debtor and vendee, and that the statute only having made the *mortgagor* liable in that special proceeding, the judgment against the vendee was void for want of jurisdiction over the subject-matter.<sup>2</sup> This decision seems wrong on the most elementary of principles. The court had jurisdiction to render a personal judgment for that amount of damages, but it erred in holding that a good cause of action was shown against one of the defendants. It is true the statute, strictly construed, did not warrant the judgment against the vendee, nor does it warrant a judgment against an infant or a lunatic; but such judgments are not void. If the mortgagee had sued the vendee at law on the note, alleging the assumption of payment, the declaration would have been demurrable for want of privity, but a judgment thereon would not have been void—unless the supreme court of Missouri was right in this case.

§ 634. **Residence in attachment and garnishment proceedings.**—A North Carolina statute gave the county court jurisdiction in attachment proceedings to be exercised against defendants absconding from the county where the court was held. In a case where the validity of such a proceeding was assailed collaterally, upon the ground that the defendant resided in another county and absconded from there, the court said: "As we conceive, the jurisdiction of suits by attachment is not specially delegated to a particular court in a particular case, and in that only; but that that process is given, instead of the *capias*, to all courts to enable them to exercise their jurisdiction over the subjects-matter gen-

1. *Mason v. Barnard*, 36 Mo. 384.

2. *Fithian v. Monks*, 43 Mo. 502, 520. Since writing this section this case was overruled in *Hagerman v. Sutton*, 91 Mo. 519, 530—the court saying that it

fails to make the readily observable distinction between jurisdiction to act in a given cause and the erroneous exercise of such jurisdiction.

erally which are within their jurisdiction. The subject of this suit is a debt, and is within the jurisdiction of the county courts. . . . Its efficacy cannot be impugned by the allegation that another court had concurrent jurisdiction of the subject-matter, and that the defendant had a right to have the cause tried in such other court. That is not an objection of the total want of jurisdiction, which every court must take notice of, because that renders any adjudication null; but it is an objection to the exercise of the jurisdiction between the particular parties, upon the ground of a provision in the law *for their convenience*, and is, therefore, to be brought to the notice of the court by putting the fact on the record by plea. The distinction is between the entire want of jurisdiction, which no consent of the parties can confer, and a general jurisdiction, except' in particular cases, or between particular persons, in which the exception must appear upon objection made. . . . Such a provision is therefore merely for the ease of the party; and, consequently, must be availed of either in the progress of the cause, or, perhaps, in some cases, by way of reversal, and not by averment of the excess of jurisdiction. . . . It is said, however, that in this respect attachments differ from other suits; because the defendant is not served with process, and may not appear, and when he does not appear, cannot be considered as waiving anything. The argument may be properly urged for reversing a judgment in attachment for errors the party is deemed to have waived by appearing and pleading in bar, or to be cured by having a verdict found against him. . . . The act goes on the idea that seizing property and advertisement would give notice, and therefore they are made to constitute notice. Consequently, if the party will not or does not appear, it is treated as his default." <sup>1</sup> In other words, it is always either alleged or assumed that the residence of the party is such as to entitle him to sue or to subject him to be sued in that particular court. The adverse party has an opportunity to contradict that allegation or assumption, and for that reason an adjudication sustaining the proceeding necessarily establishes its truth.

The opinion from which this quotation was taken was delivered by Mr. Chief Justice Ruffin, one of the very ablest jurists who ever graced an American bench. He was a member of the supreme court of North Carolina from 1829 to 1852, and during

1. *Skinner v. Moore*, 2 Dev. & Bat. L. 138, 146 (30 Am. D. 155).

these twenty-three years his terse, lucid and masterly opinions adorn the pages of Devereux, Devereux and Battle, and Iredell. There are no opinions of any judge, English or American, that I have taken more delight in reading than his. It is to be regretted that he did not sit on the supreme bench of the Nation, where the light of his genius could have shown over a broader field. In accord with this, is an English case. The mayor's court of London had no jurisdiction in proceedings in attachment and garnishment where the cause of action arose out of the city. It was held that a judgment, by default, against the defendant on constructive notice of four returns of *nihil*, and a judgment against his debtor as garnishee, was not void because the cause of action arose outside of the city, and that it would protect the garnishee.<sup>1</sup> An Indiana statute required actions in attachment against residents to be brought in the township of their residence, but authorized service by publication in case of failure to serve the summons personally. Such a proceeding was begun in one township against a resident of another, property seized, and service duly made by publication. This was held void because in the wrong township.<sup>2</sup> A *dictum* on page 402 says that if the service had been personal, the judgment would not have been void. An affidavit in attachment in Iowa alleged, in the exact language of the statute, that the defendant "has absconded so that ordinary process cannot be served upon him in this state," and service was made by publication and judgment rendered by default. This judgment was decided to be void upon evidence showing that he left his family on his farm so that service could have been made by copy of summons.<sup>3</sup> So, in Kentucky, where the statute authorized writs of attachment to issue in the county where the defendant last resided, an attachment issued from another county was held void and the judgment no protection to a garnishee.<sup>4</sup> But it was held in New York, that an attachment issued against a person as an absconding debtor, was not void because he had not in fact, absconded.<sup>5</sup>

**§ 635. Residence in bankruptcy, insolvency and capias proceedings.**—The statute of the United States required a bankrupt's peti-

1. *Westoby v. Day*, 2 El. & Bl. 605, 620 (75 E. C. L. 603, 619).

2. *Wilkinson v. Moore*, 79 Ind. 397, 401.

3. *Fuller v. Riggs*, 66 Iowa 328 (23 N. W. R. 730).

4. *Robertson v. Roberts*, 1 A. K. Marsh. 247, 249.

5. *Conklin v. Dutcher*, 5 How. Pr. 386; *Bank of Lansingburgh v. McKie*, 7 How. Pr. 360, 364; *Niles v. Vanderzee*, 14 How. Pr. 547, 549.

tion to be filed in the court of the district where the petitioner resided or carried on business for six months immediately previous. In an early case in the federal circuit court, it was held that the non-residence of a petitioner in the district where the court sat could not be shown to avoid his discharge collaterally.<sup>1</sup> The same rule was declared by the supreme court of New York,<sup>2</sup> but that case was reversed by the court of appeals, which held that the question of residence could be made an issuable fact in a state court,<sup>3</sup> with which I cannot agree. The bankrupt law of New Brunswick applied to residents of the province only; and a discharge there granted to a person actually present was held to be void in Maine upon evidence showing that he then was, in fact, a citizen of that state.<sup>4</sup> It did not seem to occur to anyone that a New Brunswick court was just as competent to decide that question of fact as a Maine court. The Maryland statute required an insolvent's petition to be filed in the county of his residence. But where it was filed in another county, the appointment of an assignee there was not void.<sup>5</sup>

**CAPIAS PROCEEDINGS.**—A New York statute authorized a *capias* to issue against a person who had not been a resident for one month previously, and an arrest in such a case on a proper affidavit was held void on proof that it was false in fact.<sup>6</sup> So, where a person was arrested as a non-resident under the statute of Vermont, and pleaded his residence in abatement, which was decided against him by the justice after a hearing on the merits, he was permitted to recover against the plaintiff and the justice in an action for false imprisonment by proving that he was, in fact, a resident.<sup>7</sup> This case is inconsistent with a later one in the same court, cited in section 652, *infra*, and is wrong on principle, as it gave the defendant two days in court where he was entitled to but one.

**§ 636. Residence in criminal proceedings.** — A statute of the Sandwich or Hawaiian Islands gave police courts jurisdiction to try persons for crimes committed in another district in cases only where the accused resided in the district where the court was

1. Lathrop v. Stewart, 6 McLean 630.

2. Poillon v. Lawrence, 43 N. Y. Superior (11 Jones & Spencer) 385.

3. Poillon v. Lawrence, 77 N. Y. 207, 218.

4. Long v. Hammond, 40 Me. 204.

5. Powles v. Dilley, 9 Gill 222, 241.

6. Bracket v. Eastman, 17 Wend. 32.

7. Wright v. Hazen, 24 Vt. 143.

held, or was there arrested. Where a person was arrested in a district where he resided for a crime there committed, and wrongfully carried before a police court of another district, and there convicted, the conviction was held not void and a discharge on *habeas corpus* was refused.<sup>1</sup> A person was fined and committed by a justice of the peace in Nevada for refusing to pay a city license to carry on business at a named place. On *habeas corpus*, it was held that he could not show that the place where he carried on his business was outside of the city limits, and thus avoid the sentence.<sup>2</sup> Opposed to these cases, and wrong it seems to me, is an early case in Massachusetts. The statute provided that, for a named offense, the defendant might be prosecuted before a justice of the peace of the county where he lived, and a prosecution and conviction in a different county was held to be void.<sup>3</sup>

§ 637. **Residence of decedent or ward—Principle involved.**—The statutes concerning the appointment of administrators and executors almost universally require it to be made in the county where the decedent resided or left assets at the time of his death, or in the case of guardianships, in the county where the ward resides or has assets at the time of the appointment. Whether or not a mistake of fact in making the appointment in the wrong county makes it void, is a vexed question about which much difference of opinion exists. The whole trouble arises, in my opinion, from confounding the doctrine of *res judicata* with that of collateral attack, as explained in section 17, *supra*. When the petition for the appointment is filed, if all persons adversely interested appear and contest the question of residence and are defeated on the merits, no one would claim that they could contest it over again in another action; but the law gives them the opportunity to make that contest in the probate court, either by resisting the making of the appointment or by moving to cancel it when they learn of it. If they will not improve the opportunity thus offered, the judgment necessarily concludes the question. They are entitled to one day in court, not two. That such an appointment is not void, has been held in Alabama, California, Colorado, Connecticut, Georgia, Illinois, Indiana, Louisi-

1. *In re Kamaha*, 2 Hawaiian 444, 449.

2. *Ex parte Edgington*, 10 Nev. 215, 217.

3. *Pearce v. Atwood*, 13 Mass. 324, 342.



ana, Maine, Maryland, Massachusetts, Missouri, New York, North Carolina, Oregon, Rhode Island, Texas, Vermont and Virginia, and by several circuit courts of the United States; while the contrary has been held in Connecticut, Georgia, Kentucky, Louisiana, Massachusetts, Mississippi, Missouri, New York, North Carolina, Texas and Wisconsin, and by the Supreme Court of the United States and in England. The question being in such confusion, I feel justified in dealing with it by states, and somewhat elaborately.

§ 638. **Residence of decedent or ward in Alabama, California and Colorado.**—The appointment of an administrator in Alabama having been attacked collaterally because not made in the county where the decedent resided, the court said: “The order here discloses upon its face no defect of jurisdiction; but it is contended that the want of jurisdiction may always be shown by testimony extrinsic of the record, and that the order is thus demonstrated to be void. This may be true when the question is as to the jurisdiction over the subject-matter, which is bestowed by the law, and cannot be conferred by consent. But such is not the question here. The constitution gives a general jurisdiction to grant administration. This is the source of the jurisdiction over the subject. The statute distributes the cases arising under that grant among the different courts of the state according to locality. The locality of the court, therefore, concerns jurisdiction of the case, which is distinguishable from jurisdiction over the subject-matter. The court, having jurisdiction over a certain class of cases, its error in adjudging some particular case to belong to that class, which properly pertains to a court of the same authority in another locality, does not make the judgment void, but simply voidable by a direct proceeding for that purpose.”<sup>1</sup>

CALIFORNIA—ADMINISTRATION IN WRONG COUNTY.—The supreme court of California held that the appointment of an administrator was not void because not made in the county where the decedent resided, saying: “It is scarcely disputable that a judgment of the district court could not be collaterally impeached by showing that the party really was not in the county or served with process; or that a judgment of the United States district court could be assailed, collaterally, by proof that the plaintiff was not really a resident of a different state from that of the

<sup>1</sup> *Coltart v. Allen*, 40 Ala. 155; *accord*, *Barclift v. Freece*, 77 Ala. 528, 531.

suit.”<sup>1</sup> This case was adhered to in a later one, the court saying that the residence of the decedent was a question that the probate court had to determine from the evidence.<sup>2</sup>

COLORADO.—Where the probate of a will was collaterally assailed in Colorado on account of the residence of the testator, the court said that that was a question to be decided upon the evidence, and that an error therein could only be corrected in some direct proceeding.<sup>3</sup>

§ 639. **Residence of decedent or ward in Connecticut and Georgia.**—The statute of Connecticut authorized the probate court to appoint a conservator for an insane person in the district where he resided. A citizen of Connecticut had been residing for three months in New York, when a conservator was appointed for him, and this was held to be void.<sup>4</sup> So, letters of administration granted in one county when the decedent resided in another were held void, the court saying: “But the judgment of a court of limited jurisdiction is never conclusive of a jurisdictional question. Its jurisdiction may always be controverted.”<sup>5</sup> Likewise, where the probate court of one county had granted letters testamentary, it was decided to be permissible to prove the will and have letters issued in another county on parol evidence that the testator there resided. The court said: “If the want of jurisdiction in fact exists, the judgment is an absolute nullity. There is no disagreement in the cases at home or abroad on this subject.”<sup>6</sup> Evidently that distinguished court was possessed of a very limited information concerning the cases “abroad.” In a later case that court decided that a judgment of a court of general jurisdiction in New York deciding that a person died domiciled in that state was conclusive as to that question on all parties to the cause.<sup>7</sup> This case shows that, in the other cases, the court confused the doctrines of *res judicata* and collateral attack, holding the judgment conclusive where there was a contest and not conclusive where there was none.

1. Irwin v. Scriber, 18 Cal. 499—*overruling* Beckett v. Selover, 7 Cal. 215, 241 (68 Am. D. 237).

2. Griffith, Estate of, 84 Cal. 107 (23 Pac. R. 528 and 24 id. 381).

3. Corrigan v. Jones, 14 Colo. 311 (23 Pac. R. 913).

4. Sears v. Terry, 26 Conn. 273, 340, 281.

5. First National Bank v. Balcom, 35 Conn. 351, 359; *accord*, Olmstead's Appeal, 43 Conn. 110, 118—Carpenter, J., *dissenting*.

6. Culver's Appeal, 48 Conn. 165.

7. Willett's Appeal, 50 Conn. 330.

GEORGIA.—A person owning land lying in two counties and residing near the line, died, and an administrator was appointed for him in one county and sold land, for which the heirs brought ejectment and were permitted to recover upon showing that by a careful survey, the decedent resided in the other county;<sup>1</sup> but this case was afterwards overruled.<sup>2</sup> The court also held that the appointment of a guardian in Alabama for infants residing in Georgia, was void.<sup>3</sup> A woman died in Georgia, but it was a question whether her domicile was in Georgia or Alabama. Her will was propounded for probate by the executor in Alabama, and all the heirs resisted on the ground that her domicile was in Georgia, but the decision was adverse to them and the will was there probated. Pending these proceedings in Alabama, at the instigation of the heirs, a stranger took out general letters of administration in Georgia. After the probating in Alabama, the executor applied to the Georgia court to revoke the letters of administration. The administrator resisted on the ground that the domicile of the decedent was in Georgia; but it was held that both he and the heirs were concluded on that question by the Alabama judgment.<sup>4</sup> Mr. Chief Justice Jackson dissented, in an opinion of twenty-seven pages, contending that, as the Georgia administrator represented creditors as well as heirs, and was not a party to those proceedings, he was not barred by the result. The learned chief justice failed to notice that the Georgia administrator was appointed pending the litigation, and did not need to be made a party. All persons in interest were made parties to that suit at the time it was begun. And the probate of the will in Alabama under such circumstances, that is, with all parties in interest before it when the suit was begun, necessarily concluded the world.

§ 640. **Residence of decedent or ward in Illinois and Indiana.**—Letters of administration were granted in Cook county, Illinois, and lands were sold. In a collateral suit, the heirs contended that the sales were void because their ancestor resided in another county, but the court said: "In many cases, by reason of the deceased having had more than one domicile, occupied alternately, as pleasure or convenience dictated, or by reason of a change in domicile

1. Lessee of Griffith v. Wright, 18 Ga. 173.

2. Tant v. Wigfall, 65 Ga. 412.

3. Boyd v. Glass, 34 Ga. 253 (89 Am. D. 252).

4. Thomas v. Morrisett, 76 Ga. 384, 387.

being in process of consummation at the time of death, it may be a question of much perplexity to determine with entire accuracy what was the actual domicile; and if the question, however deliberately passed upon by the county court, is to be considered as always open to proof whenever any one may choose to raise it in a collateral proceeding, it is fair to presume that different results might be reached by different tribunals, or even by the same tribunal, at different times, varying in each case to conform to the preponderance of proof then produced. . . . We do not consider it indispensable to the present case that we shall determine whether the county court, in granting the letters of administration, acted judicially or only ministerially, since, when the decree was passed for the sale of the lands, it was unquestionably acting judicially, and the question of jurisdiction, both over the person and the thing, was then determined. . . . Whether *the petitioner was administrator*, was one of the questions to be determined by the court, and, the court having decreed in accordance with the prayer of the petition, the presumption is that the proof was sufficient.”<sup>1</sup> The same court, in an earlier decision, in commenting on a Massachusetts case,<sup>2</sup> said: “We can hardly doubt that a different decision would have been announced had it appeared that proof had been heard, and that the probate court had determined that the intestate had resided in the county in which letters were granted at the time of the death of the intestate. But, in the absence of such facts, the decision is unsatisfactory, and seems to be opposed to the principle that, where a court has jurisdiction of the subject-matter and of the parties, its judgment must be held conclusive in all cases, except in a direct proceeding for its reversal.”<sup>3</sup>

INDIANA.—The statute of Indiana authorized the court to appoint a guardian for infants residing in the state. In a case where an appointment had been made, on an oral application as authorized by statute, there was an attempt to show, collaterally, that the wards did not reside in the state. The court said: “The question of residence is sometimes one of great difficulty upon the evidence. Suppose such investigation to have been fully made, and an erroneous decision reached, and letters of guardianship thereupon issued, would it be a salutary rule that every one

1. Bostwick v. Skinner, 80 Ill. 147, 151.

2. Cutts v. Haskins, 9 Mass. 543.

3. Wight v. Wallbaum, 39 Ill. 554, 564.

with whom the guardian should subsequently deal in the performance of his trust might go into the question of residence again to contest the validity of the appointment? Must such a question remain forever open? . . . Here the inquiry as to the residence of the infants was the exercise of jurisdiction. If that question was not correctly decided, it was an erroneous judgment, not a decision which the court had no power to make. The lack of power to determine should not be confounded with error in deciding a question of fact.”<sup>1</sup>

§ 641. **Residence of decedent or ward in Kentucky and Louisiana.**—The court of last resort in Kentucky has uniformly ruled that a mistake of fact concerning the residence of a decedent,<sup>2</sup> or ward,<sup>3</sup> made the appointment of the administrator or guardian void. So, where letters of administration with the will annexed were properly granted in one county, and where, afterwards, upon the death of the administrator, new letters were issued from another county, they were held void.<sup>4</sup> Likewise, where letters had been lawfully granted in a county where the decedent left property, and the administrator afterwards had resigned and removed from the state, and the court in which the estate was pending was the proper one to appoint a successor, but property of the decedent being in another county, the probate court there appointed an administrator *de bonis non*, this was held void collaterally, in detinue for a chattel.<sup>5</sup> A ward residing in that state had a guardian duly appointed there, and then went with a relative to Texas, where another person was appointed guardian. The statute of Kentucky authorized a non-resident guardian of a non-resident ward to collect moneys in the hands of a Kentucky guardian. Under this statute, the Texas guardian sued the Kentucky guardian, who was allowed to show that the ward was not domiciled in Texas, and that therefore his appointment was void.<sup>6</sup> But the ward was actually in Texas and its court had to decide the question of domicile, and that decision was necessarily conclusive on all the world. So, the probate of a will in a county other than that of the testator's domicile, was held void.<sup>7</sup> A

1. *Dequindre v. Williams*, 31 Ind. 444, 455—*Frazer, C. J.*—one of the ablest opinions in the State.

2. *Drake's Adm'r v. Vaughan*, 6 J. J. Marsh. 143, 145; *McChord v. Fisher's Heirs*, 13 B. Mon. 193.

3. *Munday v. Baldwin*, 79 Ky. 121.

4. *Pawling v. Speed's Ex'r*, 5 Mon. 580, 583. [277 (46 Am. D. 517).]

5. *Burnett v. Meadows*, 7 B. Mon.

6. *Munday v. Baldwin*, 79 Ky. 121.

7. *Miller v. Swan*, — Ky. — (14 S. W. R. 964); *Collins v. Powell*, — Ky. — (19 S. W. R. 578).

statute made the probate conclusive "except as to the jurisdiction of the court," but the court said that the residence was jurisdictional. This statute was merely declaratory.

LOUISIANA.—The appointment of a tutor for a minor in Louisiana is not void because made in violation of the statute, by a court not sitting in the parish of his domicile.<sup>1</sup> When the heirs of an estate reside within the state, the statute requires an *administrator* to be appointed, and, when they all reside out of the state it requires a *curator*; but a mistake in appointing an administrator instead of a curator does not lay the appointment open to a collateral assault.<sup>2</sup> So, where a person died and a curator of his succession was appointed by a certain probate court, it was held that it could not be shown in a collateral action that the decedent did not reside in the parish where the appointment was made. The court said: "These questions" [namely, the facts as to his residence and as to whether he left heirs resident of the state] "can be looked into and adjudicated upon only in a direct action before the same court."<sup>3</sup> Two cases held that the appointment, respectively, of an administrator,<sup>4</sup> or curator,<sup>5</sup> in the wrong county, was void.

§ 642. **Residence of decedent or ward in Maine, Maryland, Massachusetts, Mississippi and Missouri.**—It was held in Maine that letters of administration granted in a county where the decedent did not reside were void;<sup>6</sup> but this rule was changed by statute, and then it was held that, when letters were granted upon the representation that the decedent there resided, it could not be shown that his domicile was in Ohio in order to have distribution made according to its laws.<sup>7</sup> In Maryland it was decided, as a common-law question, that the granting of letters of administration in one county when the decedent resided in another, was not void.<sup>8</sup>

MASSACHUSETTS.—In an early case in this state, a deceased woman had lived in two counties, and it was difficult to determine where her legal residence was. Letters of administration were issued in one county and land was sold. In ejectment

1. Succession of Garrison, 15 La. Ann. 27—Merrick, C. J., *dissenting*.

2. Matter of Estate of Altemus, 32 La. Ann. 364, 368.

3. Duson v. Dupre, 32 La. Ann. 896.

4. Succession of Williamson, 3 La. Ann. 261.

5. Clemens v. Comfort, 26 La. Ann. 269.

6. Moore v. Philbrick, 32 Me. 102 (52 Am. D. 642).

7. Record v. Howard, 58 Me. 225.

8. Raborg v. Hammond, 2 Har. and G. 42, 49.

twenty years afterwards, her heirs were allowed to recover upon satisfying a jury that the probate court made a mistake, and that her legal residence was in the other county.<sup>1</sup> On the same state of facts, the heirs were permitted, in two later cases, to recover thirty-eight years afterwards.<sup>2</sup> A statute was then enacted providing that the appointment of an administrator should not be contested collaterally except "when the want of jurisdiction appears on the record." Under this statute, it was held that, where the petition alleged that the decedent resided in the county where the court sat, the appointment could not be overthrown collaterally on account of the residence being in another county.<sup>3</sup> The same statute applies to the appointment of guardians, and under it the appointment was held invulnerable collaterally.<sup>4</sup>

**MISSISSIPPI.**—The residence of a minor being in one county in this state, the appointment of a guardian for him in another county was held void;<sup>5</sup> and the same ruling was made in an early case in Missouri;<sup>6</sup> but since then the supreme court of that state has decided that letters of administration were not void because issued from a county where the decedent did not reside, expressly overruling all contrary decisions.<sup>7</sup>

**§ 643. Residence of decedent or ward in New York.**—Whether or not letters of administration or guardianship are void because the decedent or ward did not reside in the county where they were granted, seems never to have been passed upon by the court of last resort in New York. But there is some very cogent reasoning in the opinions of the supreme court, that they are not. Thus, a will was presented to the surrogate for admission to probate accompanied by an affidavit alleging that the testator died a resident of that county, and due notice was given to all persons in interest, and the will was duly probated. One of the devisees then presented the will to the surrogate of another county, accompanied with an affidavit alleging that the testator

1. *Cutts v. Haskins*, 9 Mass. 543, 547.

2. *Holyoke v. Haskins*, 5 Pick. 20, 24 (16 Am. D. 372); *Holyoke v. Haskins*, 9 Pick. 259.

3. *McFeely v. Scott*, 128 Mass. 16; *Cummings v. Hodgdon*, 147 Mass. 21 (16 N. E. R. 732).

4. *Derome v. Vose*, 140 Mass. 575 (5 N. E. R. 478).

5. *Duke v. State*, 57 Miss. 229, 231.

6. *Lacy v. Williams*, 27 Mo. 280, 282.

7. *Johnson v. Beazley*, 65 Mo. 250 (27 Am. R. 276)—*overruling* *Strouse v. Drennan*, 41 Mo. 289, and *Brooks v. Duckworth*, 59 Mo. 49, and distinguishing *Schell v. Leland*, 45 Mo. 294, and *Bryan v. Mundy*, 14 Mo. 459.



died a resident of that county. It was held that the first decree was a bar; that the question of residence was decided after due notice, and that the decision, even if wrong, was not void.<sup>1</sup> On page 667, the court said: "The taking proof of wills is a proper subject for the action of a surrogate's court. It is true also that to entitle a particular surrogate to take proof of a particular will, the testator must have resided in his county at the time of his decease. How is the fact of such inhabitancy to be ascertained? It must in some way be made to appear. In this case, as was proper, it was shown in a *verified* petition, and not controverted. The surrogate passed upon the question. He had a right, nay, was bound, to do so. There was legitimate and sufficient evidence upon which he came to the conclusion that the testator resided in the county of Rensselaer. . . . There is no known method of establishing a fact in a court of justice except by proof or admission. And whenever a fact is litigated, the court settles it in a particular way, and then the fact is established, and all parties concerned in the litigation are concluded by it; and this is so of *jurisdictional* facts as well as of any other. When, therefore, in this case, the surrogate's court of Rensselaer county had determined that the testator, at the time of his decease, resided in that county, it became a *fact* in the case, as to that will, and as to all persons who were parties to the proceedings. The question could not be re-examined except upon a direct review or appeal. It could not be brought in question in any collateral proceeding."

In a later case, the same court said: "This jurisdictional fact" [namely, the residence of the decedent] "is one which was open to litigation and which the surrogate might try and determine, and doubtless did determine, in these proceedings. It now becomes a grave question whether the proceedings can be attacked and subverted collaterally, for the purpose of destroying the title to real property devised under the will. Domicile, residence, and inhabitancy, depend upon acts coupled with intention, which it is not always easy to ascertain, and the courts will be reluctant, I think, to recognize it as a rule of evidence that the residence or habitation of a testator is open to litigation and controversy long after his will has been proved and admitted to record, and valuable rights have been acquired under it."<sup>2</sup> That a mistake

1. Bumstead v. Read, 31 Barb. 661, 667—Hogeboom, J.

2. Bolton v. Brewster, 32 Barb. 389, 394—Brown, J.

of fact by the surrogate's court in regard to the residence of the decedent does not make his action void, has been held in several later cases;<sup>1</sup> and the same ruling was made in respect to the appointment of a guardian for a minor.<sup>2</sup> But in a case in the superior court, there is an opinion of seventy pages attempting to demonstrate that letters of administration issued in the wrong county are void.<sup>3</sup> This case, on page 222, says there is a distinction between cases where the law makes a *fact* jurisdictional and where it makes the jurisdiction depend upon the *allegations* of the pleading in reference to the fact. It admits that in the latter class of cases the judgment is not void because the court reaches an erroneous conclusion. If that court is right that the jurisdiction does really depend upon a *fact*, then the question must always be open, as no number of decisions can change a fact. An early statute authorized surrogates to grant letters of administration on the estates of persons who died inhabitants of the state, but vested such power in the court of probates where they were not inhabitants. The surrogate (presumably on a petition alleging the residence of the decedent to have been in the state) granted letters of administration. These were held void in an action of trover because the decedent was not an inhabitant of the state.<sup>4</sup>

§ 644. **Residence of decedent or ward in North Carolina, Oregon and Rhode Island.**—Two early cases in North Carolina held that the appointment of an administrator by the court of a county in which the decedent did not reside, was void,<sup>5</sup> but the later cases are the other way. Thus, a sale of land had been made by a guardian by virtue of an order of a court of equity, and in answer to numerous objections made in a collateral action of ejectment, the court said: "Supposing, therefore, that there may have been irregularities or even error in the court of equity, still the decree cannot be questioned in a court of law for such causes. It is not for another court to arraign the decree or the orders confirming the sale and for the conveyance to the defendant, upon such

1. *Monell v. Dennison*, 17 How. Pr. 422, 426 (8 Abb. Pr. 401, 406); *People ex rel James v. Surrogate's Court*, 43 N. Y. Supr. (36 Hun) 218; *Matter of Harvey*, 3 Redfield 214.

2. *Lewis v. Dutton*, 8 How. Pr. 99, 102—relying on *Field v. M'Vickar*, 9 Johns. 130.

3. *Bolton v. Jacks*, 29 N. Y. Superior (6 Robt.) 166, 198, 222—*Jones, J.*

4. *Weston v. Weston*, 14 Johns. 428.

5. *Collins v. Turner*, N. C. Term R. 105; *Johnson v. Corpenning*, 4 Ired. Eq. 216 (44 Am D. 106).

grounds as that the guardian was not appointed by the proper court, or that there was not due advertisement or competent evidence of it;"<sup>1</sup> and a late case holds that it cannot be proved that a testator did not reside in the county where his will was probated, in order to show the probate to be void.<sup>2</sup>

OREGON.—The Oregon statute authorized the county court of the county in which a minor resided to appoint a guardian for him. Another statute provided that a guardian's sale of land should not be void if it should appear, among other things, "that the guardian was licensed to make the sale by a court of competent jurisdiction." It was held that the fact that the minors were not residents of the county in which the guardian was appointed, did not touch the jurisdiction of the court and that a sale was not void.<sup>3</sup>

RHODE ISLAND.—Where letters of administration were granted in one county, without a contest, it was held permissible to take out letters in another county upon showing that the decedent there resided.<sup>4</sup> But where a will was presented for probate, and there was a contest which resulted in a decree of no will, it was decided that the propounder could not then present it to the probate court of another county with an affidavit that the decedent there resided, and take the opinion of that court on the question.<sup>5</sup> The court made the distinction between the two cases rest upon the ground that there was a contest in the later one, thus confounding the doctrines of *res judicata* and collateral attack. It said: "One of the reasons which weighed heavily with us in *Bank v. Wilcox*, was that the courts of probate of the several towns may assume jurisdiction, and proceed to exercise it, without any *actual notice* to parties in interest; the only notice required being notice by publication or posting, which may never come to their knowledge, since they have no reason to be on the lookout for notice from a court having no jurisdiction." It is seldom that so much bad logic is crowded into so small a space. It decides that a decree rendered after due public notice may be

1. *Williams v. Harrington*, 11 Ired. L. 616, 621—Ruffin, C. J.

2. *Rollins v. Henry*, 84 N. C. 569, 575.

3. *Walker v. Goldsmith*, 14 Or. 125 (12 Pac. R. 537, 540).

4. *Peoples' Savings Bank v. Wilcox*, 15 R. I. 258 (3 Atl. R. 211).

5. *Thornton v. Baker*, 15 R. I. 553 (10 Atl. R. 617).

overturned collaterally by any party who did not learn of it. It also assumes that the court had no jurisdiction when that was one of the questions presented for trial.

§ 645. **Residence of decedent or ward in Tennessee and Texas.**—The supreme court of Tennessee in two late cases decided that the appointment of an administrator was not void because the decedent did not reside in the county where it was made, because the probate court had to determine that fact.<sup>1</sup> A like decision was made for the same reason by the supreme court of Texas.<sup>2</sup> The statute provided: "That the proper county for opening successions shall be determined by proof, giving preference in the following order: 1. In the county where the deceased had a fixed domicile or fixed residence. 2. In the county where the deceased owned real estate. 3. Where the deceased had his principal effects. 4. Where the deceased died." In a collateral proceeding, the evidence did not conclusively show that the decedent did not have his fixed residence in the county where administration was granted. This was held not sufficient to overturn the appointment.<sup>3</sup> The court intimates that the finding of the probate court was conclusive, but does not so rule. But where the record showed that letters were issued from the court of a county where the decedent did not reside, they were held void;<sup>4</sup> and the same ruling was made in a late case where the record showed that the decedent died in another county and failed to show that he resided or had assets in the county where the petition was filed.<sup>5</sup> The adverse parties ought to have had the proceeding dismissed.

§ 646. **Residence of decedent or ward in Vermont, Virginia and Wisconsin.**—Letters of administration granted in Vermont where the decedent did not reside are not void.<sup>6</sup> The statute of that state required an administrator *de bonis non* to be appointed by the same court that appointed the original administrator; but such an officer was appointed by another probate court—being led astray by a change in boundaries. This was held to be erroneous,

1. *East Tennessee V. and G. Ry. Co. v. Mahoney*, 89 Tenn. 311 (15 S. W. R. 652); *Eller v. Richardson*, 89 Tenn. 575 (15 S. W. R. 650).

2. *Burdett v. Silsbee*, 15 Tex. 604, 615; *Murchison v. White*, 54 Tex. 78, 83; *contra*, *Munson v. Newson*, 9 Tex. 109—a guardianship.

3. *Giddings v. Steele*, 28 Tex. 733 (91 Am. D. 336, 341).

4. *Hearn v. Camp*, 18 Tex. 545.

5. *Paul v. Willis*, 69 Tex. 261 (7 S. W. R. 357).

6. *Driggs v. Abbott*, 27 Vt. 580 (65 Am. D. 214); *Abbott v. Coburn*, 28 Vt. 663 (67 Am. D. 735).

but valid when attacked in a collateral action.<sup>1</sup> It was held in an early case in Virginia, that the grant of letters of administration in the wrong county was not void, because the court had power to determine whether the facts of any particular case brought it within its jurisdiction.<sup>2</sup> In a later case, it was said: "The court had general jurisdiction over matters of that description, and the question whether that general jurisdiction embraced the particular case having been decided by its judgment, can never be again raised except by a proceeding in error upon a case properly appearing upon the face of the record."<sup>3</sup> A *dictum* in Wisconsin is to the contrary.<sup>4</sup>

§ 647. **Residence of decedent or ward in United States courts and in England.**—In an early case in a circuit court of the United States, where the appointment of a guardian was assailed collaterally because made in a county where the ward did not reside, it was said: "The matter of fact, as to the residence of the minors, when Yeatman was appointed guardian was, of necessity, before the court of common pleas when they made the appointment; and it was not necessary to place that fact upon record. That court determined it; and can the fact be open to proof, collaterally, when the record is offered in evidence? If such be the law, then every fact necessary to be established in a judicial proceeding, whether it relate to the jurisdiction of the court, or to the merits of the case, and which did not constitute a part of the record, is open for examination."<sup>5</sup>

A late case in the United States circuit court sitting in Oregon, was this: The mother and sole heir of a deceased person took out letters of administration in a certain county in Oregon, alleging in her petition that he was, at the time of his death, a resident of that county. She then sued a railroad company for causing his death and was defeated. Then a friend made an application for letters in another county, alleging that the decedent at the time of his death, was a resident of that county, and letters were issued to one Holmes, who also sued the railroad company. It set up as a defense the prior appointment

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| 1. Clapp v. Beardsley, 1 Vt. 151, 165.    | draws v. Ivory, 14 Gratt. 229 (73 Am.    |
| 2. Burnley's Representative v. Duke,      | D. 355, 357).                            |
| 2 Rob. (Va.) 102, 129.                    | 4. <i>Dictum</i> in Reynolds v. Schmidt, |
| 3. Fisher v. Bassett, 9 Leigh 119 (33     | 20 Wis. 374, 380.                        |
| Am. D. 227); accord, <i>dictum</i> in An- | 5. Doe <i>ex dem.</i> Sprague v. Lither- |
|   | berry, 4 McLean 442, 453.                |

and adjudication in its favor. The question was, whether or not the first letters of administration were void because issued from a court not of the county of decedent's residence at the time of his death. Judge Sawyer, in a lengthy opinion, held that they were not void, and that the first appointment could not be questioned collaterally.<sup>1</sup> The learned judge was much troubled by the case of *Thompson v. Whitman*,<sup>2</sup> which he was not at liberty to disregard. It did not seem to occur to him that the question in that case was whether or not a judgment by default could be contradicted on a jurisdictional point when put in evidence *in another state*, and that, therefore, it was not authority in the case before him. Another federal judge, also mistaking the point involved in that case, and following some of its general reasoning, held that the appointment of a guardian in the wrong county was void.<sup>3</sup> A late case in the Supreme Court of the United States, was this: A person who had been domiciled in Alabama died in France, testate, appointing his wife in France and his brother in Alabama executor and executrix. The will was duly probated in Alabama upon proof made that the domicile of the testator was in that state, and letters testamentary were issued to the brother; upon the strength of these letters, he procured ancillary letters in New York, and there took possession of and sold a large amount of stocks and bonds. In the meantime, the widow had procured letters testamentary in England, and upon these had also procured ancillary letters in New York, and then sued the Alabama executor and others in the federal court in New York for a conversion, alleging that the domicile of the decedent was in France and not in Alabama. The defendants in that action then brought a suit on the equity side of the same court to restrain the action at law, apparently on the ground of an estoppel, to which a demurrer was sustained, and an appeal was taken to the Supreme Court of the United States, where it was said: "If the decedent, Robert Berney, at the time of his death, was domiciled in France and not in Alabama, the letters testamentary issued to his brother, James Berney, as executor in Alabama, were void, and the authority given by James Berney to St. James by the

1. *Holmes v. Oregon, etc., R. Co.*, 9 Fed. R. 229 and 5 id. 523 (7 Sawyer 380).

2. *Thompson v. Whitman*, 18 Wall. 457, 460. See section 389, pages 376—379, *supra*.

3. *Nettleton v. Mosier*, 3 Fed. R. 387—McCrary, J.

power of attorney was also invalid, and the payment made by the appellants to St. James of the proceeds of the sales of the bonds which belonged to the estate does not bind the rightful executor or protect the complainants."<sup>1</sup> If the widow had appeared in the Alabama court, and, after a contest over the domicile, it had been decided to have been in Alabama, I suppose that that distinguished tribunal would have considered the question concluded, collaterally. There was no complaint of absence of legal notice to the world, either in the Alabama court or in the ancillary proceedings in New York, in both of which courts the widow as well as all other persons were invited to appear and show cause against the relief sought. To hold, as this case does, that she was not bound because she did not appear and contest, confounds the doctrine of *res judicata* with that of collateral attack. The non-residence of the widow made no difference. The ancillary letters issued in New York were fair upon their face, and a non-resident can no more contradict a domestic record than a resident can. *At home*, it concludes the world. If ancillary letters had been applied for in France, then she could have objected there, because a foreign record is never conclusive on jurisdictional matters which relate to the person. This case is inconsistent with a later one commented upon in section 656, *infra*.

ENGLAND.—In the time of Lord Holt, an administrator brought a suit on a claim, and an answer that his letters were not issued from the diocese in which the intestate resided, was held good.<sup>2</sup> This is the only case of the kind I have been able to find in the English reports. The court treated it as though on error, and, apparently did not notice the fact that it was a collateral attack on the judgment of the ecclesiastical court.

§ 648. **Residence in divorce—Principle involved**—(See sections 390, 391).—When a decree of divorce, contained in a record fair on its face, is introduced in evidence within the jurisdiction where it was rendered, can it be shown in order to avoid it, that the plaintiff was not, in fact, a resident within that jurisdiction? According to the old and well-settled rule, which no court has ever directly denied, that a domestic record, fair on its face, imports absolute verity, it cannot. When there is an attempt to use the decree in another state, the want of jurisdiction can

1. Drexel v. Berney, 122 U. S. 241, 252.

2. Hilliard v. Cox, 1 Lord Raymond 562, by Holt, C. J. (1 Salk. 37 and 2 id. 747)



be shown the same as in any other kind of a case. But the *residence* is no more a jurisdictional question than the marriage itself. No court would grant a divorce and alimony to a woman who was simply the mistress and not the wife of the defendant, *unless imposed upon by the evidence*. So, the same might be said in regard to the residence or any other question of fact in the case. Why an erroneous conclusion on any of these matters of fact should make the decree void, no very satisfactory reason has ever yet been given, and I do not believe that any can be. But when the husband and wife are domiciled in a state, they have mutual rights in their children and in the property of each other which no foreign jurisdiction can destroy. Hence, when the husband, for instance, leaves the common domicile and goes to another jurisdiction and there procures a divorce by default on constructive service, it cannot have the least effect in the old domicile in respect to those matters. The wife still retains all of those rights the same as if nothing had happened. To hold otherwise, would be to allow a foreign decree by default on constructive service to affect a domestic right—something which all the cases agree it cannot do. Like proceedings in attachment and garnishment by default on constructive service, it may sequester all the property and rights of the defendant within the state, but can go no farther. Of course the husband in the case supposed may lawfully marry again within the jurisdiction where the divorce was granted, but whether he may lawfully live with his new wife in the old domicile, is a question of comity. As a common-law question, the foreign decree cannot of its own force release him from any obligation resting there. The troublesome question is, whether or not the severing of the personal bond of matrimony in the foreign state destroys it in the home state. For the reasons given in section 390, *supra*, I think it does. But, it was recently held in New York that a divorce granted in Minnesota to a resident of that state on constructive service, did not affect the *status* of the defendant in New York, and that she might obtain a divorce there.<sup>1</sup> A statute of Michigan makes it a cause for divorce that the opposite party has obtained a divorce in any other state. This statute has been held valid.<sup>2</sup>

1. Williams v. Williams, 130 N. Y. 193 (29 N. E. R. 98), *affirming* 6 N. Y. Supp. 645.      2. Wright v. Wright, 24 Mich. 180; Van Inwagen v. Van Inwagen, 86 Mich. 333 (49 N. W. R. 154).

§ 649. Resident of a state procuring a divorce in another state, by default, upon constructive service—Validity of, in state of residence—(See sections 390, 391).—That such a divorce is void in the home state, is held in Alabama, District of Columbia, Indiana, Iowa, Kansas, Louisiana, Maine, Massachusetts, Michigan, Nebraska, New Hampshire, New York, Ohio, Pennsylvania, Rhode Island, Tennessee, New Brunswick and England, and there are no cases to the contrary. Several of these cases were criminal prosecutions in the home state for living there with the second spouse,<sup>1</sup> and one was a prosecution against the husband for abandoning the wife,<sup>2</sup> while the others were civil.<sup>3</sup> A few of these cases require special notice. The Indiana case of *Watkins v. Watkins* was this: The wife brought a suit for a divorce and the husband answered that he had been duly granted a divorce in Montana, setting out a copy of the record, which was regular on its face. The Montana statute required a plaintiff in a divorce suit to have been a resident of that territory for one year, and the record showed a copy of an affidavit made by him alleging that he had then been a resident of that territory for more than a year. To this answer, the wife replied that he never had been a resident of Montana, and it was held that this reply showed his divorce to be void. The reply impliedly admitted that he was actually in Montana, and that after due service and proof made, the

1. *Thompson v. State*, 28 Ala. 12, 21; *Hood v. State*, 56 Ind. 263 (26 Am. R. 21); *State v. Fleak*, 54 Iowa 429 (6 N. W. R. 689); *People v. Dawell*, 25 Mich. 247—by two judges; *Van Fossen v. State*, 37 O. St. 317 (41 Am. R. 507); *Regina v. Wright*, 17 New Brunswick (1 P. & B.) 363, 371.

2. *People v. Smith*, 13 Hun 414.

3. *Strait v. Strait*, 3 McArthur (D. C.) 415; *Watkins v. Watkins*, 125 Ind. 163 (25 N. E. R. 175); *Litowich v. Litowich*, 19 Kan. 451 (27 Am. R. 145); *Neff v. Beauchamp*, 74 Iowa 92 (36 N. W. R. 905); *Smith v. Smith*, 43 La. Ann. 1140 (10 S. R. 248); *Gregory v. Gregory*, 78 Me. 187 (57 Am. R. 792; 3 Atl. R. 280); *Hanover v. Turner*, 14 Mass. 227 (7 Am. D. 203); *Chase v. Chase*, 6 Gray 157; *Smith v. Smith*, 13 Gray 209; *Shannon v. Shannon*, 4 Allen 134;

*Sewall v. Sewall*, 122 Mass. 156 (23 Am. R. 299); *Hardy v. Smith*, 136 Mass. 328; *Wright v. Wright*, 24 Mich. 180; *Reed v. Reed*, 52 Mich. 117 (17 N. W. R. 720); *Smith v. Smith*, 19 Neb. 706 (28 N. W. R. 296); *Leith v. Leith*, 39 N. H. 20; *Hoffman v. Hoffman*, 55 Barb. 269; *affirmed*, 46 N. Y. 30 (7 Am. R. 299); *In re House's Estate*, 14 N. Y. Supp. 275 (20 N. Y. Civ. Proc. 130); *Holmes v. Holmes* 4 Lans. 388; *Rebstock v. Rebstock*, 2 Pittsb. 124, 129; *Vetterlein, Petitioner*, 14 R. I. 378; *Gettys v. Gettys*, 71 Tenn. (3 Lea) 260 (31 Am. R. 637); *Chaney v. Bryan*, 83 Tenn. (15 Lea) 589, 592; *Shaw v. Att. Gen.*, L. R., 2 P. and D. 156; *Briggs v. Briggs*, L. R., 5 Prob. Div. 163; *Dolphin v. Robins*, 7 H. L. Cas. 390, 404.

court adjudged that he had been a resident for one year, and simply denied the *fact* of residence, thus making the jurisdiction depend upon a *fact*. The court said: "Marriage gives to the parties a peculiar legal *status*, and the courts of one state cannot, by judgment or decree, fix the *status* of the citizens of another state. The courts of Montana could not, therefore, by any decree fix the *status* of citizens of Indiana." The court did not notice an old statute, still in force, which reads: "A divorce decreed in any other state, by a court having jurisdiction thereof, shall have full effect in this state."

Decrees granting divorces are not covered by the constitution of the United States, which requires the state courts to give full "faith and credit" to the judgments of the courts of other states; hence, each state must determine what credit they shall receive. As the Montana decree was made upon constructive service, of course it could not affect the rights of the wife in Indiana, unless the statute above quoted permitted it to do so. It is to be regretted that the court did not pass upon this phase of the case. As the husband was actually in Montana, its courts were as competent to decide the question of residence as those of Indiana. The New York case of *Hoffman v. Hoffman* was peculiar. The husband and wife were domiciled in New York, when he secretly went to Indiana and there, without her knowledge, procured a divorce upon service by publication. But learning of it soon afterwards, she filed a bill in the Indiana court to set aside the decree for fraud, and so forth, and it was set aside; but upon appeal the supreme court reversed the order setting aside the decree upon a question of practice,<sup>1</sup> thus letting the original decree stand. The husband then remarried and the first wife sued for a divorce on the ground of adultery, and the Indiana decree was held void by the supreme court of New York, because jurisdiction could not be obtained upon service by publication (although the Indiana statute so provided), and upon appeal the court of appeals held it void because the domicile of the husband was in New York. Both these decisions seem to me to be wrong. The wife having actually appeared in the Indiana case and having made an unsuccessful attempt to vacate the decree, that made it final and valid everywhere. Either she did not bring forward all her evidence, or the court did not believe it, or

1. *Hoffman v. Hoffman*, 15 Ind. 278.

it mistook the law. But, as it had jurisdiction over both the parties and the subject-matter, such errors did not make its decree void. This case is inconsistent, in principle, with *Kinnier v. Kinnier*, in the same court, commented upon in section 651, *infra*. In the English case of *Dolphin v. Robins*, the parties were married in England and there domiciled. They separated, and the husband went to Scotland and there committed adultery for which the wife procured a divorce in a Scotch court. This was held to be of no validity in England, and void as to her property rights after her death. But a Scotch divorce to a domiciled Scotchman from an English wife for a cause not recognized in England, is valid there.<sup>1</sup>

A case which came before the Supreme Court of the United States was this: The Indiana statute concerning divorces required the petitioner to be a *bona fide* resident of the county where the petition was filed. A petition filed by the wife alleged her *bona fide* residence in the county, and the husband appeared and filed an answer and cross-bill, and upon a hearing, the allegations of her petition in regard to residence and the abandonment charged were found to be true, and a divorce was granted. In a collateral suit in the District of Columbia, the court below held this decree void because she was not, in fact, a *bona fide* resident of Indiana, but, on the contrary, was a resident of that district. On appeal, the supreme court, in speaking of the finding of the Indiana court on the question of residence, said: "Whether this finding is conclusive, or only *prima facie* sufficient, is a point on which the authorities are not in harmony. We do not deem it necessary to express any opinion on the point."<sup>2</sup> The case was reversed on other grounds.

A decree of divorce rendered in California which expressly finds that the plaintiff has resided in the state for six months, may be contradicted by parol, and shown to be void in Massachusetts, by proof that he did not reside there for six months. This was done in order to show that a subsequent marriage there was void, and that a child of that marriage was not his child, and took nothing under a devise to his children.<sup>3</sup> So, where a California divorce was introduced in evidence in New York, it was

1. *Harvey v. Farnie*, L. R., 6 Prob. Div. 35.

2. *Cheever v. Wilson*, 9 Wall. 108, 123.

3. *Adams v. Adams*, 154 Mass. 290 (28 N. E. R. 260).

held that the adverse party might show by parol that the plaintiff did not reside in California in order to avoid it ;<sup>1</sup> and a stronger ruling was made in New South Wales, where it was decided that a divorce granted in New Mexico, expressly finding that the plaintiff had been a resident of that territory for six months, was *no evidence* of that fact.<sup>2</sup>

§ 650. **Resident of a state procuring a divorce in another state, by default, upon constructive service—Validity of, in state where procured—**(See sections 390, 391).—A husband filed a bill for a divorce in Michigan and made an affidavit that he had been a resident of the state for a time named, in order to comply with the statute, and obtained a decree. He was then prosecuted for perjury in swearing to his residence in the state, and his defense was, that the divorce court had no jurisdiction, because he did not, in fact, reside in the state, and that, therefore, his affidavit, although willfully false, was not prejury ; but it was held that the court did have jurisdiction and he was convicted.<sup>3</sup> This case is an authority that jurisdiction depends on the allegations and not on the *facts*. A wife who resided in New York, prosecuted and obtained a divorce and alimony in Iowa, in violation of the statute which required a residence of six months. Nearly thirty years afterwards, she applied for dower in the land of her deceased husband on the ground that the divorce was void on account of her want of residence ; but the court held that she was estopped.<sup>4</sup>

§ 651. **Resident of a state procuring a divorce in another state after a contest—**(See sections 390, 391).—A divorce suit was begun by the wife against the husband in Indiana, to which he appeared, and the case was tried on the merits and a divorce granted to her. In a collateral litigation in Michigan between her and the administrator of the husband, he attempted to show that the divorce was void because she was not a resident of Indiana. The court said : “ Whether the plaintiff was a resident of Indiana was one of the matters to be settled on the law and evidence, and the judgment necessarily imports that the court decided on it and determined that she was a resident. It may have erred and there

1. *Munson v. Munson*, 67 N. Y. Supr. (60 Hun) 189 (14 N. Y. Supp. 42 N. W. R. 681).

692 ; 38 N. Y. St. Rep'r 7).

3. *People v. McCaffrey*, 75 Mich. 115

4. *Ellis v. White*, 61 Iowa 644 (17 N.

2. *Regina v. M'Leod*, 11 New South Wales, 218, 225.

W.R. 28).

may have been false testimony, but neither of these, if admitted, would cause the judgment to be *ipso facto* void." <sup>1</sup> So, where it was contended in New York that a divorce granted in Illinois, after an appearance by the defendant, was void because the plaintiff was not, in fact, a *bona fide* resident of that state, the court of last resort said: ". . . the question is presented whether the Illinois decree can be attacked in this state in a collateral action because the plaintiff in that action was not actually a *bona fide* resident of that state at the time. I think not. It is conceded he was *there*, appeared in *that court* and filed his bill, and took the decree. The question whether he was a resident then, so as to enable him to file his bill, was for the court to determine, and although it may have decided erroneously, the decision cannot affect the validity of the judgment. The *status* of all persons within a state is exclusively for that state to determine for itself. It is unnecessary to say what the effect might be, if it was alleged that Pomeroy had never been within the state, although he may have authorized the bill to be filed; but it is conceded he was there, and sufficient facts are alleged to give the Illinois court power to decide the question of domicile, and the judgment is not void, if we concede that the decision was erroneous, and if it is also conceded that the question of residence is vital to give jurisdiction. A wrong decision does not impair the power to decide, or the validity of the decision when questioned collaterally." <sup>2</sup> This case expressly overrules the early case of *Jackson v. Jackson*.<sup>3</sup>

A wife in Texas brought a suit for a divorce and caused service to be made on the husband in New York. He appeared specially and moved to quash the service for various defects, which was overruled, and he then filed an answer denying that the plaintiff was a *bona fide* resident of Texas, but, on the contrary, alleged that she was a resident of New York. This was decided against him in the court below and affirmed on appeal.<sup>4</sup> In a suit between the same parties in New York, it was held that the decree in Texas concluded the husband from showing that its court had no jurisdiction; that his remedy was by way of some direct

1. *Waldo v. Waldo*, 52 Mich. 94, 99 (17 N. W. R. 710, 713).

2. *Kinnier v. Kinnier*, 45 N. Y. 535, 540 (6 Am. R. 132); *followed*, *Johnson v. Johnson*, 67 How. Pr. 144, 146.

3. *Jackson v. Jackson*, 1 Johns. 424; .

4. *Jones v. Jones*, 60 Tex. 451, 455.

proceeding in that state.<sup>1</sup> These New York cases which hold that a jurisdictional fact is conclusively settled when actually contested, demonstrate that all the cases in that state which hold that such questions are open where the judgment was by default, confound the doctrines of *res judicata* and collateral attack, as explained in section 17, *supra*.

A husband and wife removed from South Carolina to Alabama and became domiciled there. The wife then went back to South Carolina and instituted proceedings for alimony and maintenance against the husband for cruel treatment alleged to have occurred when they resided in South Carolina. The husband appeared and contested the cause, and a judgment was rendered against him upon which he was sued in Alabama, and against which he attempted to defend on the ground that it was void; but the court held that it was valid, upon the ground that the cause of action upon which it was founded arose in South Carolina, and that the husband had there appeared and had a trial on the merits.<sup>2</sup>

§ 652. **Residence in general civil proceedings in inferior courts—Judgments not void.**—Statutes generally provide that a person shall not be sued in the inferior courts, such as justice's, police, city and the like, out of the township, town, precinct or city in which he resides. That a proceeding in violation of these statutes is not void, and must be defended, is held in California, Missouri, Texas and Vermont. In California, where the return on a justice's summons showed service made in the township where the court sat, it was held that this return presented a question for the justice to pass upon, and that his judgment was conclusive, and not void in ejectment because the defendant did not reside in the township.<sup>3</sup> But where the return showed service in another township (where the defendant, in fact, resided) the judgment was held void.<sup>4</sup> Where the record failed to show the residence of the defendant, the judgment was held to be *prima facie* void, but that parol evidence was admissible to show that defendant did reside in the township where the court was sitting.<sup>5</sup>

1. Jones v. Jones, 43 N. Y. Supr. (36 Hun) 414, 418—*affirmed*, 108 N. Y. 415 (15 N. E. R. 707; 13 N. Y. St. Rep'r. 838).

2. Harrison v. Harrison, 20 Ala. 629 (56 Am. D. 227).

3. Fagg v. Clements, 16 Cal. 389, 392.

4. Lowe v. Alexander, 15 Cal. 296, 300.

5. Jolley v. Foltz, 34 Cal. 321.



This decision was put upon the ground that the statute did not require the record to show the residence. Why the omission of an allegation from the record which the law did not require should lay the proceedings open to collateral attack by parol evidence, or should make them *prima facie* void, the court did not explain. In Missouri, Texas and Vermont, it is held that the defendant must plead his non-residence in abatement, and that the judgment is not void.<sup>1</sup> In the Vermont case, Chief Justice Poland, said: "The general provision of our statute in relation to actions brought to the supreme and county courts, is that they shall be brought in the county where one of the parties resides; and suits before justices of the peace shall be brought in the town where one of the parties lives; but it was never supposed that, if brought in some other county or town, it was a case of want of jurisdiction, so that if the action proceeded to judgment, the judgment would be void."

**§ 653. Residence in general civil proceedings in inferior courts—Judgments void.**—That the judgment of an inferior court is void when rendered in a township where the defendant did not reside, has been decided in Georgia,<sup>2</sup> Indiana, Iowa, Michigan, New York and England. In an early Indiana case, a person had been sued in a township in which he did not reside and a judgment taken by default. A transcript of the judgment was filed in the county clerk's office, and an execution issued, and a suit was brought by the defendant in the court of common pleas to restrain its enforcement. The supreme court said that the proceedings before the justice "show affirmatively that he had jurisdiction of the person as well as the cause. The validity of the judgment could not, therefore, be questioned collaterally."<sup>3</sup> Nevertheless, the court perpetually restrained the collection of the judgment, which was a collateral attack. In a later case, where a person residing in one county was found in another, and there served with summons from a justice, the collection of the judgment was enjoined,<sup>4</sup> and in another it was held void.<sup>5</sup> A person was sued before a justice of the peace and personal service returned. Twenty-three

1. Fulkerson v. Davenport, 70 Mo. 541, 545; Masterson v. Ashcom, 54 Tex. 324, 327; Collamer v. Page, 35 Vt. 387, 390; *contra*, Bornschein v. Finck, 13 Mo. App. 120.

2. Treutlen v. Smith, 54 Ga. 575; Graham v. Hall, 68 Ga. 354; Wade v.

Wisenant, 86 Ga. 482 (12 S. E. R. 645).

3. Brickley v. Heilbruner, 7 Ind. 488.

4. Grass v. Hess, 37 Ind. 193.

5. Hampton v. Warren, 51 Ind. 288, 292.

years afterwards he was allowed to show, collaterally, that a month before the suit was commenced he had removed to another township and that he was not served with summons.<sup>1</sup>

IOWA.—A person was sued before a justice of another county in Iowa, and appeared and tried the case on the merits, and still the judgment was held void.<sup>2</sup> That seems to me like trifling with the court. In a later case, the collection of a justice's judgment was enjoined because the defendant resided in another county, although service was made on him in the township where the court sat ;<sup>3</sup> and where a person was keeping a boarding house in one county, and closed up and went to living at a hotel and was there served with summons from a justice, upon which judgment was rendered by default, this was held void upon proof that his residence was in another county.<sup>4</sup>

MICHIGAN.—A justice's judgment in Michigan by default upon personal service, where neither the plaintiff nor defendant resided in the county, was decided to be void.<sup>5</sup>

NEW YORK.—The statute authorized justices to issue a long summons only where the defendant resided in the township where the justice sat, or in one adjoining; and a judgment by default upon such a summons in a case not authorized on account of the residence of the defendant, was enjoined.<sup>6</sup> The city court of Brooklyn was limited in its jurisdiction over corporations created under the laws of New York to such as "transact their general business within the said city, or are established by law therein." It was held that consent could not give the court jurisdiction over a corporation established and transacting its general business in New York City.<sup>7</sup>

ENGLAND.—A court of requests had jurisdiction over certain small causes against defendants residing within certain districts in the county. A defendant who, in fact, resided outside of those districts was sued in the court, duly summoned and judgment rendered by default. It was held that (as the court heard no evidence in regard to his residence), the judgment was void.<sup>8</sup>

1. *Johnson v. Ramsay*, 91 Ind. 189, 190.

2. *Chapman v. Morgan*, 2 G. Greene 374.

3. *Hamilton v. Millhouse*, 46 Iowa 74.

4. *Bradley v. Fraser*, 52 Iowa 289 (6 N. W. R. 293).

5. *Hall v. Shank*, 57 Mich. 36 (23 N. W. R. 478).

6. *Cooper v. Ball*, 14 How. Pr. 295.

7. *Davidsburgh v. Knickerbocker Life Ins. Co.*, 90 N. Y. 526.

8. *Carratt v. Morley*, 1 Ad. & El. 18, 27 (41 E. C. L. 417, 421).

§ 654. **Residence in general civil proceedings in superior courts.**—The cases all agree, that, when a person is sued in a superior court in a county or district in which he does not reside, in violation of the statute, he must plead his non-residence in abatement, and that the proceedings are not void.<sup>1</sup> The Missouri case cited was this: In an action against residents of a county, the statute authorized the joinder of residents of another county. In such a case after service and judgment against all, the resident defendants appeared and got the judgment set aside. It was then dismissed as to them, and judgment taken by default against the non-resident alone. This was held to be valid, collaterally; that the court did not lose jurisdiction as to him. The English case cited was this: A foreign court had jurisdiction over traders doing business in a certain place. Its judgment was held not to be void because the defendant was not a trader or domiciled there; that those facts were matters of defense.

§ 655. **Residence in tax proceedings—Principle involved, and cases.**—The assessment of taxes in New York and of the poor rate in England are judicial acts, and not void for errors of law or fact which do not destroy the jurisdiction.<sup>2</sup> The statute of New York provided that the assessors should set down the names of "taxable inhabitants" of the town for personal taxation. It was first held by the supreme court that an error in assessing a person in a town in which he was not an inhabitant made the proceeding void and the assessors trespassers,<sup>3</sup> but this case was afterwards overruled by the same court.<sup>4</sup> The question was finally carried to the court of last resort where it was decided, and steadily adhered to, with one exception, that, although the action of the assessors is judicial and not void for errors, yet a mistake of fact in respect to the inhabitancy of a person was jurisdictional and determined by them at their peril.<sup>5</sup> The statute provided that

1. Kenney v. Greer, 13 Ill. 432 (54 Am. D. 439); Gillilan v. Gray, 14 Ill. 416; Waterman v. Tuttle, 18 Ill. 292; Holloway v. Freeman, 22 Ill. 197, 202; Wickliffe v. Dorsey, 1 Dana 462; Goodrich v. Hunton, 31 La. Ann. 582; (*contra*, Alter v. Pickett, 24 id. 513); January v. Rice, 33 Mo. 409, 411; Vanquelin v. Bouard, 15 C. B. N. S. (109 E. C. L.) 341, 350, 356; Jones v. League, 18 How. 76, 81.

2. National Bank v. City of Elmira, 53 N. Y. 49, 53. All the New York cases agree on this point. Weaver v. Price, 3 B. & Ad. 409 (23 E. C. L. 186).

3. Prosser v. Secor, 5 Barb. 617.

4. Brown v. Smith, 24 Barb. 419.

5. People v. Supervisors, 11 N. Y. 563; Mygatt v. Washburn, 15 N. Y. 316; Newman v. Supervisors, 45 N. Y. 676, 682; National Bank v. City of Elmira, 53 N. Y. 49, 53; *contra*, Buffalo v. Supervisors, 48 N. Y. 93, 105.

land should be assessed in the town where the owner resided. Where the town line ran through a farm and the owner had a residence in each town, and the assessors, by mistake, assessed him in the wrong town, the supreme court again held that the place of his residence was a fact for them to determine, and that an error of fact did not make the assessment void;<sup>1</sup> but this was reversed by the court of appeals.<sup>2</sup> So, where a person resided in a town in the spring, and was there assessed for taxes in July, and sued the assessor for trespass, he was permitted to recover upon showing by a preponderance of the evidence that he had ceased to be a resident of the town when the assessment was made.<sup>3</sup> But where a statute made a person liable to be taxed for personalty in the town where he had his principal place of business, and a person had two places of business, one in the town in which he resided and one in another town, and was assessed in the town where he resided, it was held that he could not show, collaterally, that his principal place of business was in the other town.<sup>4</sup> The court said that the assessors had jurisdiction over his person because he was an actual resident of the town, and that a mistake of fact concerning his principal place of business was not jurisdictional. In another case, in the supreme court, a person was actually living in the district, and the evidence tended to show that he resided there, still a mistake was held to make the assessors liable.<sup>5</sup> This case says that if the person assessed had been notified, the proceeding would not have been void; but as it was *ex parte* and without notice, a mistake in regard to the residence made it void. But if the notice provided by law was sufficient to give life to the proceeding, the tribunal was bound to proceed and decide all questions necessary to reach a conclusion, without regard to the kind of notice given. The notice was either sufficient or good for nothing. There could be no middle ground giving the tribunal power to decide right but none to decide wrong. As the court of appeals, in the cases cited in section 651, *supra*, decided that the question of residence in divorce cases was concluded when there was a contest over it, it is quite evident that all the cases in this section

1. Dorn v. Backer, 61 Barb. 597, 608;  
*contra*, Bailey v. Buell, 59 Barb. 158.

2. Dorn v. Backer, 61 N. Y. 261.

3. Darwin v. Strickland, 57 N. Y. 290

4. Bell v. Pierce, 48 Barb. 51; *affirmed*, Bell v. Pierce, 51 N. Y. 12, 18.

5. Palmer v. Lawrence, 6 Lans. 282,

holding the proceedings of the assessors void confound the distinction between collateral attack and *res judicata* which are considered in section 17, *supra*.

ENGLAND.—A statute authorized a poor rate to be assessed against the “occupier” of land. A person was assessed for lands that he claimed not to occupy and appealed to the quarter sessions, where the rate was confirmed. He still refused to pay, and his property was seized and he replevied it and was permitted to show that he was not, in fact, an occupier of that land.<sup>1</sup> A person was assessed with a poor rate as an occupier of land in the parish of Overton, and after due notice and a refusal to pay, a writ was issued and his goods were seized. He sued the justices for trespass and was allowed to recover upon proof that his land was in another parish.<sup>2</sup> Wightman, as counsel for the justices, argued: “The plaintiff is rated as an occupier of land in Overton, and the magistrates, on the application of the overseers, grant the warrant for non-payment of the rate made upon him in respect of his land in Overton. He did not appear before them on the summons, to object that he had no ratable property in Overton; and how are the justices to know that he had none? . . . It would be hard on the magistrates, if they were bound to ascertain at their own peril whether a party who appears on the face of the rate to be duly rated really has the property for which he is rated or not.” It is evident that this argument was in line with the bumboat case,<sup>3</sup> and that the decision of the court was contrary and erroneous.

§ 656. *Residence in United States courts.*—The statutes of the United States give its courts jurisdiction over certain causes of action between citizens of different states, excluding jurisdiction where the parties are citizens of the same state. The supreme court of Louisiana, in an early case, held a decree of a district court of the United States void because, in fact, the parties were not citizens of different states;<sup>4</sup> but this case was reversed by the supreme court of the United States, which held that fact to be matter in abatement only.<sup>5</sup> This last case is of binding authority on all the state courts, and has been followed in Ala-

1. *Milward v. Caffin*, 2 W. Bl. 1330 (A. D. 1780).

2. *Weaver v. Price*, 3 B. & Ad. 409 (23 E. C. L. 186).

3. See section 539, *supra*.

4. *Lowry v. Erwin*, 6 Rob. (La.) 192 (39 Am. D. 556, 567); *accord*, *Vose v. Morton*, 4 Cush. 27, 31 (50 Am. D. 750)—a fictitious transfer of a note.

5. *Erwin v. Lowry*, 7 How. 172.

bama,<sup>1</sup> and in Iowa, where a cause was removed from the state court to the United States court when the necessary citizenship did not exist.<sup>2</sup> But where a record of the United States court showed on its face that all the parties were citizens of the same state, the supreme court of Iowa held it void,<sup>3</sup> but this was reversed by the Supreme Court of the United States, which held to the contrary.<sup>4</sup> This latter decision seems to be sound. There is no want of power in the court to grant the relief demanded on the cause of action set forth—the only infirmity being in the character of the parties. But if they choose to waive this personal privilege by omitting to raise the objection, or by objecting on other grounds, there is nothing in the policy of the law to prevent them. Consent will always give jurisdiction over the person. But I would not place the jurisdiction on the ground of consent, because the court would still have jurisdiction, even though they objected or were incapable of consenting. These two cases from 7 Howard and 123 United States show that neither a mistake of law nor of fact in respect to residence touches the jurisdiction, in the opinion of the Supreme Court of the United States. This accords with the views of Mr. Chief Justice Ruffin of North Carolina, given at large in section 634, *supra*, and is wholly inconsistent with the case of Drexel v. Berney,<sup>5</sup> cited in section 647, *supra*, which makes the residence of a decedent a jurisdictional fact in administration proceedings.

§ 657. **Revivor in name of wrong plaintiff.**—An order of revivor in the name of the wrong person, is not void;<sup>6</sup> but where the defendant died pending the suit, and the court, instead of reviving the suit and rendering a judgment in favor of the defendant for costs for the use of the officers, rendered such a judgment for the officers directly against the plaintiff, on which his land was sold, this sale was held void.<sup>7</sup> But this was merely a formal error, and not nearly so serious as where the fine was adjudged to the wrong person in the case cited in section 611, *supra*.

1. Pearce v. Winter Iron Works, 32 Ala. 68, 71; *accord*, Mattocks v. Baker, 2 Fed. R. 455—a fictitious transfer of a note.

2. Goodnow v. Burrows, 74 Iowa 251 (23 N. W. R. 251, 253).

3. Iowa Homestead Co. v. Des Moines Navigation Co., 63 Iowa 285 (19 N. W. R. 231).

4. Des Moines Nav. Co. v. Iowa Homestead Co., 123 U. S. 552 (8 S. C. R. 217).

5. Drexel v. Berney, 122 U. S. 241, 252.

6. Riley v. Gitterman, 10 N. Y. Supp. 38.

7. Hollingsworth v. Bagley, 35 Tex. 345—Ogden, J., *dissenting*.

**SERVANT OR LABORER.**—Commissioners of appeal decided that plaintiff was liable to a duty on a male servant, assessed him therefor and caused his goods to be seized, and he brought trespass and showed that the supposed “servant” was a “day laborer” and no “servant;” but it was held that the decision of the commissioners was conclusive.<sup>1</sup>

**SLAVE OR WHITE MAN.**—A justice’s court in South Carolina had power to try slaves but not white men. The defendant pleaded that he was a white man, but the court found against him, and this was held conclusive on *habeas corpus*. The court said: “The judgment of an inferior court, on the question of jurisdiction thus submitted to it, has the same binding efficacy on the parties as its judgment in any other matter confessedly within its cognizance; and errors in this respect can only be corrected in the same manner that its other errors are. The only exception to this rule, is where the want of jurisdiction is apparent on the face of the proceedings themselves.”<sup>2</sup> A statute of Missouri, in certain cases, did not authorize a slave, but did authorize a free person to be sent to the penitentiary; but where one was convicted and sent there as a free person, it was held that he could not be released on *habeas corpus* because, in fact, a slave.<sup>3</sup>

§ 658. **Soldier or civilian.**—There is much confusion in the cases whether or not the conviction of a person as a soldier by a court-martial is void, when, in fact, he was not. That the right and sworn duty of the military tribunal to punish military delinquencies by soldiers necessarily carry the power to determine whether or not the accused is a soldier, seems too plain for argument. In an old case in Pennsylvania, where a person was fined for an alleged neglect of military duty, and a writ was issued and his horse seized, for which he brought replevin, and offered to show that he was not a member of the militia, it was held that he could not do so.<sup>4</sup> The decision is apparently put upon the ground that the statute prohibited replevin in such cases, but it could not apply if the proceeding in the military court was void for want of jurisdiction. In an early case in the Supreme Court of the United States, a person was punished for alleged neglect of military duty, and this was held void upon proof that he was

1. *Earl of Radnor v. Reeve*, 2 B. & P. 391 (A. D. 1801).

2. *State v. Scott*, 1 Bailey 294.

3. *Ex parte Toney*, 11 Mo. 661.

4. *Pott v. Oldwine*, 7 Watts 173.

See section 600, *supra*.



a justice of the peace and exempt from military duty by law.<sup>1</sup> In speaking of this case afterwards, that court said: "This decision proves only that a court-martial was considered as one of those inferior courts of limited jurisdiction, whose judgments may be questioned collaterally. They are not placed on the same high ground with the judgments of a court of record."<sup>2</sup> A late writer on constitutional law says: "A court-martial cannot, by deciding that a person who is not in the military or naval service of the United States is in such service, render him amenable to their jurisdiction, or preclude the civil courts re-examining the question collaterally and liberating him through a *habeas corpus*. Such a power would enable a military commission arbitrarily to convert citizens into soldiers and then treat them as subject to the military law, and no man would be secure from an arrest that might end in his being assigned to a regiment and ordered to a remote corner of the United States, or to a foreign country."<sup>3</sup> But that logic assumes the inadmissible premise that the military court will not do its sworn duty, and after a fair and impartial trial, decide truly whether or not the alleged offender is a soldier in fact, and discharge him if he is not. It might as well be assumed that the civil courts would not do their duty, and would wrongfully deplete the ranks of the military, as to assume that the military courts would wrongfully fill them up.

The Vermont statute made citizens of the state or of the United States only, liable to do military duty. A person was fined for neglecting to do such duty, and a warrant was issued upon which he was arrested, and it was held that he might avoid the whole proceeding by showing that he was an alien.<sup>4</sup> A statute of Texas provided that the lands of a deceased soldier should not be sold by an administrator without the consent of the heirs in writing to be first recorded by the probate judge. Letters of administration were granted in such a case, and the court ordered and confirmed a sale of land without such consent by the heirs. The record did not show that the deceased was a soldier, and the land was in the hands of a *bona fide* purchaser,

1. *Wise v. Withers*, 3 Cranch 331.

2. *Ex parte Watkins*, 3 Peters 193, 209.

3. 2 Hare's American Constitutional Law 934, citing *Antrim's Case*, 5 Phila. 278.

4. *Barrett v. Crane*, 16 Vt. 246, 250, relying upon *Wise v. Withers*, *supra*.

still it was held that the heirs could recover it fifteen years afterwards.<sup>1</sup> So, where a statute of the republic of Texas prohibited the issuing of letters of administration on the estate of any deceased volunteer soldier of the republic from foreign countries, to any other than his next of kin, except upon their authority, the appointment of an administrator in violation of the statute, although it did not appear in the record that the decedent was a soldier, was held void in trespass to try title to land sold by him.<sup>2</sup> Likewise, where a clerk of a paymaster in the navy was tried by a court-martial for peculation and sentenced to the penitentiary, he was released on *habeas corpus* upon the ground that he was a mere civilian and not subject to the military authority.<sup>3</sup> But why the military court was not as competent as the civil court to decide what the law was, was not explained.

§ 659. **Widows—Errors concerning their rights.**—A decree in Mississippi erroneously awarding funds in the hands of an administrator to the widow, is not void;<sup>4</sup> and the same ruling was made where a court in New York in ordering the sale of the entire premises in partition, erroneously failed to find the value of the widow's dower;<sup>5</sup> and in Pennsylvania, where an administrator procured an order and sold land to raise means to support the alleged widow and children, and it was afterwards discovered that another woman was the lawful wife of the decedent at the time of his death, and that the alleged widow was spurious and the children bastards, the sale was decided to be valid collaterally.<sup>6</sup> The principle which underlies this case is a very plain one. The proceeding was *in rem*, against which all the world were invited to show cause, and as no one appeared to controvert the allegations of the petition that the persons named were the widow and lawful children of the decedent, the order to sell was conclusive that those allegations were true, in so far as the land sold and the distribution of the proceeds were concerned.

**DOWER OR STATUTORY RIGHTS, DISREGARDED.**—No reason occurs to me why a mistake concerning the rights of a widow should be more serious collaterally than a mistake in

1. Harris v. Graves, 26 Tex. 577, 579.

2. Chinn v. Taylor, 64 Tex. 385, 388.

3. *Ex parte* Van Kraken, 47 Fed. R. 888—Hughes, J.

4. Lowry v. McMillan, 35 Miss. 147 (72 Am. D. 119).

5. Jordan v. Van Epps, 26 N. Y. Supr. (19 Hun) 526, 533; *affirmed*, 85 N. Y. 427.

6. McPherson v. Cunliff, 11 Serg. & Rawle 422 (14 Am. D. 642).

respect to the rights of any other person, and the cases in Illinois and Iowa accord with this view. Thus, in Illinois, by a mistake, dower was set off in lands not owned by the decedent, and all of his lands were sold, but this sale was held not to be void;<sup>1</sup> and in Iowa, an administrator filed a petition to sell land and made the widow a party, and, on default, procured an order and made a sale without saving her dower rights, and it was held to bar them.<sup>2</sup> So also, in another case, where she appeared and set up her dower, and a sale of the whole was ordered and made without saving her rights, the same ruling was made.<sup>3</sup> The supreme court of Indiana seems to be out of line on this point. The statute of that state gave the widow one-third of her deceased husband's lands in fee simple "free from all demands of creditors." In each of five cases, where the administrator had filed a petition to sell the whole, and not merely the undivided two-thirds, and had made the widow a party as such, and, after due service upon her, had procured an order upon her default, to sell the whole, without noticing or saving her rights, and had sold it and made a deed which had been confirmed, the sales and deeds were held to be void;<sup>4</sup> and in two other cases, there are *dicta* that a sale of the widow's interest is "beyond the power of the jurisdiction of the court."<sup>5</sup> In *Elliott v. Frakes*, the widow had died and devised her undivided one-third to her two minor children, and they were made parties to the administrator's petition to sell, and were duly served, and a guardian *ad litem* appointed for them, who appeared and answered; and the sale made was held void at their instance twenty years afterwards.

The case of *Hutchinson v. Lemcke*, is peculiar. A husband and wife each owned the undivided one-half of a lot of land, when the husband died. The widow then owned the half in her own right and the sixth as widow. The administrator of the husband then filed a petition to sell the entire lot, and made the widow a party as such, and duly procured an order and made a sale of the whole, which was confirmed. Afterwards, she brought

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| 1. <i>Miller v. McMannis</i> , 104 Ill. 421, 425. | <i>Compton v. Pruitt</i> , 88 Ind. 171, 178;                     |
| 2. <i>Olmsted v. Blair</i> , 45 Iowa 42.          | <i>Clark v. Deutsch</i> , 101 Ind. 491, 494;                     |
| 3. <i>Garvin v. Hatcher</i> , 39 Iowa 685, 689.   | <i>Hutchinson v. Lemcke</i> , 107 Ind. 121, 132 (8 N. E. R. 71). |
| 4. <i>Hanlon v. Waterbury</i> , 31 Ind. 168;      | 5. <i>Matthews v. Pate</i> , 93 Ind. 443,                        |
| <i>Elliott v. Frakes</i> , 71 Ind. 412, 415;      | 445; <i>Pepper v. Zahnsinger</i> , 94 Ind. 88,                   |
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an action to recover her undivided four-sixths, and it was held that, in respect to the half which she owned in her own right, she was called upon to make defense against the petition, and that her title was gone ; but, in respect to the sixth which she owned as widow, the proceedings were decided to be void and she was permitted to recover. The court said that when the widow, *as such*, is made a party to an administrator's petition to sell land, as she was in that case, the petition and order to sell will be construed with reference to that fact and to the law, so that an unqualified order to sell will be held to be subject to her rights. The principle announced by this decision is, that a judgment barring one's rights will be construed collaterally as saving them, when it ought to have done so. If that be law, it is not perceived why any judgment in favor of a party should not be construed to be in favor of his adversary when the record shows that it ought to have been that way. For instance, when the record shows a demurrer sustained to a valid plea in bar, and a judgment for the plaintiff for want of an answer, why should it not be construed as saving the defendant's rights? That kind of reasoning would make all judgments founded on a mistake of law, void. A judgment is never void when by any possibility it may have been right, and in each of those actions it was possible that the widow's interest had been set off to her in other lands, or that she had none on account of an ante-nuptial agreement. In either of those cases, the allegation of the petition, which the statute required, that the land described was "liable to be made assets for the payment of the debts" of the decedent, would have been true. The Indiana statute which made the widow's rights free from the demands of creditors, and impliedly forbade the administrator to sell them, added nothing to the law, and it is respectfully submitted that the Illinois and Iowa cases are right, and the Indiana cases wrong. But a still later case in Indiana concerning a widow's rights, is inconsistent with the cases cited. After a widow had inherited one-third of her deceased husband's land in fee simple and remarried, another section of the statute took away all power of alienation or encumbering, but she was still deemed to hold the fee, which at her death during such marriage, descended to her children by the former marriage as her forced heirs ; but when the entire land of the deceased husband, including her one-third, was sold in partition proceedings, the statutes, as construed by the supreme court, gave her the one-third of the proceeds absolutely,

and not merely the use for life ;<sup>1</sup> but, in such a case, the court awarded her the interest of one-third during life, and ordered the principal to be paid to the children at her death, and this order was decided to be valid collaterally.<sup>2</sup> It will be seen that the widow was made a party "as such," and that the court had all the facts before it, and by a mistake of law transferred the principal of the proceeds of her land derived from her deceased husband, to the children. The *law* gave her all the proceeds "free from all demands of children" just as imperatively as it gave her the land itself "free from all demands of creditors." The same court held that a decree quieting the title of a purchaser from a widow was not void because she had no title.<sup>3</sup> Where, in proceedings in partition in Missouri, the homestead, to which the widow was entitled in fee, was set off to her as *dower*, but where no order was made in respect to the fee after her death, and the remainder of the land was divided, it was held that the proceedings did not affect her right to the fee, because it was not adjudicated.<sup>4</sup>

1. Small v. Roberts, 51 Ind. 281;  
Klinesmith v. Socwell, 100 Ind. 589.

2. Isbell v. Stewart, 125 Ind. 112 (25  
N. E. R. 160). See section 612, *supra*,  
pages 649-651.

3. Davis v. Lennen, 125 Ind. 185  
(24 N. E. R. 885).

4. Case v. Mitzenburg, — Mo. —  
(19 S. W. R. 40).

## CHAPTER XIV.

### JURISDICTION LOST BY REASON OF A MISTAKE OF LAW OR FACT.

SCOPE OF, AND PRINCIPLE INVOLVED IN CHAPTER XIV.—ADMINISTRATOR'S SALE—ALTERATION BY JUSTICE—IRREGULARITIES

ALPHABETICALLY ARRANGED, . . . . .	§ 660
PART I.—PROCEDURE WRONG—LOSS OF JURISDICTION BY, . . . . .	661-719
PART II.—RELIEF GRANTED, ERRONEOUS, . . . . .	720-762
PART III.—FINAL ENTRY, INFORMAL OR UNCERTAIN, . . . . .	762-780
PART IV.—CONFIRMATION, . . . . .	781-791

§ 660. Scope of, and principle involved in, Chapter XIV.—This chapter treats of the validity of rights and titles depending on defective judicial proceedings where the infirmity consists of something done or omitted after complete jurisdiction has been acquired. In the "Case of the Marshalsea," it was said that if a court "has jurisdiction of the cause, and proceeds *inverso ordine*, or erroneously, then the party who sues, or the officer or minister of the court who executes the precept or process of the court, no action lies against them."<sup>1</sup> In an early case in Wisconsin, it was said that no order which a court is empowered to make under any circumstances in the course of the proceedings, is void merely because it was improvidently made, or made in a manner not warranted by law or the previous state of the case.<sup>2</sup> That mere irregularities, which do not oust the jurisdiction, do not make the proceedings void, all the cases agree.<sup>3</sup>

ADMINISTRATOR'S SALE.—Irregularities in the proceedings to procure an administrator's sale,<sup>4</sup> or a sale by a de-

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| <p>1. Case of the Marshalsea, 10 Coke 68, 76.</p> <p>2. Tallman v. McCarty, 11 Wis. 401, 406.</p> <p>3. Gunn v. Howell, 35 Ala. 144 (73 Am. D. 484, 487)—a judgment of another state. Rodgers v. Evans, 8 Ga. 143 (52 Am. D. 390); Skrine v. Simmons, 36 Ga. 402 (91 Am. D. 771); Barnum v. Kennedy, 21 Kan. 181; Meixell v. Kirkpatrick, 28 Kan. 315;</p> | <p>Mitchell v. Chambers, 43 Mich. 150, 158 (5 N. W. R. 57); Buell v. Cross, 4 O. 327, 330; Barber v. Chandler, 17 Pa. St. 48 (55 Am. D. 533); Hess v. Cole, 23 N. J. L. (3 Zab.) 116; Buell v. Trustees of Lockport, 11 Barb. 602, 605.</p> <p>4. Barbee v. Perkins, 23 La. Ann. 331; Seymour v. Ricketts, 21 Neb. 240 (31 N. W. R. 781); Sumner v. Sessoms, 94 N. C. 371.</p> |
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visce,<sup>1</sup> do not make the sale void. An administrator filed a petition showing a private sale and asked for a confirmation, or for an order to sell. The court first confirmed the private sale, and then made an order to sell, and it was held that the irregularity did not make the order to sell void;<sup>2</sup> and the same ruling was made concerning the sale by an administrator with the will annexed, where he signed the deed as "executor."<sup>3</sup>

ALTERATION BY JUSTICE.—A justice of the peace duly rendered and entered a judgment and the costs within the time prescribed by the statute. On discovering afterwards that his costs, as entered, were too small, he set down the balance beneath the original footing and added them together as a new footing. On learning that that was illegal, he erased it, permitting the original footing to stand. It was held that this did not make the judgment void.<sup>4</sup> So irregularities of practice in *attachment*,<sup>5</sup> or *bankruptcy*,<sup>6</sup> or *contempt*<sup>7</sup> proceedings, do not make them void. Nor is the sentence of a *court-martial* void because of a failure to serve a copy of the charges and specifications upon the defendant as required by statute.<sup>8</sup>

CRIMINAL CASES.—Errors and irregularities in practice before a justice of the peace in criminal proceedings, do not make them void.<sup>9</sup> The record in a criminal case in Mississippi failed to show any order for the *venire* for a grand jury; the sentence attempting to show their impaneling was not completed; the name of the foreman and of the members, and of the officer sworn to take charge of them were all left blank; the return of the indictment into court was not shown, and no express statement that the prisoner was present at any time during the trial, except on arraignment. This was held not void, and the prisoner was denied a release on *habeas corpus*.<sup>10</sup>

1. *Tyson v. Belcher*, 102 N. C. 112 (9 S. E. R. 634).

2. *Stuart v. Allen*, 16 Cal. 474, 499 (76 Am. D. 551).

3. *Mobberly v. Johnson's Ex'r*, 78 Ky. 273, 277.

4. *Dauchy v. Brown*, 41 Barb. 555.

5. *Banister v. Higginson*, 15 Me. 73, 78.

6. *Richards v. Nixon*, 20 Pa. St. 19; *Hubbell v. Cramp*, 11 Paige 310.

7. *Burnham v. Stevens*, 33 N. H. 247, 258; *Griswold v. Sedgwick*, 6 Cowen 456, 463.

8. *Brown v. Wadsworth*, 15 Vt. 170 (40 Am. D. 674).

9. *State v. Glenn*, 54 Md. 572, 608; *Kane v. State*, 70 Md. 546 (17 Atl. R. 557).

10. *Ex parte Phillips*, 57 Miss. 357, 362.



DEMURRER.—A judgment against the plaintiff for refusal to plead over upon the overruling of his *demurrer* to a supposed paragraph of answer which had never been filed, is not void.<sup>1</sup> The failure to enter a *discontinuance* in respect to a defendant not served before taking judgment against those served, is irregular, but it does not make the judgment void;<sup>2</sup> nor is a judgment of *discontinuance* void because the costs were not paid.<sup>3</sup> Proceedings to establish a *ditch* are not void because “informal,”<sup>4</sup> nor is the decision of an *ecclesiastical* court void because it did not proceed according to the laws and usages of the church, nor because the decision is wrong.<sup>5</sup> *Foreclosure* proceedings are not void for irregularities,<sup>6</sup> nor can a *garnishee* question the regularity of proceedings in attachment in answer to a *scire facias*.<sup>7</sup> So, an error in laying out a *highway*,<sup>8</sup> or in leaving *issues of law* undisposed of,<sup>9</sup> or in *naturalization* proceedings;<sup>10</sup> or a *non-joinder* in a demurrer to the evidence and the failure to agree to a withdrawal of the case from the jury and to the submission to the court;<sup>11</sup> or an error of law appearing in a *partition*<sup>12</sup> or *poor debtor's*<sup>13</sup> proceeding; or the entry of a decree in equity for the complainant over a good answer to the bill without a *reply*;<sup>14</sup> or that the procedure to *revive* a judgment is erroneous;<sup>15</sup> or that a *second judgment* is rendered on the same cause of action;<sup>16</sup> or an order *setting aside a decree* instead of merely opening it in order to let in a party to defend;<sup>17</sup> or where a demand upon the plaintiff for a bill of items worked a *stay* until it should be fur-

1. Walker v. Hill, 111 Ind. 223 (12 N. E. R. 387).

2. Riddle v. Turner, 52 Tex. 145, 150.

3. Winsor v. Farmers', etc., Bank, 81\* Pa. St. 304.

4. Donalson v. Lawson, 126 Ind. 169 (25 N. E. R. 903).

5. Connitt v. Reformed Protestant Dutch Church, 54 N. Y. 551, 561.

6. Rigg v. Cook, 9 Ill. (4 Gilm.) 336 (46 Am. D. 462, 470).

7. Welsh v. Blackwell, 14 N. J. L. (2 Green) 344, 347; Lomerson v. Hoffman, 24 N. J. L. (4 Zab.) 674.

8. Bailey v. McCain, 92 Ill. 277; Baker v. Runnels, 12 Me. 235; Goodwin v. Inhabitants, id. 271, 276;

Gaither v. Watkins, 66 Md. 576 (8 Atl. R. 464).

9. Camman v. Executor of Traphagen, 1 N. J. Eq. (Saxton) 230.

10. Vaux v. Nesbit, 1 McCord Eq. 352, 366.

11. Phillips v. Lewis, 109 Ind. 62, 67 (9 N. E. R. 395).

12. Southgate v. Burnham, 1 Me. (1 Greenl.) 369.

13. Neal v. Paine, 35 Me. 158, 160.

14. Kinnier v. Kinnier, 45 N. Y. 535, 539 (6 Am. R. 132).

15. Ludeling v. Chaffe, 40 La. Ann. 645 (4 S. R. 586, 588).

16. Pendleton v. Weed, 17 N. Y. 72.

17. Southern Bank v. Humphreys, 47 Ill. 227, 234.

nished, and the judgment was taken without furnishing it;<sup>1</sup> or the rendition of a judgment of *suretyship* between co-defendants on an answer instead of a cross-complaint;<sup>2</sup> or an error in *suspending* instead of adjourning proceedings to imprison a person in a civil action during the pendency of an injunction,<sup>3</sup> does not make the judgment void.

## PART I.

## PROCEDURE, WRONG—LOSS OF JURISDICTION BY.

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| <p>§ 661. Advisory officers to aid the court, failure to appoint.</p> <p>662. Advisory officers to aid the court—Improper persons, or their action improper—Time improper—Rejection of report.</p> <p>663. Advisory officers to aid the court, number appointed or acting, wrong.</p> <p>664. Appraisement by administrators and guardians.</p> <p>665. Appraisement in attachment proceedings.</p> <p>666. Appraisement in poor debtors' proceedings—Sheriff's and marshal's sales.</p> <p>667. Attorney for absent heirs, imprisoned defendant, non-resident creditors and unknown heirs, not appointed.</p> <p>668. Clerk or stranger acting instead of judge or court, and <i>vice versa</i>.</p> <p>669. Confession—Offers to make.</p> <p>670. Consent decrees and judgments—Consent misinterpreted.</p> <p>671. Default omitted or wrongfully taken.</p> <p>672. Discontinuance in inferior court—Adjournment by consent.</p> <p>673. Discontinuance in inferior court—Adjournment, indefinite.</p> | <p>§ 674. Discontinuance in inferior court—Adjournment, too long.</p> <p>675. Discontinuance in inferior court—Adjournment, omitted or unauthorized.</p> <p>676. Discontinuance in inferior court—Judgment delayed—Consent to delay.</p> <p>677. Discontinuance in inferior court—Justice absent.</p> <p>678. Discontinuance in inferior court—Plaintiff absent.</p> <p>679. Discontinuance in inferior court—Plaintiff tardy.</p> <p>680. Discontinuance in inferior court—Process delayed—Viewers absent.</p> <p>681. Discontinuance in superior court—Delay in criminal case.</p> <p>682. Discontinuance in superior court—Delay in filing pleadings—Delay in rendering judgment.</p> <p>683. Discontinuance in superior court—Delay in publication—Delay in revivor—Irregular revivor.</p> <p>684. Discontinuance in superior court—Removal to another court.</p> <p>685. Discontinuance in superior court—Removal from state to United States court.</p> |
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1. Egan v. Sengpiel, 46 Wis. 703, 709.

2. McCormick v. Webster, 89 Ind. 329.

3. Stanton v. Schell, 3 Sandford 323.

sewer assessors,<sup>1</sup> were not "freeholders," the proceeding was not void.

**THEIR ACTION IMPROPER.**—The commissioners of a decedent's estate in Vermont allowed a claim, and this was approved by the probate court. In a collateral suit there was an attempt to show that the commissioners had removed from the state before they allowed the claim, and that it was done outside of the state; but this evidence was held to be inadmissible.<sup>2</sup> So, the action of commissioners to make a guardian's sale without a commission;<sup>3</sup> or the failure of highway viewers to take an oath in the form prescribed by the statute;<sup>4</sup> or the neglect of partition commissioners to meet together to perform their duties, as required by statute,<sup>5</sup> or to make their report "under their hands and seals;"<sup>6</sup> or a sale made by an agent of the commissioner in partition instead of by the commissioner himself;<sup>7</sup> or a sale, by a referee, of two lots jointly instead of separately;<sup>8</sup> or a sale made to one person and another substituted in his place;<sup>9</sup> or the failure of ditch viewers to examine all the lands affected,<sup>10</sup> does not make the decree void. A statute of Kentucky provided that, "before a court shall have jurisdiction to decree a sale of infants' lands, three commissioners must be appointed to report under oath to the court, the net value of the infants' real and personal estate and the annual profits thereof, and whether the interest of the infant or idiot requires the sale to be made." Where the report failed to state that the interest of the infant required the sale to be made,<sup>11</sup> or the net value of his property;<sup>12</sup> or stated that he had no other property "known to them;"<sup>13</sup> or was not sworn to,<sup>14</sup> the sales were set aside on the motion of the purchaser; but in a later case,<sup>15</sup> these motions were said to be direct attacks, and that in order to sustain them "it was immaterial whether the sale

1. *Porter v. Purdy*, 29 N. Y. 106.

2. *Tate v. James*, 50 Vt. 124.

3. *Hunter v. Hatton*, 4 Gill 115, 122 (45 Am. D. 117).

4. *Henline v. People*, 81 Ill. 269, 273.

5. *Parker v. Kane*, 22 How. 1.

6. *Lane v. Bommelman*, 17 Ill. 95, 97.

7. *Chambers v. Jones*, 72 Ill. 275, 278.

8. *Duer v. Dowdney*, 11 N. Y. St. Rep'r 301.

9. *Hunter v. Hatton*, 4 Gill 115, 122 (45 Am. D. 117).

10. *Cauldwell v. Curry*, 93 Ind. 363.

11. *Wells v. Cowherd*, 2 Met. (Ky.) 514; *Mattingly's Heirs v. Read*, 3 id. 476 (524); *Watts v. Pond*, 4 id. 61.

12. *Woodcock v. Bowman*, 4 Met. (Ky.) 40.

13. *Bell v. Clark*, 2 Met. (Ky.) 573.

14. *Watts v. Pond*, 4 Met. (Ky.) 61.

15. *Thornton v. McGrath*, 1 Duvall

was void or only voidable." But the purchaser at a judicial sale is not concerned with mere errors which do not affect the jurisdiction; and a reversal of the cause does not harm him, as that court has decided.<sup>1</sup> But in still later cases, the court held that the omission of the report to show that the whole estate was valued,<sup>2</sup> or the failure to appoint commissioners,<sup>3</sup> made the sale void. So, where the report did not show the annual profits of the estate, the motion of the purchaser, made after confirmation, to set aside the sale was sustained upon the ground that the sale was void.<sup>4</sup>

**TIME, IMPROPER.**—The failure of an auditor,<sup>5</sup> or of ditch commissioners,<sup>6</sup> to make a report at the term required by the statute, does not make the confirmation void; and the same ruling was made concerning the neglect of a curator to make report of a sale at the term required;<sup>7</sup> but where road commissioners in Missouri failed to qualify or to make their report to the county court before the first day of the term, an order to open the road was held to be void and was enjoined.<sup>8</sup>

**REJECTION OF REPORT.**—In proceedings to establish a highway the wrongful rejection of the report of the viewers, and the appointment of reviewers, does not make the proceeding void.<sup>9</sup> So, where a magistrate erroneously rejected the report of referees because not signed by all, this action was decided not to be void, and that mandamus would not lie to compel him to accept it.<sup>10</sup>

**§ 663. Advisory officers to aid the court, number appointed or acting, wrong.**—A New York statute provided for the election of five persons to make assessments for street improvements, and allowed an appeal from their decision. It required *one* board to determine the amount to be assessed and the damages sustained; but the city council committed the duty to ascertain the benefits and to distribute the expense to one board, and the duty to ascertain the lands injured, to assess the dam-

1. *Gossom v. Donaldson*, 18 B. Mon. 185 (230).

2. *Wyatt v. Mansfield's Heirs*, 18 B. Mon. 779, 782.

3. *Barrett v. Churchill*, 18 B. Mon. 387, 390.

4. *Carpenter v. Strother's Heirs*, 16 B. Mon. 289, 295.

5. *Hartshorne v. Johnson*, 7 N. J. L. (2 Halst.) 108.

6. *McMullen v. State*, 105 Ind. 334, 341 (4 N. E. R. 903).

7. *McVey v. McVey*, 51 Mo. 406, 424—an appeal.

8. *Rose v. Garrett*, 91 Mo. 65 (3 S. W. R. 828).

9. *Grimwood v. Macke*, 79 Ind. 100.

10. *Petition of Farwell*, 2 N. H. 123,

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age and to distribute it over the property benefited, to another. The court said: "What was done was an irregular and illegal exercise of a power which the common council doubtless possessed," but the assessment was held void and the city liable to refund it.<sup>1</sup> But where a Delaware statute required the court to appoint three commissioners to lay out ditches, the order was decided not to be void because five were appointed;<sup>2</sup> and it was also held in Vermont that, while it was erroneous for the probate court to allow a claim approved by one commissioner only, yet the allowance was not void;<sup>3</sup> but in Montana, where the statute required a certificate of insanity to be signed by the whole jury of three and sworn to, an imprisonment on a certificate signed by only two and not sworn to, was held to be void and the prisoner was released on *habeas corpus*.<sup>4</sup> A board of commissioners in Kansas appointed three persons to view a highway, two of whom by law could act alone. Their report was signed by one of the viewers and a stranger, and it was held that the order establishing the highway was void, even though the record recited that the report was presented by the viewers, as it was contradicted by the report itself.<sup>5</sup> But where the Ohio statute required three persons with the surveyor, to act as viewers of a proposed highway, the order establishing it was not void because the surveyor acted as one of the three viewers;<sup>6</sup> but an opposite ruling was made in New York, where an order laying out a highway was made on the report of two of the three commissioners, without showing that all met and deliberated, or were notified to appear and do so.<sup>7</sup> It seems to me that the matters here considered are merely evidentiary, and do not touch the jurisdiction, and that all the cases which hold the proceedings void, are unsound.

§ 664. **Appraisement by administrators and guardians.**—A sale of land by an administrator in Arkansas without an appraisement,<sup>8</sup> or the procuring of an order to sell by a guardian in Indiana upon

1. *Howell v. City of Buffalo*, 15 N. Y. 512, 519.

2. *Wood v. Wilson*, 4 Houston (Del.) 94.

3. *Whitcomb v. Hutchinson*, 48 Vt. 310, 313.

4. *Territory ex rel. McCann v. Sheriff of Gallatin Co.*, 6 Mont. 297 (12 Pac. R. 662).

5. *State v. Horn*, 34 Kan. 556, 561 (9 Pac. R. 208).

6. *McClelland v. Miller*, 28 O. St. 488, 501.

7. *Chapman v. Swan*, 65 Barb. 210.

8. *Bell v. Green*, 38 Ark. 78; *Apel v. Kelsey*, 47 Ark. 413, 419 (2 S. W. R. 102).

an appraisal not signed by the appraisers,<sup>1</sup> or in California upon one not sufficient to enable the court to intelligently determine the necessity for a sale, and not marked "filed" until after the sale, although executed and approved before,<sup>2</sup> is not void. So, the fact that land sold by a guardian in Missouri was appraised by householders instead of freeholders, does not make the sale void;<sup>3</sup> but the sale of the real estate of a succession in Louisiana without appraisement is void, and the purchaser cannot be compelled to comply with his bid.<sup>4</sup>

§ 665. **Appraisement in attachment proceedings.**—The statute of Maine required an officer who levied an attachment on land to have it appraised by disinterested freeholders, and to show that fact in his return; and because the return in such a case failed to show that the appraisers were "disinterested," the proceeding was held void in a litigation with another attacher.<sup>5</sup> The court treated the matter as if before it on appeal by the attachment defendant, failing to notice that the point was a mere irregularity in procedure which the judgment cured, collaterally. The statute of Michigan required the appraisers in attachment to be disinterested freeholders and sworn; but where they were sons of the defendant and neither freeholders nor sworn, the judgment was decided not to be void at the instance of the defendant;<sup>6</sup> and the failure of a sheriff in Ohio to sign the inventory and appraisement of attached property, as required by the statute, does not affect the validity of the proceeding collaterally.<sup>7</sup>

§ 666. **Appraisement in poor debtor's proceedings.**—The statute of Maine provided that, when the examination of a poor debtor disclosed any chose in action, the oath should not be administered until it should be appraised, when the creditor was given the right to take it at the appraised value. Where the record showed that the debtor did own such property and that it was not appraised, the discharge was held void.<sup>8</sup> This case seems to me unsound.

1. Worthington v. Dunkin, 41 Ind. 515, 522.

2. Smith v. Biscailuz, 83 Cal. 344 (21 Pac. R. 15, 18 and 23 id. 314).

3. Exendine v. Morris, 76 Mo. 416, 418.

4. Succession of Curley, 18 La. Ann 728.

5. Pierce v. Strickland, 26 Me. 277, 288.

6. Grover v. Buck, 34 Mich. 519, 521.

7. Lessee of Mitchell v. Eyster, 7 Q. 257, 259.

8. Harding v. Butler, 21 Me. 191.

**SHERIFF'S AND MARSHAL'S SALES.**—A sale by a sheriff,<sup>1</sup> or a marshal,<sup>2</sup> without an appraisement, in direct violation of the statute, or after an erroneous appraisement,<sup>3</sup> is not void after confirmation.

§ 667. **Attorney for absent heirs, imprisoned defendant, non-resident creditors and unknown heirs, not appointed.**—In proceedings by a curator,<sup>4</sup> or administrator,<sup>5</sup> in Louisiana, to sell the land of *absent heirs*, the statute required an attorney to be appointed to represent them, and required the petitioner to prove, contradictorily with the attorney, that the sale was necessary or would be advantageous; but the failure to appoint an attorney does not make the proceeding void.

**IMPRISONED DEFENDANT.**—Where service was made on a person in Virginia on the day upon which he was convicted of a felony, but before the conviction, and the judgment taken by default without the appointment of a committee to defend, was attacked collaterally for that error, the court said: "Jurisdiction having been once properly acquired over the person and the subject-matter of the controversy, no error in its exercise, no irregularity in the proceedings, can make the judgment void."<sup>6</sup> But, in Kansas, where service was made on a defendant then in prison, the failure to appoint a trustee to defend, when the statute so required, was held to make the judgment void.<sup>7</sup> And the same ruling was made in California where the statute required the court to appoint an attorney to represent non-resident creditors in insolvency proceedings, and there was a failure to do so;<sup>8</sup> but where the Kentucky statute required the court to appoint an attorney to represent unknown heirs, and there was a neglect of this duty, an opposite ruling was made.<sup>9</sup>

§ 668. **Clerk or stranger acting instead of judge or court, and vice versa.**—The Tennessee statute, in actions already pending in court, required writs of attachment to be issued by order of the judge, but in such a case one was issued by the clerk, without such an order, upon which land was seized and duly ordered to be sold

1. *Crowell v. Meconkey*, 5 Pa. St. 168.

2. *Neligh v. Keene*, 16 Neb. 407 (20 N. W. R. 277).

3. *Watson v. Tromble*, — Neb. — (50 N. W. R. 331).

4. *Gibson v. Foster*, 2 La. Ann. 503, 509.

5. *Heirs of Herriman v. Janney*, 31 La. Ann. 276, 279.

6. *Neale v. Utz*, 75 Va. 480, 485.

7. *Price County Com'rs v. Lawrence*, 29 Kan. 158.

8. *Hanscom v. Tower*, 17 Cal. 518.

9. *Atcheson v. Smith*, 3 B. Mon. 502, 504.



on final judgment, and the sale was decided to be void because of this irregularity ;<sup>1</sup> and the same ruling was made in Nebraska, where the clerk issued a writ of attachment on a claim not due, without an order from the court or judge.<sup>2</sup> A California statute authorized the clerk to enter judgment by default when *all* the defendants were served and failed to answer. In a case where *one* was not served, and the cause was dismissed as to him, a judgment entered by the clerk as to the others was held void.<sup>3</sup> But it was decided in New York that an erroneous entry of judgment by the clerk, without an application to the court for an order, did not make it void,<sup>4</sup> and the same ruling was made in Indiana in respect to a judgment altered by the clerk before it was signed by the judge.<sup>5</sup>

An administrator's sale of land in Kansas, is not void because the appraisers were erroneously appointed by the court instead of by the administrator.<sup>6</sup> So, where a motion was made in writing, according to the Kansas statute, to set aside a judgment by default before a justice of the peace, and the justice being absent, another justice, who was present, took the papers and noted their filing on the docket, and made an entry setting aside the judgment and setting the cause for trial anew, and signed his own name to the entry; and the regular justice, upon returning a few hours afterwards and seeing what had been done, ratified it, and rendered a judgment against the defendant for costs upon his confession contained in his written motion, the proceedings were held to be erroneous but not void ;<sup>7</sup> and in an old case in North Carolina, where a justice's record, after showing service on the defendant, an administrator, read : " Judgment confessed to the officer by the administrator, Aaron H. Moses, for the sum of fifteen dollars with interest from the first day of January, 1843, and costs, April 24, 1845, L. Cogdell, J. P.," this was decided not to be void, even though the confession was made to the constable.<sup>8</sup> It seems to me that, after jurisdiction has attached by service of process, no act of an

1. *Morris v. Davis*, 36 Tenn. (4 Sneed) 452.

2. *Philpot v. Newman*, 11 Neb. 299 (9 N. W. R. 94).

3. *Junkans v. Bergin*, 64 Cal. 203.

4. *Roeber v. Dawson*, 3 N. Y. Supp. 122 (14 N. Y. Civ. Proc. 354).

5. *Hall v. Durham*, 109 Ind. 434 (9 N. E. R. 926 and 10 id. 581).

6. *Fleming v. Bale*, 23 Kan. 88, 94.

7. *Bates v. McConnell*, 32 Kan. 1 (3 Pac. R. 515).

8. *Hooks v. Moses*, 8 Ired. L. 88, 90.

unauthorized person can make the proceedings void for the reasons given in the Kansas case, namely, the court ratifies and approves it by taking further steps in the case. The defendant is in court, and the court might expunge the act from the record, and then order it to be re-entered; but the very fact that the court can do so, shows that the jurisdiction was not lost, for when that is the case there is nothing to amend.

§ 669. **Confession—Offers to make.**—A statute of New York authorizes a judgment to be rendered on a written offer to confess when accepted in writing, but the failure to put the acceptance in writing,<sup>1</sup> or mere irregularities in the offer itself,<sup>2</sup> do not make the judgment void. Two partners were sued, and an attorney appeared for them and made an offer of judgment. The statute provided that the attorney must annex to his offer his affidavit that "he is duly authorized to make it on behalf of the party." The attorney annexed his affidavit that he "is duly authorized by John Sherlock, one of said defendants (said defendants being co-partners), to make the foregoing offer of judgment on behalf of said defendants." Judgment was entered, and property seized, and replevin was brought by the partner Bulger, on the theory that the judgment was void, and the trial court so held, but it was reversed because it was merely irregular practice;<sup>3</sup> and in another case it was held that the failure of the attorney to make any affidavit did not make the judgment void.<sup>4</sup>

§ 670. **Consent decrees and judgments** are not void because the proper parties are not before the court, nor because of the improper joinder of causes of action.<sup>5</sup> A statute of Tennessee enacted that, upon petition and notice, the court should release the surety on an administrator's bond and *require* him to give a new bond. In such a case, on petition and notice, the administrator came in and voluntarily gave a new bond without being "required" to do so by the court, and it discharged the old surety and accepted the new. In a suit on the old bond, the chancellor held that the discharge was void, but on appeal this was reversed, the court saying that to hold otherwise was to "stick in the

1. *White v. Bogart*, 73 N. Y. 256, 259.

2. *Gilmore v. Ham*, 10 N. Y. Supp. 48 (62 N. Y. Supr. (55 Hun) 613).

3. *Bulger v. Rosa*, 54 N. Y. Supr. (47 Hun) 435 (14 N. Y. St. Rep'r 278).

4. *Citizens' National Bank v. Shaw*, 53 N. Y. Supr. (46 Hun) 589.

5. *Schermerhorn v. Mahaffie*, 34 Kan. 108 (8 Pac. R. 199).

bark.”<sup>1</sup> A second change of venue in Missouri, even by consent of parties, is erroneous, but the judgment of the new court is not void.<sup>2</sup> A decree of foreclosure in California covered all the land described in the mortgage, when a stipulation in writing was filed in the cause providing that a certain parcel should be excluded, and this stipulation was held not void.<sup>3</sup> Commissioners in partition in Indiana having reported that a division could not be made equally, made a report of an unequal division and recommended that those receiving the larger portions should pay certain specified sums to the others (a thing not provided for by the statute), to which report the parties attached their written consent and request for the court so to render judgment, which it did. This was held valid collaterally.<sup>4</sup>

CONSENT MISINTERPRETED, OR WANTING.—A justice’s record in Vermont showed that plaintiff took a non-suit on a plea in abatement; that then the parties proceeded with the case by agreement; that the defendant then pleaded in abatement to the writ; that the parties then agreed that the trial should proceed, and that if the plea in abatement should be sustained the defendant should recover his costs, and if the plaintiff should sustain his case on the merits, he should recover judgment. After a trial, the justice adjudged the plea in abatement good and rendered a judgment for defendant for his costs; and also adjudged the case for the plaintiff on the merits and rendered a judgment in his favor; and this was held to be proof against a collateral attack.<sup>5</sup> In a foreclosure suit in Indiana against the mortgagor and subsequent mortgagees, the mortgagor appeared and demurred to the complaint. Pending this demurrer, the plaintiff and subsequent mortgagees filed a written stipulation settling their rights and also fixing the sum for which a foreclosure should go against the mortgagor, who was not a party to such stipulation, and a decree was entered accordingly, and the land was sold. It was held that the decree was not void against the mortgagor, and that the sale passed his title.<sup>6</sup> So, a resolution accepting a composition in bankruptcy, duly confirmed by the court, is not void because the

1. *Gower v. Shelton*, 84 Fenn. (16 Lea) 652, 656.

2. *Chonteau v. Nuckolls*, 20 Mo. 442, 445.

3. *Trope v. Kerns*, 83 Cal. 553 (20 Pac. R. 82 and 23 id. 691).

4. *Applegate v. Edwards*, 45 Ind. 329, 334.

5. *Egerton v. Hart*, 8 Vt. 207.

6. *Bateman v. Miller*, 118 Ind. 345

(21 N. E. R. 292).

signature of the debtor is omitted.<sup>1</sup> A statute of Wisconsin prohibited strict foreclosures of mortgages except by consent of parties in open court; but such a decree without consent was held not to be void. The court said: "The only question in such case is, had the court or tribunal power, *under any circumstances*, to make the order or perform the act?"<sup>2</sup>

§ 671. **Default omitted or wrongfully taken.**—The failure to enter a default,<sup>3</sup> or a decree *pro confesso*,<sup>4</sup> for want of pleading, does not make the judgment void; but where a person was out on bail in a criminal case before a justice of the peace in Iowa, and did not appear, and the justice entered a forfeiture of the bond without calling or defaulting him or his surety, this was held void in an action on the bond.<sup>5</sup> I am unable to see where the loss of jurisdiction occurred. A judgment was entered in Pennsylvania for want of an affidavit of defense in a cause where the law required none, but this did not make the judgment void.<sup>6</sup> The affidavit filed by plaintiff's counsel in Wisconsin in order to obtain a judgment for want of an answer, instead of saying that "*no* copy of an answer to the complaint in this action has been received," said that "*the* copy of an answer," etc. On this, the clerk entered a judgment by default, and this was held not void because no one could be misled by the mistake.<sup>7</sup>

§ 672. **Discontinuance in inferior court—Adjournment by consent.**—A Kansas statute authorized justices to adjourn causes for a period "not to exceed ninety days" from return day. The defendant procured and consented to several continuances, aggregating one hundred and six days, and then procured the cause to be dismissed for want of jurisdiction, but on appeal the court said: "He could not induce the court to adjourn itself out of jurisdiction, and then make of that fact a defense."<sup>8</sup> So, where the statute of New Hampshire authorized justices to adjourn poor debtors' proceedings for ten days, an

1. Home National Bank v. Carpenter, 129 Mass. 1.

2. Salisbury v. Chadbourne, 45 Wis. 74, 77; *accord*, Landon v. Burke, 33 Wis. 452, 460.

3. Drake v. Duvenick, 45 Cal. 455; Gillespie v. Splahn, 1 Wilson (Indiana Superior Ct.) 228; Woolery v. Grayson, 110 Ind. 149 (10 N. E. R. 935).

4. Rushing v. Thompson's Ex'rs, 26 Fla. 583, 595.

5. State v. Gorley, 2 Iowa 52, 57.

6. Clarion, etc., R. R. Co. v. Hamilton, 127 Pa. St. 1 (17 Atl. R. 752).

7. Morrison v. Austin, 14 Wis. 601, 603.

8. Jennerson v. Garvin, 7 Kan. 136, 139.

adjournment for fifty-four days by agreement of parties did not make the discharge void;<sup>1</sup> and where the statute of Wisconsin authorized the board of supervisors to adjourn a proceeding to lay out a highway for thirty days, but where, by the written consent of the parties, it was adjourned for thirty-three days, when an order laying it out was made, it was held both upon a direct proceeding by *certiorari*<sup>2</sup> and a collateral attack to enjoin the board from enforcing the order,<sup>3</sup> that the jurisdiction was lost and that the order was void. It seems to me that such rulings tend to bring the courts into contempt, and that for the reason given in the Kansas case, the decision is wrong. A trial before a justice in New York was set for one o'clock, at which time the defendant appeared, and finding no one present, departed. The justice was detained, officially, at a town meeting until after five o'clock, when he went to his office and rendered a judgment by default, upon which an execution was issued and the defendant arrested. He sued the justice for false imprisonment, and it was held that he might prove in defense that there was an oral agreement to continue the cause until after the town meeting was over.<sup>4</sup>

The constitution of Georgia provided that the justices' court should sit "monthly at fixed times and places," and the statute provided that "all continuances in justices' courts shall be from term to term." The regular time fixed for holding a justice's court was on Friday. A case then set for trial was postponed by consent of parties until the next day and then tried. On *certiorari*, it was held that the court and parties had no power to postpone the trial to the next day, that the judgment rendered was *void*, and the cause was sent back to be placed on the docket and tried at the regular term.<sup>5</sup> It would seem that such narrow construction would impair the usefulness of the justices' courts in Georgia. In furtherance of justice and in discouragement of bald technicalities, the court might have held that the constitution did not limit the length of the term, and that the statute simply meant that when a cause was *continued* it should always be until the *next* term and never until the *second* or *third* term; and that

1. Leach v. Pillsbury, 18 N. H. 525.

4. Hunt v. Wickwire, 10 Wend. 102

2. Ruhland v. Supervisors, 55 Wis. 664 (13 N. W. R. 877).

(25 Am. D. 545).

3. Ruhland v. Jones, 55 Wis. 673 (13 N. W. R. 689).

5. White v. Mandeville, 72 Ga. 705,

707.

it had no reference to *postponements* of cases from one day to another in the same term.

§ 673. **Discontinuance in inferior court—Adjournment, indefinite.**—A justice of the peace in Wisconsin adjourned a cause to a certain day at ten o'clock "A. P.," instead of "A. M." On *certiorari*, it was held that he did not lose jurisdiction, because if he had merely said "ten o'clock," the "A. M." would have been understood.<sup>1</sup> Where a justice in Wisconsin fails to fix the hour,<sup>2</sup> or the place,<sup>3</sup> to which a cause is adjourned, he loses jurisdiction; but where he adjourned a cause from April 23, 1883, to "the thirtieth day of April, at 9 o'clock A. M., at my office," the omission to name the year 1883, did not make it void.<sup>4</sup> A second meeting of creditors was held at a court of insolvency. This meeting was adjourned "to the time and place of holding the third meeting," without fixing the time or place in the order. A third meeting was held, and the insolvent discharged, and this was decided to be void because of the irregular adjournment.<sup>5</sup> So, where the record of two justices in granting a poor debtor's discharge showed that they met "pursuant to previous adjournment," but did not show any previous meeting or adjournment, the discharge was held void.<sup>6</sup> It was lately decided in Nebraska that when a justice adjourns a cause to an uncertain and unknown time, he loses the right to proceed further, but that his judgment is not void, and that its enforcement cannot be restrained;<sup>7</sup> and this seems to me to be the better view. The parties are in court, and ought to move to have the entry corrected, if dissatisfied with it as made.

§ 674. **Discontinuance in inferior court—Adjournment, too long.**—An adjournment for a longer time than the statute authorizes is erroneous; but why the court should thereby lose jurisdiction so as to make all further action void collaterally, it is not very easy to see. Thus, in New York, where a justice of the peace, on the disagreement of a jury, adjourned the cause for seven days which was erroneous and worked a discontinuance, yet it was held that he did not lose jurisdiction so as to make his judgment rendered

1. Taylor v. Wilkinson, 22 Wis. 40.

2. Crandall v. Bacon, 20 Wis. 639 193.  
(91 Am. D. 451).

3. Grace v. Mitchell, 31 Wis. 533, 536.

4. Stromberg v. Esterly, 62 Wis. 632 (22 N. W. R. 864).

5. Greenough v. Whittemore, 8 Gray

6. Bowker v. Porter, 39 Me. 504.

7. Lininger v. Glenn, — Neb. —  
(49 N. W. R. 1128), *relying upon*  
Gould v. Loughran, 19 Neb. 392 (27 N.  
W. R. 397).

on the adjourned day void;<sup>1</sup> but in precisely the same case in Arkansas, the judgment rendered on the adjourned day, after an appearance by both parties and trial without objection, was held void.<sup>2</sup> On the same principle, that court ought to hold that a trial by agreement without process would be void. The adjournment of proceedings for the discharge of a poor debtor in Maine,<sup>3</sup> and of proceedings before supervisors in Wisconsin to lay out or vacate a highway,<sup>4</sup> for a longer time than authorized by statute, causes a loss of jurisdiction and makes the whole proceeding void.

§ 675. **Discontinuance in inferior court—Adjournment, omitted or unauthorized.**—The failure of the justice in Massachusetts to adjourn a cause on the return day, as required by statute when the defendant was absent, does not make the judgment void.<sup>5</sup> So a judgment by default against a defendant served, and a continuance as to the one not served, is erroneous, but not void;<sup>6</sup> but in summary proceedings by a landlord in New York to recover possession of land, an unauthorized adjournment makes the proceeding void.<sup>7</sup> So where a justice had authority, *in his own discretion*, to adjourn the cause, but none simply upon the motion of the defendant, it was held that where he did adjourn on the motion of the defendant over the objection of the plaintiff, he lost jurisdiction;<sup>8</sup> and the same ruling was made in Wisconsin in respect to the effect of an adjournment granted by a justice on the plaintiff's motion unsupported by affidavit, without the consent of the defendant, when the statute required a showing to be made under oath.<sup>9</sup> But where the surrogate's record in New York, in an administrator's proceeding to sell land, showed that the return day was fixed for August 30, and that the order to sell was made by default on September 2, without showing any order of adjournment to that time, it was decided that this defect did not make the sale void.<sup>10</sup>

1. *Hard v. Shipman*, 6 Barb. 621, 630.

2. *Manufacturing Co. v. Donahoe*, 49 Ark. 318 (5 S. W. R. 342).

3. *Fales v. Goodhue*, 25 Me. 423.

4. *State v. Castle*, 44 Wis. 670, 675.

5. *Hawes v. Hathaway*, 14 Mass. 233.

6. *Anderson v. Gray*, 134 Ill. 550 (25 N. E. R. 843).

7. *Boller v. Mayor, etc., of New York*, 40 N. Y. Super. (8 Jones & Spencer) 523, 537.

8. *Peck v. Andrews*, 32 Barb. 445.

9. *Grace v. Mitchell*, 31 Wis. 533, 536.

10. *Rigney v. Coles*, 19 N. Y. Super. (6 Bosworth) 479, 491, 494.



§ 676. **Discontinuance in inferior court—Judgment delayed.**—The statutes generally require justices of the peace and other inferior tribunals to render judgment within a specified time after the trial is completed or verdict returned. That a failure in this respect does not make the judgment void, is held in California, Georgia, Kansas and Ohio.<sup>1</sup> In the California case, the statute required the justice to render judgment “at the close of the trial,” but he waited forty-four days. In the Georgia case, it was the duty of the ordinary, then an inferior court, to approve or reject a guardian’s report at the next term after it was filed with the clerk, but he failed to act at that term; and in the Kansas case, the delay was one day; and in a later Kansas case, where the justice publicly announced his judgment within the four days allowed by statute, his failure to enter it upon the record until some days afterwards, was held not even erroneous on appeal.<sup>2</sup> To the contrary, that such failure works a discontinuance and makes the judgment void, are cases in Indiana, Michigan, Maine, Massachusetts and New York.<sup>3</sup> The Maine statute provided that the oath of a poor debtor must be taken within six months from the time the bond to release him from arrest should be given. When the examination was begun on the last day of the six months, and continued along until three o’clock the next morning;<sup>4</sup> or where it was adjourned over until the next day by the justice;<sup>5</sup> or where the examination was finished on the last day and the oath administered the next day;<sup>6</sup> or where the oath was taken two days after the expiration of the six months,<sup>7</sup> the discharge was held void. The Massachusetts statute required a third meeting of creditors of an insolvent to be called within six months, and the failure to

1. *Heinlen v. Phillips*, 88 Cal. 557 (26 Pac. R. 366); *Ragland v. Justices*, 10 Ga. 65, 69; *Stewart v. Waite*, 19 Kan. 218; *dictum* in *Robinson v. Kious*, 4 O. St. 593.

2. *Conwell v. Kuykendall*, 29 Kan. 707.

3. *Dictum* in *Burton v. McGregor*, 4 Ind. 550; *Harrison v. Sager*, 27 Mich. 476—*Campbell, J., dissenting*; *Brady v. Taber*, 29 Mich. 199—delay of one day; *Longfellow v. Scammon*, 21 Me. 108; *Newton v. Newbegin*, 43 Me. 293; *Morrison v. Corliss*, 44 Me. 97; *Guilford v. Delaney*, 57 Me. 589; *Williams*

*v. Robinson*, 4 Cush. 529; *Crocker v. Stone*, 7 Cush. 341; *Bloomer v. Merrill*, 1 Daly 485, 487; *Wiseman v. Panama R. R. Co.*, 1 Hilton 300; *Dalton v. Laughlin*, 4 Abb. N. Cas. 187; *Sire v. Merrick*, 6 N. Y. Supp. 661 (17 N. Y. Civ. Proc. 325; 25 N. Y. St. Rep’r 931); *Gillingham v. Jenkins*, 47 N. Y. Supr. (40 Hun) 594 (2 N. Y. St. Rep’r 300)—a delay of 8 months.

4. *Guilford v. Delaney*, 57 Me. 589.

5. *Morrison v. Corliss*, 44 Me. 97.

6. *Newton v. Newbegin*, 43 Me. 293.

7. *Longfellow v. Scammon*, 21 Me.

108.

do so was held to avoid the discharge collaterally.<sup>1</sup> The reason given for this decision was, that the creditors had until the third meeting to file their dissent to a discharge, and that, as the statute required the dissent to be filed within the six months, when the third meeting was not called within that time, the rights of the creditors were abridged. But why abridging the rights of the creditors when they were present in court should make the final judgment void, is not very clear.

“FORTHWITH” OR “IMMEDIATELY.”—The Indiana statute required justices, in certain cases, to render judgment “immediately;” but the court held that this meant within a reasonable time, and that a delay of six days did not make the judgment void.<sup>2</sup> The same ruling was made in Kansas in respect to a delay of five days.<sup>3</sup> And where the Iowa statute required the judgment to be rendered “forthwith,” a delay from 10 P.M. until 11 A. M. was held not even erroneous;<sup>4</sup> and a delay from late Saturday evening until Monday morning was held not to be void;<sup>5</sup> but the contrary was held where the delay was for ninety days.<sup>6</sup> In Wisconsin, under the same statute, a delay from two o’clock in the morning until four in the afternoon, was held to make the judgment void.<sup>7</sup> There are several cases in the latter state where the proceedings were quashed on *certiorari* on account of the error under consideration, but as that is a direct method provided by law to correct such matters, the cases are not strictly applicable here.<sup>8</sup>

CONSENT TO DELAY.—On the third day of February, a suit was tried before a justice of the peace in Maine, and the parties agreed that the cause should be continued for judgment to such time as the justice should appoint, and he appointed the sixth day of September, at which time he rendered judgment; this was decided in New Hampshire not to be void.<sup>9</sup> So, where a statute

1. Williams v. Robinson, 4 Cush. 529; Crocker v. Stone, 7 Cush. 341.

2. Martin v. Pifer, 96 Ind. 245.

3. Stillman v. McConnell, 36 Kan. 398 (13 Pac. R. 571).

4. Davis v. Simma, 14 Iowa 154, 156.

5. Burchett v. Casady, 18 Iowa 342, 344.

6. Tomlinson v. Litze, — Iowa — (47 N. W. R. 1015).

7. Hull v. Mallory, 56 Wis. 355 (14 N. W. R. 374).

8. McNamee v. Speers, 25 Wis. 539 —a delay from 11 o’clock Saturday night until 1 o’clock Monday afternoon; Wearne v. Smith, 32 Wis. 412—a delay from 11 P. M. to 9 A. M.; Kleinstauber v. Schumacher, 35 Wis. 608—a case where the statute allowed a reasonable time and thirteen days were taken.

9. Smith v. Whittier, 9 N. H. 464.

of New York required a justice to render judgment within four days, but by agreement of parties entered of record he took five days, this was held not even to be erroneous;<sup>1</sup> and in another case in the same state, where a longer time than the statute allowed was taken by agreement of parties, the postponement was said to have been for their personal benefit, and that the judgment was not void.<sup>2</sup> Where a statute of Maine provided that the oath of a poor debtor must be taken within six months from the time the bond to release from arrest was given, and the creditor procured an adjournment to a day beyond the six months, a discharge then granted was held valid collaterally.<sup>3</sup>

§ 677. **Discontinuance in inferior court—Justice absent.**—A New Jersey justice of the peace, finding that he could not be present on the return day, continued the cause to another day. This was done in the absence of the defendant. On the return day, the defendant, not knowing of the continuance, appeared and found no one present and went away. On the day to which the cause was adjourned, the plaintiff and justice appeared, and judgment was rendered by default. Execution was issued and property seized, and the defendant sued the justice; but it was held that he could not recover.<sup>4</sup> Mr. Chief Justice Hornblower put his opinion upon the ground that the act of the justice was *judicial*, done *pendente lite*. Mr. Justice Ford put his opinion upon the ground that, whether he should adjourn or discontinue the cause was a question which came up before him for decision; and that his decision, although erroneous, was not void collaterally, and was a protection to him. Mr. Justice Dayton, was in doubt all around, but concurred in holding the justice not liable. It seems to me that the true reason was stated by Mr. Justice Ford. At the time fixed for trial before a justice in Tennessee, the defendant went to his office and learned that he had "gone south," and returned home. Sometime afterwards, the justice returned and rendered a judgment by default against the defendant, and upon a collateral assault, the court said: "He should have notified the defendant of the continuance, certainly, but his failure to do so does not make his proceeding void."<sup>5</sup> But in Kansas, where the justice was absent on the day set for

1. Barnes v. Badger, 41 Barb. 98.

2. Keating v. Serrell, 5 Daly 278.

3. Moore v. Bond, 18 Me. 142.

4. Taylor v. Doremus, 16 N. J. Law (1 Harr.) 473.

5. West v. Williamson, 31 Tenn. (1 Swan) 276.

trial, it was held that action taken by him on a later day was void.<sup>1</sup> During the hour fixed for trial before a justice of the peace in Iowa, and before the defendant arrived, the justice adjourned the cause for five hours and departed. After this, and during the hour set for trial, the defendant arrived, and finding no one present, also departed. The justice returned at the adjourned hour and rendered a judgment by default, which was held to be erroneous, but not void.<sup>2</sup> A statute of Maine provided that, when a justice was absent on the day set for trial, another justice might adjourn the cause to a time not exceeding thirty days, and that if the justice was still absent, he might proceed and try it himself. After such an adjournment, the justice was still absent on the day set, and the new justice, instead of proceeding to try it at that time, adjourned it to another day, by reason of which it was held that he lost jurisdiction.<sup>3</sup> So, where the adjournment made by the new justice was unlawful, a judgment by default on the adjourned day was held void.<sup>4</sup> But where a poor debtor in Maine gave notice that he would take the oath to obtain a discharge at ten o'clock, and one of the justices did not arrive until *after eleven* o'clock, at which time the court was organized, and the oath administered and the debtor discharged in the absence of the creditor, the judgment was decided not to be void.<sup>5</sup> The decision was put upon the ground that the debtor had done all he could, and that the irregular time was *short*. A justice's summons in Rhode Island was returnable at one o'clock. At that hour the defendant appeared and remained an hour, but, the justice not appearing, he departed. Several hours afterward the justice came and rendered a judgment by default, and issued an execution on which the defendant was arrested. He sued the justice, in Connecticut, for false imprisonment, and it was held that the judgment was void, and that he could recover.<sup>6</sup> It would seem from the case, inferentially, that the justice's judgment did not show the irregularity. If it did not, the case is wrong on that ground.

§ 678. *Discontinuance in inferior court—Plaintiff absent.*—It was held in Arkansas that, where a justice's record showed the ab-

1. Olson v. Nunnally, 47 Kan. 391 (28 Pac. R. 149).

2. Central Iowa Ry. Co. v. Piersol, 65 Iowa 498 (22 N. W. R. 648)—Adams, J., *dissenting*.

3. Call v. Mitchell, 39 Me. 465.

4. Spencer v. Perry, 17 Me. 413.

5. Perley v. Jewell, 26 Me. 101.

6. Dyer v. Smith, 12 Conn. 384, 392.

sence of both parties on the return day,<sup>1</sup> the judgment was not void; and in an old case in New York, where the record of a justice showed that the verdict was received and judgment rendered in the absence of the plaintiff, it was decided that the justice ought to have entered a discontinuance, but that the irregularity did not make the judgment void, and that it would bar another action.<sup>2</sup> But in Michigan, the failure of the plaintiff to appear before the justice on the adjourned day was held to make the judgment void, because that was made a cause for discontinuance by statute.<sup>3</sup> This statute did not change the law, as is shown by the last case cited from New York, and I think the case wrong. In a cause before a justice of the peace in Pennsylvania, by order of the plaintiff no service was made, and the cause was continued for further orders. Afterwards, the defendant gave the plaintiff notice to appear and try the cause, which he failed to do, and the defendant took a judgment on the merits, which was held void and no bar to another action.<sup>4</sup> I think this case is unsound.

§ 679. **Discontinuance in inferior court—Plaintiff tardy.**—A Kansas statute provided that “the parties are entitled to one hour in which to appear, after the time mentioned in the summons for appearance, . . . but are not bound to remain longer than that time.” The plaintiff could not get security for costs, and the defendant, after waiting more than one hour, discharged his counsel and left, and after that the justice adjourned the cause six days and notified the defendant, who refused to appear, and a judgment was taken against him by default. This was held to be erroneous, but not void.<sup>5</sup> The defendant ought to have seen to it that the cause was dismissed before he left. The time for the examination of a poor debtor in Massachusetts was fixed at nine o’clock, at which time the creditor appeared, and waited more than an hour, but the debtor not appearing, he departed. Afterwards, at three o’clock, the debtor appeared, and the creditor was notified, but refused to appear, and the debtor was discharged. This was held void.<sup>6</sup> But a contrary ruling was made where a poor debtor’s examination was set for ten o’clock, and the justices met and remained until 11.10, and then started to go away, and met the

1. Shaver v. Shell, 24 Ark. 122.

2. Relyea v. Ramsay, 2 Wend. 602. 410.

3. Brady v. Taber, 29 Mich. 199.

4. Fisher v. Longnecker, 8 Pa. St.

5. Roby v. Verner, 31 Kan. 306.

6. Sweetser v. Eaton, 14 Allen 157.

debtor and returned and administered the oath and discharged him.<sup>1</sup>

§ 680. **Discontinuance in inferior court—Process delayed.**—Where the service before a justice in New York was not personal, but by copy, and the defendant failed to appear, the justice was authorized to issue a warrant for his arrest. The statute did not declare how long the plaintiff must wait before causing a warrant to issue, and where he waited a year, the issuing and arrest of the defendant then was held to make the justice a trespasser.<sup>2</sup> As to what was a reasonable time, the justice was compelled to judge.

**VIEWERS ABSENT.**—Where the original process, in a proceeding before the board of county commissioners in Indiana to establish a free gravel road, was a notice by publication of the time and place of the meeting of viewers to assess damages, the failure of the viewers to meet at the time designated, was held to work a discontinuance and to make the subsequent proceedings void.<sup>3</sup> This seems to me to be unsound. The parties were in court, and they ought to have moved to dismiss the proceeding.

§ 681. **Discontinuance in superior court—Delay in criminal case.**—The Ohio statute provided that a person imprisoned on a criminal charge and not brought to trial within a specified time should be discharged, which should be an acquittal; but an erroneous refusal of the court to order a discharge in such a case was held not void, and not to entitle the prisoner to a release on *habeas corpus*;<sup>4</sup> but precisely the contrary was decided in Colorado<sup>5</sup> and Kansas.<sup>6</sup> If those courts are correct, that, as soon as the time has expired the court loses jurisdiction, then, at that moment, the sheriff becomes liable for false imprisonment. The reason why a mistake of law or fact at this point should be so much more serious than at any other, is not made very clear by those decisions. Under the same conditions in Indiana, it was held to be conclusive, on *habeas corpus*, that the motion for a discharge was denied on account of some exception to the general statute.<sup>7</sup>

1. Niles v. Hancock, 3 Metc. 568. See section 686, *infra*.

2. Gold v. Bissell, 1 Wend. 210, 213.

3. Hobbs v. Board of Commissioners, 103 Ind. 575 (3 N. E. R. 263).

4. *Ex parte McGehan*, 22 O. St. 442, 445.

5. *In re Garvey*, 7 Colo. 502 (4 Pac. R. 758).

6. *In re McMicken*, 39 Kan. 406 (18 Pac. R. 473), *overruling In re Edwards*, 35 Kan. 99 (10 Pac. R. 539), and Horton, C. J., *dissenting*.

7. *McGuire v. Wallace*, 109 Ind. 284, 290 (10 N. E. R. 111).

A person was convicted of a misdemeanor at the October term of a Michigan court and sentence was deferred to the February term, at which time a peremptory order was issued for him to appear and receive sentence on the tenth day of March. He appeared in obedience to this order, but found no court in session, and departed. He was afterwards arrested and sentenced, but this sentence was held to be void upon the ground that the court lost all jurisdiction on the tenth day of March.<sup>1</sup> But, if the cause was still properly on the docket awaiting judgment on that day, I cannot understand why the failure of the court to be in actual session—perhaps the judge was temporarily disabled or dead—should cause it to lose jurisdiction. If the defendant was dissatisfied with the tardiness of the court, he ought to have obtained a writ of *mandamus* from the supreme court to compel it to proceed.

§ 682. Discontinuance in superior court—Delay in filing pleadings.—An Iowa statute required the process to state when the petition would be filed, and provided that upon a failure to file it at the time indicated, “the action will be deemed discontinued;” but a judgment by default was held not to be void because the petition was not filed for fifteen days after the time indicated.<sup>2</sup>

DELAY IN RENDERING JUDGMENT.—An Indiana statute provided that the court should not hold any issue of law or fact under advisement for more than sixty days, but a violation of the statute was held not to work a discontinuance.<sup>3</sup> So, where a statute of New York authorized a personal judgment to be rendered in a mechanic’s lien case within a year from the time of taking the lien, it was held that such a judgment taken after a year would not be void.<sup>4</sup>

§ 683. Discontinuance in superior court—Delay in publication.—Where the statute of Michigan required the plaintiff in attachment proceedings to publish notice for the defendant, when there was no personal service, within thirty days from the time of the return of the writ of attachment, it was held that a failure to do so until after thirty days caused a loss of jurisdiction, and made the judgment void.<sup>5</sup> The defendant, when brought in, ought to have had the service quashed.

1. *People v. Kennedy*, 58 Mich. 372 (25 N. W. R. 318).

2. *Hildreth v. Harney*, 62 Iowa 420 (17 N. W. R. 584).

3. *Smith v. Uhler*, 99 Ind. 140.

4. *Schaettler v. Gardiner*, 47 N. Y.

5. *Millar v. Babcock*, 29 Mich. 526.



**DELAY IN REVIVOR.**—A statute of Missouri required an action, abated by the death of the defendant, to be revived against his personal representative within three terms. A defendant died, and no steps were taken to revive for six terms, when notice was served on the executor, who appeared and answered, and a trial was had and judgment rendered against him, from which he appealed, first to the supreme court of the state, and then to the Supreme Court of the United States, where it was affirmed. He then sought to enjoin the judgment as void because it was not revived within the time prescribed by statute, but the writ was denied.<sup>1</sup>

**IRREGULAR REVIVOR.**—Upon the death of a defendant, the Minnesota statute authorized the cause to be continued against the heirs on supplemental complaint and notice. On the filing of the supplemental complaint and of proof of notice to the attorneys of the original defendant, the court, without waiting for notice to the heirs, revived the cause as to them and made them parties, and caused notice to be served on them by publication, they being non-residents. After notice was completed, the court, without any new order of revivor, rendered a judgment of foreclosure against them by default, which was held void.<sup>2</sup> The court held that there was no power to enter the order to revive until after service, and that as it was not then done, the judgment by default was void. But this was a mere irregularity of practice. The heirs were then before the court to answer a complaint against them seeking to foreclose their rights. If there was any reason why it should not be done, then was the time to make it known.

§ 684. **Discontinuance in superior court—Removal to another court.**—The appeal from a conviction before a police judge sets aside the judgment, and if the defendant is afterwards imprisoned, he will be released on *habeas corpus*.<sup>3</sup> An order made in a federal court giving the plaintiff leave to discontinue the cause after an appeal had been taken to the supreme court, was held to be void.<sup>4</sup> So after a cause has been removed to another court on a change of venue, and the transfer perfected, an order made by the original court permitting the sheriff to amend his

1. Postlethwaite v. Ghiselin, 97 Mo. 420 (10 S. W. R. 482).

2. Lee v. O'Shaughnessy, 20 Minn 173.

3. *In re* Watson, 30 Kan. 753.

4. Ball v. Trenholm, 45 Fed. R. 588.

judgment by default was held void.<sup>1</sup> In another case the docket showed that summons was issued on the 23d, returnable on the 30th, and served on the 23d. It next recited the appearance of plaintiffs, and the non-appearance of defendant, giving no date, a trial and judgment, giving no date, but showing that at the time of the rendition of judgment an application was made for an execution which was issued on the 30th. This was held void collaterally for failure to show when the plaintiff appeared.<sup>2</sup> In a later case, the docket showed the cause duly set for trial on July 6, at 1 o'clock P. M. It then recited: "July 6, 1885. This cause called. The plaintiff appeared and answered to his name. The defendant did not appear. After waiting one hour, the plaintiff proceeded to trial," and judgment was rendered, which was decided to be void because the docket failed to show that the appearance of the plaintiff was at one o'clock P. M.<sup>3</sup> It seems to me that such decisions trench too much on the dignity and usefulness of the justice's court. The court has complete jurisdiction, and the defendant is bound to appear at the hour named in the process. If the plaintiff does not appear, he ought to move to have the cause discontinued according to the statute; or if the plaintiff had been there and taken a judgment prematurely, he ought to move to vacate and to discontinue. If the justice should refuse to grant his motion—a thing highly improbable—the proceedings could be quashed on *certiorari*. The Michigan cases furnish authority for these views. Thus, when an attorney offers to appear for the plaintiff, the statute requires the justice to make him prove his authority, and a failure so to do is error, and the judgment by default will be quashed on *certiorari*,<sup>4</sup> but it is not void collaterally.<sup>5</sup> The error is just as apparent in the latter cases as in the former. In the former, the record fails to comply with the statute by not showing the hour when the plaintiff appears, and in the latter by not showing that he appears at all. See section 679, *supra*.

§ 687. Docket or record, irregular—Continuance, deposit, index.—A justice's court does not lose jurisdiction by failing to enter a con-

1. Redman v. White, 25 Mich. 523.

2. Mudge v. Yaples, 58 Mich. 307 (25 N. W. R. 297).

3. Post v. Harper, 61 Mich. 434 (28 N. W. R. 161).

4. Scofield v. Cahoon, 31 Mich. 206.

5. Reed v. Gage, 33 Mich. 179; Mayhew v. Snell, 33 Mich. 182.

tinuance,<sup>1</sup> or an itemized bill of costs;<sup>2</sup> nor by a failure to deposit the docket with the town clerk upon the removal of the justice from the town,<sup>3</sup> or to *index* the judgments;<sup>4</sup> nor by any irregularity as long as the record shows the jurisdiction, the kind and amount of the judgment and the entry at the proper time.<sup>5</sup>

§ 688. **Docket or record, irregular—Papers used instead of docket.**—The statutes of Michigan, New York and Vermont require justices of the peace to enter their judgments on dockets or records provided for that purpose. But an entry in Michigan upon a sheet of paper was held not void. The court said: "The entry in the docket is evidence of the judgment, but not the judgment itself. One is a judicial, the other a ministerial or clerical act."<sup>6</sup> The minutes of a justice in New York, made at the close of the trial, were: "Fish v. Emerson. Testimony submitted June 30, 1863. Judgment for plaintiff; damages, \$124.20." This was held to be a "rendition" of judgment, and not void because not copied on the docket, nor because the Christian names of the parties were omitted.<sup>7</sup> In three cases in Vermont, it was decided that the files before the justice were not admissible in evidence in a collateral suit, because the statute required a record to be kept;<sup>8</sup> but in a later case, the justice's memorandum made on the writ was: "Continued to the 4th Monday of Oct. 1840, same time and place. Defaulted, Oct. 26, 1840—damages \$59.72—costs, \$2.59. Exon. issued Oct. 26, 1840." It was held that this was a valid judgment, and that it would support an action, because the justice was dead and could not extend it upon his docket.<sup>9</sup> If the proceedings of the justice were void while he lived, it is difficult to see why his death should make them valid. In fact, this case overrules the others, and, it seems to me, rightly so. If a memorandum made by a judge of a superior court on the papers in the case showing a judgment rendered, can be spread on the record *nunc pro tunc*, at any time thereafter, as the judgment of the court, no reason occurs to me why the same rule ought not to

1. Osborn v. Sutton, 108 Ind. 443 (9 N. E. R. 410). 188, 190—a failure to keep the docket "as the statute prescribes."

2. Gunn v. Tackett, 67 Ga. 725, 728. 6. Hickey v. Hinsdale, 8 Mich. 267, 272 (77 Am. D. 450).

3. Carshore v. Huyck, 6 Barb. 583, 585. 7. Fish v. Emerson, 44 N. Y. 376.

4. Hopper v. Lucas, 86 Ind. 43, 50. 8. Wright v. Fletcher, 12 Vt. 43; Strong v. Bradley, 13 Vt. 9; Nye v.

5. Humphrey v. Persons, 23 Barb. 313, 320; Baker v. Brintnall, 52 Barb. Kellam, 18 Vt. 594.

9. Ellsworth v. Larned, 21 Vt. 535.

apply to an inferior court. A decree was drawn up by a probate judge in Alabama and filed among the papers and indorsed: "Decree in Est. of James Hudson, deceased. Filed 2d Monday April, 1847," but it was not entered on the record. This was held to be no decree, and that a *scire facias* would not lie to revive it.<sup>1</sup> The same ruling was made in Ohio, where an administrator's deed was held void because the order to sell was simply indorsed upon the petition, and not spread upon the record as required by the statute.<sup>2</sup> The last two cases seem to me to be unsound. The heirs were in court and bound to know the contents of the records; and if they were incomplete or informal, to their dissatisfaction, they ought to have had them corrected, which could have been done at any time. An Indiana statute requires the book and page containing the order to sell to be inserted in a guardian's deed, but the omission to do so does not make the confirmation void.<sup>3</sup> A paper in the handwriting of the attorney for the plaintiff, found among the files, purporting to be a decree ordering the sale of land and appointing a commissioner to sell, furnishes no evidence of authority to sell, in the absence of any entry showing that such a decree was ever made or referred to by the court.<sup>4</sup>

§ 689. *Docket or record, irregular—Placita, pleading, process, seal.*—The omission of the *placita* from the record of a superior court so that it fails to show at what term it was made does not make the judgment void;<sup>5</sup> and the same ruling was made in Indiana where a justice failed to copy the pleadings on his docket as required by statute.<sup>6</sup> But the failure of the clerk to record the collector's report and certificate of publication in a proceeding to foreclose a tax lien, as required by a statute of Illinois, was held to make the judgment void.<sup>7</sup> Illinois is out of line in tax proceedings.<sup>8</sup> The neglect of a justice to enter on his docket the process, affidavit and bond in attachment proceedings,<sup>9</sup> or the "issuing of process and the return thereof,"<sup>10</sup> as required by

1. Hall v. Hudson, 20 Ala. 284.

2. Newcomb's Lessee v. Smith, 5 O. 447, 451.

3. Hammann v. Mink, 99 Ind. 279, 286.

4. Raymond v. Smith, 1 Metc. (Ky.) 65 (71 Am. D. 458).

5. Den v. Zellers, 7 N. J. L. (2 Halst.) 153; McMillen v. Lovejoy, 115 Ill. 498 (4 N. E. R. 772).

6. Reed v. Whitton, 78 Ind. 579;

Hopper v. Lucas, 86 Ind. 43, 50.

7. Dukes v. Rowley, 24 Ill. 210, 221.

8. See section 582, *supra*.

9. Roberts v. Burrell, 3 Thompson & Cook 30.

10. Houston v. Walcott, 1 Iowa 86.

statute, does not make the judgment void. A Canadian statute required a conviction to be entered by the justice under his hand and seal, and it was held that the omission of a seal after his signature made the conviction void and the justice a trespasser.<sup>1</sup>

§ 690. **Docket or record irregular—Signature of judge or justice, irregular or omitted.**—An Indiana statute required a justice to sign his judgment, and the omission to do so was held to make it void;<sup>2</sup> but where the Minnesota statute simply required the justice to “enter the judgment in his docket,” it was held that signing was not necessary.<sup>3</sup> As the signature of the justice or judge is not necessary at common law, and is a mere ministerial act for the better identification of the record, I think the Indiana cases are wrong. The statutes of several states require the judges of the superior courts to sign the record at the end of each day’s proceedings, but it has been universally held that a failure in this respect does not make the judgments void.<sup>4</sup> The Indiana statute provided, not only that the record should be signed at the end of each day’s proceedings, but also that no process should issue thereon until it was signed, and process issued in violation of this statute, was held to be void;<sup>5</sup> but where a special judge held the court in that state, and the record was signed by the regular judge only, the proceedings were held to be erroneous, but not void.<sup>6</sup> A justice’s judgment in Michigan was dated, but not signed; and immediately below was a stay of execution dated with the same date, and both the judgment and stay seemed to be one transaction. The official signature of the justice was appended at the foot of the stay, and it was decided that this defect did not make the entry void.<sup>7</sup>

§ 691. **Docket or record, irregular — Verdict.**—The omission to record the verdict, as required by the statute, when it is in writing and on file, does not make the judgment void.<sup>8</sup>

1. *Haacke v. Adamson*, 14 C. P. (U. C.) 201, 206.

2. *Ringle v. Weston*, 23 Ind. 588; *State ex rel. Lee v. Wanee*, 4 Ind. App. — (30 N. E. R. 161).

3. *State v. Bliss*, 21 Minn. 458, 462—a direct attack.

4. *Slocomb, Richards & Co., ex parte*, 9 Ark. (4 Eng.) 375; *Childs v. McChesney*, 20 Iowa 431 (89 Am. D. 545).

*Rollins v. Henry*, 78 N. C. 342, 346; *Keener v. Goodson*, 89 N. C. 273, 277; *Eastman v. Harteau*, 12 Wis. 267, 275.

5. *Galbraith v. Sidener*, 28 Ind. 142, 148.

6. *Kambieskey v. State*, 26 Ind. 225.

7. *Hollister v. Giddings*, 24 Mich. 501.

8. *Gunn v. Plant*, 94 U. S. 664.

§ 692. **Docket or record, irregular—Wholly wanting.**—The entire absence of any record or memorandum of judgment necessarily makes the whole proceeding void because there is nothing to amend by. Thus, a fine collected on a penal judgment of a justice, of which no record is made, is void;<sup>1</sup> and parol evidence to show that a note was put into judgment before a justice, but no record of it made because the justice was too unwell, is inadmissible.<sup>2</sup> But an order from a justice to an officer to remove a person from the court room, does not need to be entered upon the docket, and is a justification to the officer, and can be shown by parol evidence in a collateral action.<sup>3</sup> A Massachusetts statute required justices to keep a record of all their judicial proceedings; and where a justice was sued for refusing to allow an appeal in a criminal case, it was held that the action could not be maintained, because his record did not show that an appeal was prayed for.<sup>4</sup> So, a person who sues for a malicious prosecution before a justice, must prove the prosecution and acquittal by the record. He cannot show by parol that he was prosecuted, and that the justice, now out of office, neglected to make up the record.<sup>5</sup>

**WRONG RECORD, OR WRONG KIND OF RECORD.**—The statute required the county court to keep three records for three kinds of business. Proceedings in lunacy were entered in the wrong record, but a federal circuit court held them not void for that cause;<sup>6</sup> and the supreme court of Indiana decided that a justice's judgment was not void because not recorded in a "book of not less than two hundred pages," as required by statute.<sup>7</sup>

§ 693. **Evidence, conclusive but disregarded—The principle.**—The court having jurisdiction over both subject-matter and person, and a trial having been had, the judgment is never void because contrary to conclusive or undisputed evidence.

**JUDGMENT DISREGARDED.**—A person was convicted and imprisoned by a criminal court in Missouri, and was discharged on *habeas corpus* by the circuit court. The criminal court issued a new warrant, upon which, by its order, he was re-arrested and re-imprisoned. He then procured a writ of *habeas corpus* from

1. *Stromburg v. Earick*, 6 B. Mon. 578.

2. *Benaway v. Bond*, 2 Pinney 449 and 2 Chandler 110 (54 Am. D. 147).

3. *State v. Copp*, 15 N. H. 212.

4. *Wells v. Stevens*, 2 Gray 115, 117.

5. *Sayles v. Briggs*, 4 Metc. 421.

6. *Sprigg v. Stump*, 8 Fed. R. 207, 212—*Sawyer and Deady*, JJ.

7. *Hopper v. Lucas*, 86 Ind. 43, 50.

the supreme court, which held that, admitting the discharge by circuit court to have been wrongful, it could not be disregarded by the criminal court, and that its second imprisonment was void, and he was released.<sup>1</sup> The court in this case announced a correct rule, namely, that a judgment is not void for errors where there was jurisdiction, and then violated the rule. The criminal court had undoubted jurisdiction to order the re-commitment of a prisoner unlawfully found at large before the expiration of his sentence. On the hearing of the motion to re-commit, the judgment of the circuit court was conclusive in his favor, and the judgment of the criminal court that he was unlawfully at large, was contrary to the evidence, and therefore erroneous, but not void. A probate court in Kansas imprisoned a person for failure to pay over money, but he was released by the district judge on *habeas corpus*. Afterwards, and without any new notice, the probate judge made a new order that he pay over the money, and again imprisoned him for non-compliance. The supreme court held that it was a flagrant error to issue the new order without notice, but that it was not void.<sup>2</sup> A decree in Indiana granting a divorce is not void because a divorce had been refused on the same grounds in Pennsylvania.<sup>3</sup> In the celebrated Sharon divorce case, the husband commenced a suit in the federal court to cancel an alleged marriage contract held by the wife. She then commenced a suit in the state court to have it declared valid, and for divorce and alimony. The suit in the state court was tried first, and relief was granted to her as prayed for. Afterwards, the case in the federal court was tried and relief was granted to the husband as prayed for, and the wife was enjoined from any attempted use of the alleged contract. The question then came up in the state court in respect to the effect of these conflicting judgments, and it was held that that was a question to be determined by some direct proceeding, not saying what; that as both courts had jurisdiction, the decree of neither was void; and, as they were based on different evidence, it might be that neither was erroneous so as to be liable to reversal.<sup>4</sup> When the decree in the state court was rendered, if it had been set up in the federal court by supplemental plea, it would have barred

1. *Ex parte Jilz*, 64 Mo. 205, 208.

2. *In re Morris*, 39 Kan. 28 (18 Pac. R. 171).

3. *Richardson, Estate of*, 132 Pa. St.

292 (19 Atl. R. 82).

4. *Sharon v. Sharon*, 79 Cal. 633 (22 Pac. R. 26, 30).



all further proceeding there, the same as any other complete, final and lawful settlement of the controversy would have done. But not being set up, or being set up and disregarded, then the decree of the federal court necessarily became the binding one, because it adjudicated that the wife had *no grounds whatever* for her assertion that the alleged marriage contract was valid, necessarily sweeping away the state adjudication, as that was one of her grounds. A judgment in England in disregard of a former judgment, as shown by the record,<sup>1</sup> and a justice's judgment in Maryland in disregard of a discharge in insolvency, as appears by his record,<sup>2</sup> are not void. So, where a case was affirmed in the appellate court, and upon the filing of the mandate of affirmance, the court below rendered a new judgment for costs, this was held to be irregular, but not void.<sup>3</sup>

The supervisors of a county in Iowa had been enjoined by a state court from levying taxes to pay certain bonds on account of their invalidity. An action was brought on some of these bonds against the supervisors in the United States court, and the judgment of the state court in the injunction suit was pleaded as a defense and disregarded, and a judgment rendered on the bonds sued upon, and a mandamus issued to the supervisors to levy a tax for its payment, which they refused to obey, and were attached for contempt. They then applied to the state court for a release upon *habeas corpus*, but their petition was denied.<sup>4</sup> The most that could be said against the judgment of the United States court was, that it was erroneous for disregarding the judgment of the state court, but it was not void. It would undoubtedly have been reversed on a writ of error from the Supreme Court of the United States. Where a claim was defeated on the merits in a state court in Minnesota, and then sued in the federal court, where the state adjudication was expressly disregarded and judgment rendered for the plaintiff, the state court, being better informed in law than the federal court, refused to hold its flagrantly erroneous judgment void.<sup>5</sup> The fact that a cause of action sued upon before a justice of the peace has already been

1. Toft v. Rayner, 5 M. G. and S. (57 E. C. L.) 162.

2. Bell v. State, 4 Gill. 301 (45 Am. D. 130); Dial v. Harris, 8 Md. 40 (63 Am. D. 686); *Ex parte* McDonald, — Cal. — (17 Pac. R. 234).

3. Mulford v. Estudillo, 23 Cal. 94.

4. *Ex parte* Holman, 28 Iowa 88 (4 Am. R. 159)—Beck, J., *dissenting*.

5. Ames v. Slater, 27 Minn. 70, 74 (6 N. W. R. 418).

put into judgment before another justice, does not render the second judgment void, nor make it inadmissible as evidence in a suit to quiet title;<sup>1</sup> nor is a second judgment entered on a warrant of attorney void.<sup>2</sup> A county court in Virginia rejected a will offered for probate. In a new proceeding, the circuit court disregarded the decree of the county court, and admitted it to probate. In a third proceeding, the supreme court held the decree of the circuit court void because it disregarded the decree of the county court;<sup>3</sup> and in a Kentucky case it was said that if an Ohio court should disregard a valid Kentucky judgment, and decide the point the other way, it would be held void in Kentucky.<sup>4</sup> The last two cases are clearly wrong. The attachment statute of Indiana provided that, if the plaintiff failed to recover a judgment against the defendant before a justice, the garnishee should be discharged. In a case where there was an attachment and garnishment, and also personal service on the debtor, the attachment failed, which entitled the garnishee to be discharged, but a personal judgment was rightfully rendered against the defendant, and a judgment wrongfully rendered against the garnishee, and this was held to be void.<sup>5</sup> The court had jurisdiction over both the subject-matter and the person of the garnishee, but rendered a judgment against him when the evidence, namely, the judgment in favor of the defendant in the attachment proceeding, was conclusive in his favor, which did not, in my opinion, make it void.

§ 694. **Evidence, conclusive because undisputed, but disregarded.**—In a suit before a justice of the peace in Wisconsin, where the plaintiff admitted a payment, but the justice, notwithstanding such admission, rendered a judgment for the full amount of the claim, which the plaintiff collected, it was held that the defendant could not recover it back.<sup>6</sup> So, where a cognovit authorized a confession for the sum mentioned in the bond, a judgment rendered for the amount of the penalty, or twice the amount of the bond, is not void.<sup>7</sup> Where the evidence in gar-

1. Gregory v. Bovier, 77 Cal. 121 (19 Pac. R. 232).

2. Martin v. Rex, 6 Serg. & Rawle, 296; Ulrich v. Voneida, 1 Penrose & Watts 245.

3. Ballow v. Hudson, 13 Gratt. 672, 682.

4. *Dictum* in Rogers v. Rogers, 15 B. Mon. 364, 379 (292, 304).

5. Emery v. Royal, 117 Ind. 299 (20 N. E. R. 150).

6. Driscoll v. Damp, 17 Wis. 419 (432).

7. Den *ex dem.* Flommerfelt v. Zellers, 7 N. J. L. (2 Halstead) 153.

nishment proceedings in Rhode Island showed that, on May 17, the principal debtor had assigned the debt owing to him from the garnishee, upon whom the writ of garnishment was served on May 22, and that he learned of the assignment on May 27, before the trial, and proved that fact on the trial, the judgment holding him liable was erroneous, but not void, and was a protection to him.<sup>1</sup> So, a judgment against a garnishee is not void because his debt was evidenced by a negotiable note.<sup>2</sup> Nor is the decree of a court of probate void because in direct violation of the terms of the will.<sup>3</sup> But where an insolvent's discharge in Massachusetts recited that a majority in value of the creditors had not filed their dissent to the discharge, it was held competent in a collateral suit to prove the contrary from an inspection of the records of the insolvency court.<sup>4</sup> This case seems to violate the most elementary principles. The evidence all being of record, the court in the collateral action examined it, and being of the opinion that the original court erred, held its judgment void. According to that doctrine, a decree in equity would always be void where the court reached a wrong conclusion on the evidence.

§ 695. **Evidence, illegal.**—A conviction on illegal evidence in a criminal case;<sup>5</sup> or a divorce granted on the testimony of the complainant,<sup>6</sup> or the confession of the defendant;<sup>7</sup> or a judgment rendered against an infant on the confession of his guardian *ad litem*;<sup>8</sup> or an order of a board of supervisors laying out a highway on illegal evidence, as shown by its record,<sup>9</sup> is not void. But where a poor debtor's oath was administered in the form provided by a repealed statute, the discharge was held void.<sup>10</sup> This case seems to me to be wrong. The court had jurisdiction to grant the discharge on a proper showing; and the oath taken by the debtor showed that he had done certain things, and had not done others, which were insufficient under the new statute to warrant relief, but that did not make it void. So, a tax-judgment in Tennessee was held void because the record showed that it

1. Cottle v. American Screw Co., 13 R. I. 627.

2. Gatchell v. Foster, — Ala. — (10 S. R. 434).

3. Todd v. Flournoy's Heirs, 56 Ala. 99 (28 Am. R. 758).

4. Gardner v. Nute, 2 Cush. 333.

5. Stanton v. Schell, 3 Sandf. 323.

6. Hunt v. Hunt, 72 N. Y. 217, 226.

7. Succession of Weigel, 18 La. Ann. 49, 53.

8. Hollis v. Dashiell, 52 Tex. 187, 197.

9. Humboldt County v. Dinsmore, 75 Cal. 604 (17 Pac. R. 710, 713).

10. Rider v. Thompson, 23 Me. 244; Little v. Hasey, 12 Mass. 319.

was founded on illegal evidence, namely, the sheriff's report instead of the justice's list.<sup>1</sup> But a probate of a will is not void because one of the attesting witnesses was incompetent,<sup>2</sup> nor because made on the testimony of incompetent witnesses.<sup>3</sup> So, where a probate court in the Sandwich Islands made an order distributing property among legatees without having the will probated, it was decided to be valid collaterally.<sup>4</sup>

ORAL INSTEAD OF WRITTEN EVIDENCE.—A statute of Texas provided that a mistake, miscalculation or misrecital of any sum of money in a judgment might be amended by any verdict or instrument in writing in the record, on application of either party, after notice. A railway company was sued for eighty-seven bales of cotton, evidenced by three bills of lading for fifty-one, thirty and six bales, respectively, which bills were attached to the complaint as exhibits. It seems that the finding of the court was that the railway company was responsible for the eighty-seven bales at nine and one-half cents per pound, but whether or not the record showed the weight of the eighty-seven bales, I cannot determine from the report, but I think it did not. As a matter of fact, the court in calculating the amount overlooked the six bales, and the judgment was too small. At the next term, after notice, the court corrected the judgment by adding the value of the six bales. This was held to be void because corrected on parol evidence.<sup>5</sup> But this seems to me to confound the question of jurisdiction with an error of law concerning the admission of evidence. The court had power to hear and determine the motion, but no right to grant the relief prayed for on oral evidence.

QUESTION ILLEGAL.—A commitment for contempt is not void because the question asked was improper.<sup>6</sup> An Iowa statute authorized justices of the peace to compel persons to come before them and make affidavits when "satisfied that the object is legal and proper." Where a person was committed by a justice for refusing to answer, it was held that he could not be discharged on

1. *Hamilton v. Burum*, 11 Tenn. (3 Yerger) 354, 360—Catron, C. J., *dissenting*. The only strange thing is that they did not all dissent.

2. *Fortune v. Buck*, 23 Conn. 1.

3. *Appeal of Peebles*, 15 Serg. & Rawle 39.

4. *Burgess v. Cooper*, 6 Hawaiian, 88.

5. *Missouri Pacific Ry. Co. v. Haynes*, 82 Tex. 448 (18 S. W. R. 605).

6. *People ex rel. Mitchell v. Sheriff*, 7 Abb. Pr. 96, 103.

*habeas corpus* because the questions asked, if answered, would be legally useless, as that was a question of law for the justice.<sup>1</sup>

§ 696. **Evidence, insufficient.**—A statute of Maine authorized an examining magistrate, upon finding that a crime had been committed and that there was probable cause for *believing* the accused to be guilty, to cause him to enter into a recognizance for his appearance at the district court. But where the magistrate, in such a proceeding, simply found and adjudged that there was “good cause to *suspect* the accused to be guilty,” and took his recognizance, this was held void for want of jurisdiction.<sup>2</sup> The finding of the justice showed that his judgment holding the accused to bail was founded on insufficient evidence, which, in my opinion, did not make it void. A judgment binding a person to keep the peace,<sup>3</sup> or licensing a guardian to sell land,<sup>4</sup> is not void because made on insufficient evidence. On a petition to sell the land of a minor in Alabama in order to make a division, the statute required the necessity therefor to be proved by the depositions of witnesses taken as in chancery proceedings. But it was held that irregularities in taking the depositions, or erroneous conclusions drawn from them as to the necessity for a sale, would not make it void.<sup>5</sup> So, a conviction before a magistrate is not void because the evidence was insufficient,<sup>6</sup> or too weak to justify its submission to the jury.<sup>7</sup> Nor is a decree void because the evidence was false and forged, and it will bar an action against the fraudulent actor for damages;<sup>8</sup> and the same rulings were made in respect to a judgment of a justice of the peace,<sup>9</sup> and of naturalization,<sup>10</sup> founded on insufficient evidence. A judgment against the indorser on a note, when the evidence showed that no demand was made nor notice given, is not void;<sup>11</sup> and the same is true in re-

1. State *ex rel.* Whitcomb v. Seaton, 61 Iowa 563, 567 (16 N. W. R. 736)—*relying on* Robb v. McDonald, 29 Iowa 360—Beck, J., *dissenting*.

2. State v. Hartwell, 35 Me. 129.

3. *In re* Bion, 59 Conn. 372 (20 Atl. R. 662).

4. Davis v. Helbig, 27 Md. 452 (92 Am. D. 646); Stow v. Kimball, 28 Ill. 108; Murphy v. De France, 105 Mo. 53 (15 S. W. R. 949 and 16 id. 81)—a probate order.

5. Bland v. Bowie, 53 Ala. 152; Petrus v. McClanahan, 52 Ala. 55.

6. *Ex parte* Hopwood, 15 Q. B. 121.

7. *Ex parte* Daley, 27 New Brunswick 129.

8. Peck v. Woodbridge, 3 Day 30, 36—Edmond, J., *dissenting*.

9. Hendrickson v. St. Louis, etc., R. Co., 34 Mo. 185 (84 Am. D. 76); Odle v. Frost, 59 Tex. 684—a transcript from another state.

10. Spratt v. Spratt, 4 Peters 393, 406.

11. *Dictum* in Hunt v. Hunt, 72 N. Y. 217, 229.

spect to an order appointing surveyors of highways on insufficient proofs.<sup>1</sup> But where a statute of Maine empowered the justices to grant a discharge to a poor debtor upon a full disclosure of all his property, a discharge granted, as shown by the record, when he had disclosed enough, in the opinion of the justices, to pay the creditor, was held void.<sup>2</sup> As the justices simply acted on insufficient evidence, I think this case is unsound. Where a New York statute prohibited a justice of the peace from proceeding further in a cause when it appeared to his satisfaction that the total accounts of both parties exceeded four hundred dollars, a judgment dismissing a cause for that reason is not void, even though the accounts did not exceed that amount;<sup>3</sup> and the same ruling was made concerning the probate of a will by only one of the three attesting witnesses.<sup>4</sup>

§ 697. **Evidence, none heard.**—Where the record of a justice of the peace shows on its face that it was rendered in the absence of the defendant, and without hearing evidence,<sup>5</sup> although a statute required him to hear evidence in such cases,<sup>6</sup> the judgment is not void. So, the rendition of a judgment in attachment by a justice, without the return showing a levy,<sup>7</sup> or in a *capias* case, after a refusal to examine the defendant under the statute to ascertain if he was entitled to a certificate of discharge,<sup>8</sup> is not void. Where the Nevada statute required a justice of the peace to hear evidence on a preliminary examination, and did not permit the accused to waive an examination, yet where this was done and no evidence heard, the commitment was not void.<sup>9</sup> A justice had authority in criminal cases in Indiana to render a judgment for a fine to a limited amount, but when he was of the opinion, from the evidence, that the fine he could assess was inadequate, he was required to bind the defendant over to the circuit court. On a plea of guilty, his record showed that he heard no evidence and made no finding that the fine he could

1. Matter of Highway, 18 N. J. L. (3 Harr.) 291.

2. Stone v. Tilson, 19 Me. 265.

3. Glackin v. Zeller, 52 Barb. 147, 150.

4. Nalle's Representatives v. Fenwick, 4 Rand. 585.

5. Vandyke v. Bastedo, 15 N. J. L. (3 Green) 224, 229; St. Louis, etc., Ry. Co. v. Barnes, 35 Ark. 95, 99.

6. *Dictum* in Hendrickson v. St. Louis and Iron Mountain R. R. Co., 34 Mo. 188, 190; Strickland v. Laraway, 62 N. Y. Supr. (55 Hun) 612 (9 N. Y. Supp. 761; 29 N. Y. St. Rep'r 873).

7. Field v. Dortch, 34 Ark. 399, 406.

8. *In re* Hosley, 22 Vt. 363.

9. *Ex parte* Ah Bau, 10 Nev. 264.

assess was inadequate, but bound the defendant over to court. This was held erroneous, but not void.<sup>1</sup> So, where a justice of the peace in Kentucky issued a warrant upon his own view for the arrest of a person to compel him to keep the peace, upon which he was arrested and taken before another justice, who bound him over on the strength of the warrant alone, without hearing any evidence, this was held sufficient to protect the judgment collaterally and to bar an action against the justice.<sup>2</sup> But where a person was arrested for an alleged crime in Vermont, and the justice refused to hear his evidence to disprove the charge, the conviction was held void,<sup>3</sup> and the same ruling was made in Canada where the conviction was had without hearing any evidence.<sup>4</sup> Where the record shows that the defendant was not notified to appear, or that the court refused to permit him to appear, the cases uniformly hold the judgment void; and, on the same principle, it seems to me when the record shows that the court arbitrarily refused to hear the evidence of either party, the judgment is void, because that is equivalent to striking out his appearance. But, unless the record affirmatively shows that fact, it is invulnerable, because it cannot be shown by extrinsic evidence.

A statute of Michigan authorized justices to order the commitment of infants to the reform school in certain cases, but required the circuit or probate judge to review "the proceedings and testimony taken on the trial" before the justice, and to approve the same before the commitment could be carried into effect. In such a case, where the evidence given on the trial before the justice was not taken down, and the probate judge approved the order of commitment without any review of the evidence, but simply upon an examination of the papers, the commitment was held void and the defendant discharged on *habeas corpus*.<sup>5</sup> I do not think this case is sound. There was no refusal to hear or examine the evidence, no denial of any jurisdictional right, but merely action without legal evidence. The judgment of an inferior court in Indiana establishing a ditch is not void because no evidence was heard,<sup>6</sup> nor because it refused to hear any in respect to its utility, wrongfully holding the report

1. Harris v. State, 54 Ind. 2, 5.

2. Robinson v. Ramey, 8 B. Mon. 214.

3. *In re Hardigan*, 57 Vt. 100.

4. Connors v. Darling, 23 Q. B. (U. C.) 541, 550.

5. Matter of O'Leary, 25 Mich. 144.

6. Argo v. Barthand, 80 Ind. 63, 66.



of the viewers to be conclusive.<sup>1</sup> A statute of Arkansas authorized a judgment to be taken on a forfeited delivery bond without notice when the *execution* was returned not satisfied. The record recited that the bond was forfeited and that the *judgment* was not satisfied, and a judgment was entered on the bond, which was held void.<sup>2</sup> But when proof was made that the judgment was not satisfied, the failure to make technical proof that the execution also was not satisfied would not seem sufficient to make the judgment void. A decree taken against infants without proofs,<sup>3</sup> or against a party constructively summoned without proof as to payments made,<sup>4</sup> or a discharge granted an insolvent after refusing to permit a creditor to examine him,<sup>5</sup> is erroneous, but not void. Nor can it be shown in order to impeach the discharge of a poor debtor by a justice, that no evidence was heard.<sup>6</sup> So, where a statute of Illinois required that one giving a power of attorney to confess judgment on a note before it became due, should have the effect of such power particularly explained to him, and that proof of that fact should be made to the court before judgment should be rendered, it was held that the failure to make such proof did not lay the judgment open to collateral assault.<sup>7</sup> The judgment was founded upon insufficient evidence, and that was all. The same statute also provided that "any person, for a debt *bona fide* due, may confess judgment by himself or attorney duly authorized, either in term time or vacation, without process." Where a confession was entered by the clerk in vacation on a power of attorney with no affidavit filed proving its execution, this judgment was first held to be valid collaterally,<sup>8</sup> but afterwards, on a rehearing, it was held void.<sup>9</sup> It seems to me that the original decision was right. The statute did not require such proof. A contrary ruling was made in Arkansas, where a judgment by confession was decided not to be void because the record failed to show that the execution of the power of attor-

1. Marshall v. Gill, 77 Ind. 402.

2. Miller v. Barkeloo, 8 Ark. (3 Eng.) 318, 322.

3. Boyd v. Roane, 49 Ark. 397 (5 S. W. R. 704, 709).

4. Colton v. Rupert, 60 Mich. 318 (27 N. W. R. 520).

5. Blanchard v. Young, 11 Cush. N. E. R. 1072). 341, 345.

6. Burnham v. Howe, 23 Me. 489; *accord*, in respect to probate decrees, is Gallup v. Smith, 59 Conn. 354 (22 Atl. R. 334); Ackley v. Tinker, 26 Kan. 485.

7. Bush v. Hanson, 70 Ill. 480, 482.

8. Gardner v. Bunn, 21 N. E. R. 614.

9. Gardner v. Bunn, 132 Ill. 403 (23

ney was proved.<sup>1</sup> A board of equalization raised the assessment of a person upon their own knowledge, and without hearing witnesses as provided by statute. Their action was held to be judicial, and erroneous, but not void.<sup>2</sup> So, a decree of an ordinary rejecting a will without hearing evidence, is not void.<sup>3</sup> A trial was had and a finding and judgment drawn up in form by the court, but not filed. In the meantime the court was abolished and its jurisdiction transferred to another court. The new court ordered the findings and judgment to be entered on its records as its judgment. It was held that, conceding this order to be erroneous, it was not void.<sup>4</sup>

§ 698. **Final judgment, proceedings afterwards, upon notice.**—An administrator sold land in Missouri; the sale was approved and a deed ordered, and final settlement of the estate was made, but the administrator was not discharged. The heirs sued to recover the land, and it being supposed that the first report and approval were void, the administrator, after notice to the heirs, made a new report of the sale, which was confirmed and a deed ordered and made. These last proceedings were held to be void because the final settlement was conclusive.<sup>5</sup> The court held that the first sale was valid, and that the administrator had not been discharged, and that it did not appear whether or not a deed had been made on the first order. But the cause was still before the probate court, and if the final settlement did not show the facts correctly, it could be corrected, on notice—at least, such correction would not be void. A divorce was granted in New York and no alimony was given. Eighteen years afterwards, on a petition filed and notice to the husband, and a hearing, alimony was granted because he had then become able to pay. This decree was held void.<sup>6</sup> It does not appear to me that there was any want of jurisdiction. The parties were before the court, and it had power to grant alimony in a proper case. The plaintiff had had a single cause of action for divorce *and* alimony, which she had split into two parts, and taken judgment on one part alone, which barred the right to sue upon the other,<sup>7</sup> the same as any

1. Byrd v. Clendenin, 11 Ark. (6 Eng.) 572.

2. Steele v. Dunham, 26 Wis. 393, 398; *contra*, Phillips v. City of Stevens Point, 25 Wis. 594.

3. Davis v. Port, 3 Brevard 197.

4. Clark v. Superior Court, 55 Cal. 199.

5. Garner v. Tucker, 61 Mo. 427, 432.

6. Kamp v. Kamp, 59 N. Y. 212, 215—Grover and Folger, JJ., *dissenting*.

7. Fischli v. Fischli, 1 Blackf. 360.

other defense would have done, but none of those matters touched the jurisdiction of the court. It simply disregarded a defense. A court in Ohio ordered a non-suit. Two terms later, and after the defendant had removed to Connecticut, the plaintiff filed a motion to set aside the non-suit, notice of which, by order of the court, was served on the defendant's attorney in that suit, and the non-suit was set aside and a judgment rendered for the plaintiff upon which the defendant was sued in Connecticut, and his defense was that the order setting aside the non-suit and all subsequent proceedings, were void. But the supreme court, by three judges against two, in very lengthy opinions, overruled his defense, and held that it was for the Ohio court to determine what the law of that state was in regard to setting aside non-suits, and that its decision was conclusive collaterally,<sup>1</sup> which seems to me to be correct. It did not seem to occur to any one that, if the defendant had a meritorious defense and no actual notice of the motion, he could get relief from a court of equity either in Ohio or Connecticut. A joint judgment against two persons was rendered in Georgia upon service on one alone. The one upon whom there was service left the state, when a motion was made to strike out the name of the one not served from the judgment, and after notice to the attorney of the one served, it was granted, and the name stricken out. The defendant served was sued upon this judgment in Maine, and claimed that the original judgment was void because joint, and that the amendment was void for want of notice, but the latter point was decided against him, and the judgment held valid.<sup>2</sup> A person was convicted on forty out of one hundred and five counts in an indictment, without specifying or designating the counts. A judgment was entered, according to the statute, of imprisonment for ten days on each count, but without specifying that the imprisonment of one should begin when another terminated. At the expiration of ten days, the prisoner was released on *habeas corpus*. At the next term, after notice to him, the court made a *nunc pro tunc* entry ordering that he be imprisoned ten days on each count, and that the second should begin at the termination of the first, and so on, and he was again imprisoned. This was held void, upon the ground that the court had no power to make such an order at a subsequent term.<sup>3</sup> A person was convicted of an assault and

1. Sanford v. Sanford, 28 Conn. 6, 13.

3. People ex rel. Manyx v. Whitson,

2. Hall v. Williams, 10 Me. 278, 291. 74 Ill. 20.

battery before a mayor in Texas, and appealed to the county court, which dismissed the appeal for want of a sufficient bond. The mayor refused to receive a new bond, and the county court ordered him to proceed, and he issued a writ on which the defendant was arrested. This was decided, on *habeas corpus*, not to be void.<sup>1</sup> A person was convicted of a crime in Mississippi, and sentenced to pay a fine and be imprisoned in jail for one week. The entry was of a judgment "for — dollars" and the costs of prosecution. At the next term, the proper judgment was entered, and this was held not even erroneous.<sup>2</sup>

§ 699. **Final judgment, proceedings afterward, without notice.**—Where an assignee in bankruptcy was discharged, and, two years afterward, filed a petition before the register showing that he had just received a note belonging to the estate, and asked for an order to dispose of it, which was granted, the supreme court of Arkansas held that this order was equivalent to opening the order of discharge, or to his re-appointment as assignee, and that it was not void.<sup>3</sup> An amendment to a judgment in a criminal case at the next term and in the absence of the defendant, was held to be void in Iowa, and not to affect the original judgment.<sup>4</sup> But if the record furnished the data from which to make the correction, the absence of notice did not affect the jurisdiction. It is the duty of courts to correct their records, when a clerical mistake is discovered, and notice to the adverse party is of no use, as he cannot resist, and is a mere matter of information and courtesy. When a final judgment is rendered establishing a gravel road and adjusting the assessments, a new assessment laid at another term, and without notice, is void.<sup>5</sup> A decree in Kentucky found the sum due, awarded an execution, ordered a sale and was continued. At the next term, the master's report was filed and approved. The record failed to show any continuance. Six years afterward, the defendant having then become a resident of Illinois, the cause was taken up again, without notice, and a new and larger decree rendered. This was held void in Illinois.<sup>6</sup> A mortgage was foreclosed, a sale made, a deficiency reported and

1. *Ex parte Schwartz*, 2 Tex. App. 74.

2. *Easterling v. State*, 35 Miss. 210.

3. *Geisreiter v. Sevier*, 33 Ark. 522, 530.

4. *Elsner v. Shrigley*, 80 Iowa 30 (45 N. W. R. 393).

5. *Gavin v. Board of Commissioners*, 104 Ind. 201 (3 N. E. R. 846).

6. *Warren v. McCarthy*, 25 Ill. 95 (83, 88).

the sale confirmed. At a subsequent term, an order was made, without notice to defendant, to issue an execution for the deficiency. This order was held void.<sup>1</sup> But this case seems to me to be wrong. The report in respect to the deficiency was not acted on. The defendant could have called it up for action as well as the plaintiff. At least, there was a question for the court to decide. A foreclosure sale was confirmed by a court in Ohio, but no personal judgment was then rendered for the deficiency. Twelve years later, and without notice to the defendant, a personal judgment was rendered. This was held void in Virginia.<sup>2</sup> But this seems to me to have been the mere completion of the decree, to be done as a matter of course, and that delay did not affect it. The defendant was still in court. If he desired to get out, he ought to have moved the court to proceed. A Nebraska statute authorized judgments by default to be set aside after notice, and where it was done without notice, the order was held to be void and to leave the original judgment in force.<sup>3</sup> So, where an appeal was dismissed in Illinois, a re-instatement at the next term, without consent, was void.<sup>4</sup> It seems to me that when a final judgment is rendered and the term is past, the parties are completely out of court; and that any new proceeding without a notice is just as void as the original would have been.

§ 700. Final judgment, proceedings afterward—Reversal.—The reversal of a judgment for errors that are not jurisdictional, does not make a sale before the reversal, void.<sup>5</sup>

SECOND JUDGMENT.—The allowance and classification of a claim by the probate court in Arkansas, is a judgment; and another classification made at a succeeding term, is held to be void.<sup>6</sup> But this seems to me to be unsound. The administration of an estate is one proceeding, and necessarily *in fieri* until completed; and the court has inherent power to correct errors at any time before final settlement; and upon discovering that a claim has been wrongly classified, it is its duty to correct it. Where one of two joint defendants in contract suffers a default, and a

1. Mulvey v. Carpenter, 78 Ill. 580.

2. Johnson v. Anderson, 76 Va. 766.

3. Tootle v. Jones, 19 Neb. 588 (27 N. W. R. 635).

4. Davies v. Coryell, 37 Ill. App. 505, 508.

5. Ponder v. Moseley, 2 Fla. 207 (48 Am. D. 194). As the cases do not conflict on this point, and are numerous, it is not considered necessary to cite them.

6. Cossitt v. Biscoe, 12 Ark. (7 Eng.) 95.

judgment is entered against him, and the other stands a trial and is defeated and a judgment is entered against him, the entering of two judgments is erroneous, but they are not void.<sup>1</sup>

SECOND SENTENCE.—Where a person was sentenced to six months in jail in Maine, and after serving nineteen days was brought out and given three years in state prison, this was held void on *habeas corpus* because the first sentence was partly executed.<sup>2</sup> So, in Louisiana, where a person was sentenced to prison, and was brought back five days afterwards and given a new and different sentence, the supreme court held that an appeal would not lie, and dismissed it, but said that the second sentence was void.<sup>3</sup> But where a sentence in North Carolina was for twelve months in jail, and after eight days were served, the prisoner was brought in and the sentence reduced to six months, this was decided not to be void.<sup>4</sup> I think the cases cited from Maine and Louisiana are wrong according to the principles discussed in sections 730 to 738, *infra*.

§ 701. Final judgment, proceedings afterward—Setting aside judgment by inferior courts.—When the statute gives to inferior courts the power to set aside their judgments, or to grant new trials within a specified time, are the proceedings had after the time fixed, void? I think not. The *power* is given, but, like all other power, the cases wherein it is to be used are limited and defined, and in these cases simply by time. It seems to me that action in such cases is not usurpation, but simply the exercise of a given power at an improper time, against which the adverse party must defend. In accord with these views are two cases from Kansas. The statute authorized justices to grant new trials within five days after judgment; but where new trials were granted, respectively, seven<sup>5</sup> and nine<sup>6</sup> days after final judgment, this was held to be simply an erroneous exercise of power, and not void. But in Maine, where the statute authorized a justice of the peace to set aside a default within twenty-four hours, a default set aside after that time and the subsequent proceedings, were decided to be void, and that perjury could not be committed therein;<sup>7</sup> and where,

1. Downer v. Dana, 22 Vt. 22, 25.

5. Scott v. Kreamer, 37 Kan. 753 (16

2. Brown v. Rice, 57 Me. 55 (A. D. Pac. R. 123).  
1869).

6. Woodward v. Trask Fish Co., 38

3. *Dictum* in State v. Davis, 31 La. Kan. 283 (16 Pac. R. 456).  
Ann. 249.

7. State v. Hall, 49 Me. 412.

4. In Matter of Brittain, 93 N. C.  
587.

on the day set for trial before a justice of the peace in Rhode Island, the plaintiff was defaulted and judgment rendered against him for costs, which, three days afterwards, was set aside over the objection of the defendant, and the cause continued to another day, when a judgment by default was rendered against him, this was held void.<sup>1</sup>

§ 702. **Findings, defective or omitted.**—The judgment is not void because the findings are defective,<sup>2</sup> or obscure and merely inferential,<sup>3</sup> or omitted.<sup>4</sup> So, where the statute of Oregon required a special finding of facts to be made and filed, and conclusions of law to be drawn therefrom, it was said that a general finding and judgment would not be void.<sup>5</sup> The Indiana statute, in bastardy proceedings by an infant female, authorized a settlement before the justice “by showing to the satisfaction of the court that suitable provision has been made and properly secured for the maintenance of the child, and a finding of the court to that effect entered of record.” In such a case, where the justice’s record read “and the parties compromise this case between themselves, and the defendant is to pay the costs, and the said Adelia Mills to receipt the docket in full satisfaction,” it was held that this entry was not void, and that its invalidity could not be pleaded in bar of an action on the note given in settlement.<sup>6</sup>

§ 703. **Guardian ad litem, failure to appoint.**—The failure to appoint a guardian *ad litem* for an infant defendant is erroneous, but it does not make the judgment by default void,<sup>7</sup> even when the service is constructive<sup>8</sup> or the infant a non-resident;<sup>9</sup> but it

1. Hamill v. Bosworth, 12 R. I. 124.

2. *Dictum* in Breeze v. Doyle, 19 Cal. 101, 106.

3. English v. Woodman, 40 Kan. 412 (20 Pac. R. 262).

4. *Dictum* in Breeze v. Doyle, 19 Cal. 101, 106; Garner v. State, 28 Kan. 790; Doty v. Sumner, 12 Neb. 378 (11 N. W. R. 464); Connolly v. Miller, 22 Neb. 82 (34 N. W. R. 76, 78).

5. *Dictum* in Bush v. Geisey, 16 Or. 355 (19 Pac. R. 123, 125).

6. Allyn v. Allyn, 108 Ind. 327, 333 (9 N. E. R. 279).

7. Trapnall’s Adm’x v. State Bank, 18 Ark. 53, 63; *dictum* in Peak v. Shasted, 21 Ill. 137 (74 Am. D. 83);

Millard v. Marmon, 116 Ill. 649 (7 N. E. R. 468); Evans v. Ashby, 22 Ind. 15; Blake v. Douglass, 27 Ind. 416; McBride v. State, use of Clanoy, — Ind. — (30 N. E. R. 699); Walkenhorst v. Lewis, 24 Kan. 420; Porter v. Robinson, 3 A. K. Marsh. 253 (13 Am. D. 153); McLemore v. Chicago, etc., R. R. Co., 58 Miss. 514, 528; McMurray v. McMurray, 66 N. Y. 175; Burgess v. Kirby, 94 N. C. 575, 579; Lessee of Morgan v. Burnet, 18 O. 535, 547.

8. Simmons v. McKay, 5 Bush 25, 36.

9. *Dictum* in Clemens v. Clemens, 60 Barb. 366, 370; Crouter v. Crouter, — N. Y. — (30 N. E. R. 726).



was lately held in Alabama, that a decree settling an estate was void in respect to an infant distributee for whom no guardian *ad litem* was appointed,<sup>1</sup> although the failure of the probate record to show an acceptance or answer by him, does not have that effect.<sup>2</sup> Omitting to appoint a guardian *ad litem* for an infant in an administrator's proceeding to sell land, does not make the sale void in Illinois,<sup>3</sup> but does in Maryland<sup>4</sup> and New York.<sup>5</sup> The Maryland statute provided "that no decree shall be passed unless . . . upon the appearance and answer of such infant by guardian to be appointed by the court," but this added nothing to the law. Neglecting to make such an appointment in Pennsylvania, in a proceeding where the court ordered the real estate to be conveyed to the oldest son at a valuation,<sup>6</sup> or in a suit to foreclose a mortgage in Mississippi, even when no day is given him to show cause against the decree after coming of age,<sup>7</sup> or in partition proceedings in Massachusetts,<sup>8</sup> New York<sup>9</sup> or Texas,<sup>10</sup> or in proceedings to probate a will in New York,<sup>11</sup> does not make the decree void; but the last point was ruled to the contrary in Wisconsin.<sup>12</sup>

**IRREGULAR APPOINTMENT.**—The appointment of a guardian *ad litem* for infants on motion of the plaintiff's solicitor,<sup>13</sup> or the appointment ten days before service, and by a deputy clerk,<sup>14</sup> does not affect the decree collaterally.

§ 704. **Interlocutory decree, omitted.**—It was contended in Wisconsin that a decree in partition was void because the preliminary or interlocutory decree declaring and fixing the rights of the parties, required by the statute, was omitted. But the court said: "No order which a court is empowered, under any circumstances in the course of a proceeding over which it has jurisdiction, to

1. *Eatman v. Eatman*, 82 Ala. 223 (2 S. R. 729).

2. *Saltonstall v. Riley*, 28 Ala. 164 (65 Am. D. 334).

3. *Gage v. Schroder*, 73 Ill. 44, 47.

4. *Roche v. Waters*, 72 Md. 264 (18 Atl. R. 866 and 19 id. 535).

5. *Schneider v. McFarland*, 4 Barb. 139, 145; *affirmed*, 2 N. Y. 459; *Havens v. Sherman*, 42 Barb. 636, 640.

6. *Elliott v. Elliott*, 5 Binney 1.

7. *Smith v. Bradley*, 14 Miss. (6 Sm. & M.) 485, 492.

8. *Austin v. Charlestown Female Seminary*, 8 Metc. 196, 202 (41 Am. D. 497).

9. *Croghan v. Livingston*, 17 N. Y. 218, 221.

10. *Montgomery v. Carlton*, 56 Tex. 361.

11. *Matter of Becker*, 35 N. Y. Supr. (28 Hun) 207, 209.

12. *Dictum* in *O'Dell v. Rogers*, 44 Wis. 136, 173.

13. *McCroskey v. Parks*, 13 S. C. 90.

14. *Greenlaw v. Kernahan*, 36 Tenn. (4 Sneed) 370, 378.

make, can be treated as a nullity merely because it was made improvidently, or in a manner not warranted by law or the previous state of the case. The only question in such a case is, Had the court or tribunal the power, under *any circumstances*, to make the order or perform the act? If this be answered in the affirmative, then its decision upon *those circumstances* becomes final and conclusive, until reversed by a direct proceeding for that purpose.”<sup>1</sup> This was said to be the rule in all judicial proceedings, and was applied to a case where the judgment was claimed to be void because the complaint failed to state a cause of action.<sup>2</sup>

INVENTORY WANTING.—The failure of an independent executrix in Texas to file an inventory, would make a judgment against her erroneous, but not void.<sup>3</sup>

§ 705. **Jury, incompetent or irregular.**—A justice’s judgment in a criminal case is not void because two of the jurors were aliens—a fact unknown to the defendant;<sup>4</sup> nor is a proceeding by a village to condemn land void because the jurors to assess damages were not freeholders.<sup>5</sup> But the contrary was held in Mississippi, where a justice’s record failed to show that the jurors called to assess damages for land taken by a railroad company, were freeholders.<sup>6</sup> This case seems to me to be clearly wrong.

OATH, IRREGULAR.—A judgment establishing a highway in Illinois is not void because the justice in administering the oath to the jury to assess damages added the words “if any;”<sup>7</sup> and the same ruling was made in the Australian province of Victoria, in respect to a conviction in a criminal case where nine of the twelve jurors were not sworn; and the prisoner was denied relief on *habeas corpus*.<sup>8</sup>

REFUSED OR NOT USED.—A judgment is not void because a jury trial was refused by a justice of the peace in a civil case,<sup>9</sup>

1. Tallman v. McCarty, 11 Wis. 401, 406; *accord*, that such omission does not make the decree void, is Sewall v. Ridlon, 5 Me. 458; Falkner v. Guild, 10 Wis. 563, 571.

2. Frankfurth v. Anderson, 61 Wis. 107 (20 N. W. R. 662).

3. Willis v. Ferguson, 46 Tex. 496, 502.

4. Foreman v. Hunter, 59 Iowa 550 (13 N. W. R. 659).

5. Buell v. Trustees of Lockport, 8 N. Y. 55, 58.

6. White v. Memphis, etc., R. R. Co., 64 Miss. 566.

7. Hankins v. Calloway, 88 Ill. 155, 159.

8. Regina v. Cleary, 5 Wyatt, Webb & A’Beckett’s Victorian Reports, Law 85.

9. *Dictum* in *In re Hackett*, 53 Vt. 354, 356.

or in a penal case for the violation of a city ordinance ;<sup>1</sup> nor because of the trial of an action at law as a suit in equity, where the court had jurisdiction of both classes of cases.<sup>2</sup> Where the record shows a trial by the court without a waiver of a jury in Kansas<sup>3</sup> or Oregon,<sup>4</sup> or in another state,<sup>5</sup> or in a case in Texas where the damages were unliquidated,<sup>6</sup> the proceeding is erroneous, but not void. A Mississippi statute authorized the county court to determine as to the necessity of a new road, and to appoint a jury to lay it out. The jury reported that it had viewed the road and that it "can be a good one," and upon this the court made the following order: "The court grant the above road, on condition that it is not to deviate more than from the sectional line." This was held void because it was laid out by the court and not by the jury.<sup>7</sup> I cannot agree with this case. The constitution of Georgia provides that "the court shall render judgment without the verdict of a jury, in all civil cases founded on unconditional contracts in writing, where an issuable defense is not filed under oath or affirmation." Under this law, it was contended that a judgment rendered by the court without the verdict of a jury, against endorsers, was void because their liability was conditional, by law; but it was said that the question was not free from doubt, and that the court had to determine it as one of the questions in the cause, and that it was not one involving jurisdiction, but the proper exercise of it.<sup>8</sup>

**WAIVER OF JURY.**—A trial of a criminal case before the court without the aid of a jury, by consent of the parties, is not void, although in violation of the statute.<sup>9</sup> So, where the constitution of Indiana provided that "in all criminal prosecutions the accused shall have the right to a public trial by an impartial jury in the county in which the offense shall have been committed," and the statute provided that "the defendant and prosecuting attorney, with the assent of the court, may submit the trial to

1. *Ex parte Brandon*, 49 Ark. 143 (4 S. W. R. 452).

2. *Harris v. Townsend*, 52 Ark. 411 (13 S. W. R. 283).

3. *Maxwell v. Stewart*, 22 Wall. 77, 79.

4. *Dolph v. Barney*, 5 Or. 191, 210.

5. *Conway v. Ellison*, 14 Ark. 360, 362.

6. *Carter v. Roland*, 53 Tex. 540, 545.

7. *Stockett v. Nicholson*, Walker (Miss.) 75, 77.

8. *Georgia Railroad and Banking Co. v. Pendleton*, 87 Ga. 751 (13 S. E. R. 822).

9. *Kelley v. People*, 115 Ill. 583 (4 N. E. R. 644)—disapproving a *dictum* to the contrary in *Windsor v. McVeigh*, 93 U. S. 274.

the court, except in capital cases," a submission to the court to fix the punishment on a plea of guilty in a capital case, was held to be merely erroneous,<sup>1</sup> and not void;<sup>2</sup> and in Iowa, a trial in a criminal case by eleven jurors, by consent, is not even erroneous.<sup>3</sup>

**§ 706. Notice not original, wanting**—ADMINISTRATORS' AND GUARDIANS' SALES.—The sale of chattels by an administrator on a shorter notice than the statute required is not void in Mississippi.<sup>4</sup> The court compared it to a sale by a sheriff on too short a notice or without any notice, which would not be void. The same court held that the failure to give notice of the time, place and terms of a guardian's sale of land, as required by statute, did not make the sale void.<sup>5</sup> The failure of the record to show a notice of an administrator's sale of land,<sup>6</sup> does not make the sale void; and the same ruling was made where it showed that a guardian's notice of sale was published in a German newspaper—the notice being in English.<sup>7</sup> So, where a guardian's notice for the sale of land correctly described it by government sub-divisions, sections, township and range, but did not give the county or state, the sale was held valid collaterally.<sup>8</sup>

ADMINISTRATOR'S SETTLEMENT.—Service of process from a New York surrogate's court upon an administrator in Pennsylvania to appear and settle, gives the court jurisdiction to render a judgment against him, as it was his duty to settle without notice.<sup>9</sup>

APPLICATION FOR JUDGMENT.—A Wisconsin statute provided that when a defendant appeared by an attorney, notice of an application for judgment should be given to his attorney; but the failure to do so was held to have no effect, collaterally.<sup>10</sup>

BENEFITS AND DAMAGES ASSESSED TO LAND.—The board of county commissioners in Kansas acquired jurisdiction to establish a highway by the filing of a petition, advertising notice and giv-

1. *Wartner v. State*, 102 Ind. 51 (1 N. E. R. 65).

2. *Lowery v. Howard*, 103 Ind. 440 (3 N. E. R. 124).

3. *State v. Kaufman*, 51 Iowa 578 (2 N. W. R. 275)—*denying* *Bell v. State*, 44 Ala. 393, and *Allen v. State*, 54 Ind. 161, and *Cancemi v. People*, 18 N. Y. 128.

4. *Bland v. Muncaster*, 24 Miss. 62 (57 Am. D. 162), *citing* *Minor v. Se-*

*lectman*, 12 Miss. (4 Sm. & M.) 619 (43 Am. D. 488).

5. *Hanks v. Neal*, 44 Miss. 212, 226.

6. *Saltonstall v. Riley*, 28 Ala. 164 (65 Am. D. 334).

7. *Schaale v. Wasey*, 70 Mich. 414 (38 N. W. R. 317, 320).

8. *Richardson v. Farwell*, — Minn. — (51 N. W. R. 915).

9. *Moore v. Fields*, 42 Pa. St. 467.

10. *Egan v. Sengpiel*, 46 Wis. 703, 758.

ing bond. Another section made it the duty of the petitioners to give notice to the landowners of the time and place of the meeting of the viewers to assess damages, but it was held that the failure to give the latter notice did not destroy the jurisdiction or make the order establishing the highway void.<sup>1</sup> Precisely the same point was decided the same way in a late case in Arkansas,<sup>2</sup> while the contrary was held in Texas;<sup>3</sup> but it was said by the supreme court of Indiana, in speaking of notice to landowners of the meeting of viewers to assess damages for the establishing of a free gravel road, that "if the statute provided for notice of the filing of the petition, and one was given, then disregard of subsequent notices would be irregularities not going to the question of jurisdiction."<sup>4</sup> In proceedings to condemn land for a railway in Minnesota, the statute provided that a petition should be filed, and the landowner notified, and that then commissioners should be appointed to assess damages, and that notice of the time and place of their meeting should "be entered on the minutes of the court, and the same shall operate as notice to all parties." In such a proceeding, where this notice was not entered on the minutes of the court, the landowner moved to set aside the award for that cause, but his motion was overruled because he had actual notice of the time and place of the meeting; nevertheless, the award was held void.<sup>5</sup> A proceeding to establish a highway was begun before the board of supervisors in California, and the landowners duly notified according to the statute. Some months afterward, one of them conveyed his land, and the vendee put his deed on record, but the vendor remained in possession. The statute was silent as to whether or not a *lis pendens* purchaser should be notified, and the board proceeded and established the highway without any notice to the vendee. But, for that omission, the proceedings were held void. The court said: "The common law doctrine of *lis pendens* does not apply to the proceedings before the board of supervisors, and the statute has not extended it to them."<sup>6</sup> It seems to me that the

1. Commissioners of Leavenworth v. Espen, 12 Kan. 531, following Beebe v. Scheidt, 13 O. St. 406.

2. Howard v. State, 47 Ark. 431 (2 S. W. R. 331, 335).

3. McIntire v. Luckner, 77 Tex. 259 (13 S. W. R. 1027).

4. *Dictum* in Hobbs v. Board of Commissioners, 103 Ind. 575, 578 (3 N. E. R. 263).

5. Kanne v. Minneapolis and St. L. Ry. Co., 33 Minn. 419 (23 N. W. R. 854).

6. Curran v. Shattuck, 24 Cal. 427, 434.

cases from Arkansas, Indiana and Kansas are right, and the others wrong. The parties are all in court, and the interlocutory notices—which are very numerous in chancery practice—are, like all the practice, mere matters of convenience, the disregard of which is error that does not touch the jurisdiction.

§ 707. **Notice, not original, wanting—Dismissal and reinstatement.**—When a cause is dismissed it can be reinstated during the same term without notice, as the parties are deemed to be in court during the whole term. But after it has passed, a new suit must be commenced. But when a cause is simply stricken from or ordered off the docket, that implies that it may be placed on again; and when that is done, it is taken up where it was left off. It has none of the elements of a new suit; and if notice is necessary in such a case to reinstate it, as was held in Illinois,<sup>1</sup> it does not seem to me that such notice, being merely interlocutory and not original, is jurisdictional. If the adverse party is not satisfied with the order to strike or leave off the docket, and wants it entirely dismissed, so that it cannot trouble him further, he ought to have that done or else push the case to a final result in some other way.

A decree for specific performance was made and a commissioner ordered to execute conveyances; while this order stood in force, the cause was, on motion, stricken from the docket. Ten years later, and four years after the death of the parties, the court, without notice to the heirs, ordered the same commissioner to make a deed to the heirs of the adverse party. This order was held void.<sup>2</sup>

Involuntary bankruptcy proceedings were begun against a person by creditors, and service duly made; and then the creditors dismissed the proceedings, and the debtor absconded from the state, and attachment proceedings were taken out in a state court, and his property was seized, and duly sold and converted into cash. After the levy in attachment, the bankruptcy dismissal was set aside, and the proceedings reinstated without notice. This was after the debtor had absconded, and an adjudication in bankruptcy was afterwards made without any new notice. In the meantime, the state court ordered the sheriff to distribute the money among the attaching creditors, and the bankruptcy court notified him to show cause why he should not pay it

1. *Tibbs v. Allen*, 29 Ill. 535, 548.

2. *Welch v. Louis*, 31 Ill. 446, 456.

to the assignee in bankruptcy. He made a return of his doings to that court and it ordered him to pay the money to the assignee, which he did. In a suit in the state court by the attachment creditors against him, the judgment of the bankruptcy court was held void, and no protection, on the ground that, after the proceedings were dismissed, the reinstatement without notice was void.<sup>1</sup> This case is very unsatisfactory. If the cause was reinstated in the bankruptcy court at the same term it was dismissed, there was no loss of jurisdiction, and the subsequent order compelling the sheriff to pay to the assignee was necessarily correct. Being *in rem*, all the world were bound.

§ 708. Notice, not original, wanting—Final decree, notice of.—The statute of Louisiana authorized a judicial separation of the wife's property, and provided that "the separation of property obtained by the wife must be published three times in the public newspapers, at the farthest, within three months after the judgment which ordered the same." But the failure so to publish does not lay the judgment open to collateral attack.<sup>2</sup>

MOTIONS.—The want of a notice of the making or hearing of a motion in a pending cause, where the statute requires it, is erroneous, but it does not make the order void;<sup>3</sup> but where the statute of Nebraska provided that the appointment of a receiver without notice should be "void," such an appointment was decided to be void collaterally.<sup>4</sup> But it seems to me that the statute meant void in a direct proceeding to remove.

REVERSAL.—A statute of Illinois provided that, after a reversal of a cause in the supreme court, it should be reinstated in the court below, after notice to the appellee or defendant in error. And where such a case was reinstated without notice to the appellee, and a judgment taken against him, by default, it was held void in Missouri.<sup>5</sup> The only power of the district court in Texas, on an appeal from the probate court, was to try the cause on the merits or dismiss the appeal; but in such a case, the record being defective, the district court remanded the case for further

1. Gage v. Gates, 62 Mo. 412, 415.

3. Pinckney v. Hagerman, 4 La.

2. Carite v. Trotot, 105 U. S. 751, 374.

760, relying upon Turnbull v. Davis, 1

4. Johnson v. Powers, 21 Neb. 293

Mart. N. S. 568, and Raiford v. Thorn,

(32 N. W. R. 62).

15 La. Ann. 81.

5. Meyer v. Hartman, 14 Mo. App.

130.



proceedings, which the probate court took, and rendered a new judgment by default. This was held void, as being without notice to the defendant.<sup>1</sup> On an appeal from the board of county commissioners in Indiana to the circuit court, in a proceeding to establish a ditch, the assessments were decided to be erroneous; but the court, instead of making the assessments, sent the cause back to the board with an order to re-assess, which was done. The supreme court said that, conceding that the circuit court erred in not making the assessments and in remanding the matter to the board, yet its order was not void.<sup>2</sup> It must be apparent, it seems to me, that the supreme court of Texas permitted a judgment to be overturned collaterally, and one of its courts to be treated with contempt, upon a mere technicality that could do no harm, while the supreme court of Indiana would not do so. The defendant being present in the district court of Texas when the order to remand was made, he ought to have objected and taken steps to compel the court to proceed. He could not be heard to say that he did not have notice of the subsequent proceedings in the probate court. What should be done when a defective record was sent up from the probate court, was a question for the district court to decide.

**STAY OF PROCEEDINGS.**—Where a statute of New York authorized a judge, at chambers, to make an order staying proceedings for twenty days without notice, but required notice where the stay would be longer, it was held that an order for a stay of more than twenty days without notice, was void.<sup>3</sup> I think this case is unsound.

**§ 709. Officer appointed to execute order, improper.**—An erroneous order that a sale be made by a referee instead of the sheriff,<sup>4</sup> or that a sale in partition be made by a stranger instead of the sheriff,<sup>5</sup> does not make the sale void. The same ruling was made in Wisconsin, where road supervisors, being a judicial body, appointed persons who had signed the petition, as commissioners to lay out the road.<sup>6</sup> So the enrollment and testing of a judgment by one styling himself “deputy clerk,” who was not a lawful deputy, is

1. *Townsend v. Munger*, 9 Tex. 300, 311.

2. *Sunier v. Miller*, 105 Ind. 393 (4 N. E. R. 867).

3. *Bangs v. Selden*, 13 How. Pr. 374, 376.

4. *Gaskin v. Anderson*, 7 Abb. Pr. N. S. 1, 7.

5. *Dabney v. Manning*, 3 O. 321, 326.

6. *Williams v. Mitchell*, 49 Wis. 284, 289 (5 N. W. R. 798).

merely irregular, and not void;<sup>1</sup> and where the statute of Kentucky required a suit on a bastardy bond to be by the state, an order appointing a stranger to collect it, is erroneous, but not void, and no defense to the suit.<sup>2</sup> On the contrary, an erroneous order appointing a commissioner instead of the administrator to make sale of the land of the decedent, was held void in Indiana,<sup>3</sup> Massachusetts<sup>4</sup> and Texas.<sup>5</sup> But such an error did not touch the jurisdiction over the subject-matter, because that was the power to order a sale in a proper case, nor did it prevent any of the heirs from objecting. The only effect it could have was to deprive the officers of their lawful fees, and how that could cause a loss of jurisdiction, I cannot understand. Thus, where an administrator in Ohio proceeded in a court of equity instead of in the probate court and obtained an order to sell land, which sale was made by an officer of the court, according to the rules of equity, instead of by the administrator, the proceedings were held to be valid collaterally.<sup>6</sup> So, where a New York statute permitted a sale on foreclosure to be made by a referee instead of the sheriff where all the parties to the action consented, an order made by the court to a referee to sell, is not void because the consent of an absent party was not obtained.<sup>7</sup> The court erroneously construed the statute to mean the parties present, which was a question for it to decide.

§ 710. **Premature judgments—Administrator's sale.**—An administrator's order to sell land could not be granted lawfully until after the final account of the personal assets had been settled, but an order granted before that had been done, is not void.<sup>8</sup> The Missouri statute required the court to delay the approval of an administrator's or guardian's sale of land until the next term after it was made, but such a sale is not void because approved at the same term,<sup>9</sup> or an adjourned term.<sup>10</sup>

1. *King v. Belcher*, 30 S. C. 381 (9 S. E. R. 359).

2. *Bell v. Chapell*, 2 Monroe 151.

3. *State ex rel. Clawson v. Younts*, 89 Ind. 313, 316.

4. *Crouch v. Eveleth*, 12 Mass. 503.

5. *Rose v. Newman*, 26 Tex. 131, 133.

6. *Calkins v. Johnston*, 20 O. St. 539, 549.

7. *Abbott v. Curran*, 98 N. Y. 665.

8. *Snyder v. Markel*, 8 Watts 416.

9. *Murray v. Purdy*, 66 Mo. 606; *Sims v. Gray*, 66 Mo. 613, 616; *Henry v. McKerlie*, 78 Mo. 416, 429—*overruling* several prior cases. *State, use of Perry v. Towl*, 48 Mo. 148, and *Castleman v. Relfe*, 50 Mo. 583, 588, were guardian's sales.

10. *Wilkerson v. Allen*, 67 Mo. 504, 508.

**APPEAL.**—It was held in Michigan that an order of a probate judge granting an appeal to the circuit court before the application or bond was filed, was void.<sup>1</sup>

**ATTACHMENT.**—After an attachment of goods before a justice in Illinois without personal service, the statute required ten days' posting of notices, and an adjournment of the cause for not less than fifteen days; and a judgment by default after an adjournment of only fourteen days was held void;<sup>2</sup> but where the Delaware statute under such circumstances required a delay of five weeks, a judgment rendered on the day the goods were attached was decided not to be void.<sup>3</sup> So, where the Tennessee statute directed a delay of six months after the return of process of attachment against non-residents before the entry of judgment, a judgment entered before that time was held not to be void—the court saying it was a mere mistake in practice.<sup>4</sup> Funds in the hands of a trustee in Maryland were not liable to attachment and condemnation until the share of the debtor had been ascertained by a statement of the trustee and the settlement of his final account; but a judgment in attachment for the unascertained share of the debtor before the settlement of the trustee, was held to be valid collaterally, and to hold the balance found to be due.<sup>5</sup> The Texas statute permitted suits in attachment to be brought upon claims not due, but forbade judgment until they became due, and a judgment before the claim became due was decided to be void.<sup>6</sup> It seems quite plain to me that all the cases in this section holding the judgments void, are wrong.

§ 711. **Premature judgments—Contempt and criminal proceedings.**—Where the statutes of California and Nevada required a specified delay before passing sentence upon a plea of guilty, a judgment rendered before the proper time, was not void.<sup>7</sup> But where the county court in Illinois had power to imprison an administrator who refused for thirty days to obey an order to pay a claim, an imprisonment before the expiration of that time was held

1. Dickinson, Appellant, 2 Mich. 337, 339.

2. People v. Jarrett, 7 Ill. App. 566, 569.

3. Stephenson v. Newcomb, 5 Harr. (Del.) 150.

4. Porter v. Partee, 26 Tenn. (7 Humph.) 168.

5. Groome v. Lewis, 23 Md. 137 (87 Am. D. 563).

6. King v. Frazer, 2 Tex. App. Civil Cases, § 789.

7. *Ex parte Ah Sam*, 83 Cal. 620 (24 Pac. R. 276); *Petition of Smith*, 2 Nev. 338, 341; *In re Barton*, — Utah — (21 Pac. R. 998).

void.<sup>1</sup> A Michigan statute empowered a justice to render a judgment for a fine, and to enforce it by imprisonment in case no property could be found on an execution. A judgment for a fine and immediate imprisonment in default of payment, without ordering an execution, was held void, and no protection to the justice.<sup>2</sup>

§ 712. **Premature judgments**—A drainage assessment is not void because made before the time for answering had expired.<sup>3</sup>

**HIGHWAYS.**—An order of the board of commissioners in Ohio establishing a highway at the same session at which the report of the viewers was made, when the statute required it to lie over until the next session, is not void.<sup>4</sup>

**INSOLVENTS.**—An insolvent's discharge recited that six months had elapsed since the date of the assignment. It was dated on the 17th, being six months and one day after the date of the assignment. It was held competent to show, in order to defeat it in a collateral suit, that it was issued on the 14th and ordered to bear date on the 17th.<sup>5</sup> The statute required three meetings of the creditors of an insolvent to be called, but the master decided that it had been repealed, and refused to call the third meeting, for which error the discharge was held to be void.<sup>6</sup> But that was a question the master was compelled to decide, and therefore he was just as competent to do so as the supreme court.

**PARTITION.**—A judgment in partition entered at the first term in Missouri,<sup>7</sup> or an administrator's sale, made for purpose of partition in Texas before the expiration of a year from the granting of letters of administration,<sup>8</sup> is erroneous, but not void. The Massachusetts partition statute, where the shares could not be set off equally, provided for the appointment of commissioners to award money to those getting the lesser shares in value so as to make it just and equal. It also provided that "the partition shall not be established by the court until all the sums so awarded shall be paid to the parties entitled thereto, or secured to their satisfaction, or that of the court before which the matter

1. Von Kettler v. Johnson, 57 Ill. 109, 116.

2. Sheldon v. Hill, 33 Mich. 171.

3. McBride v. State, use of Clanoy, 233. — Ind. — (30 N. E. R. 699).

4. McClelland v. Miller, 28 O. St. W. R. 161). 488, 501.

5. Gardner v. Nute, 2 Cush. 333.

6. Sanderson v. Taylor, 1 Cush. 87.

7. Latrielle v. Dorleque, 35 Mo.

8. White v. Jones, 67 Tex. 638 (4 S.

is pending." The court confirmed the partition in such a case before the money awarded was paid, and this was held void.<sup>1</sup>

§ 713. **Premature judgments—Poor debtors.**—Where a statute of Maine prohibited the justices from administering the oath to a poor debtor until the property disclosed by his examination should be disposed of according to law, it was held that an oath administered to him and discharge granted without a lawful disposition of such property, was void.<sup>2</sup> A poor debtor's application for a discharge in New Hampshire was set for three o'clock, and the oath was administered at that hour. The creditor appeared at 3.20, and the justices refused to recall the debtor for examination, and this was decided to make the discharge no bar to a suit on the bond.<sup>3</sup> The case admits that there was no inflexible rule requiring the justices to delay the administration of the oath, and loses sight of the fact that the attack was collateral.

**RECEIVER APPOINTED.**—It was error for the court to appoint a receiver for a corporation in Illinois before a decree on the merits, but that did not make the appointment void.<sup>4</sup>

**RETURN DAY, OR TIME FOR ANSWERING.**—That a judgment by default after the service is complete but before the return day, or time for answering has expired, is not void, is held in California,<sup>5</sup> Illinois,<sup>6</sup> Kansas,<sup>7</sup> Missouri,<sup>8</sup> and Wisconsin.<sup>9</sup> So where the agent of a corporation, after due service of process, wrongfully and without authority consented to the entry of judgment before the return day, a like ruling was made.<sup>10</sup> But where the statute forbade the taking of a judgment at the return term on constructive service before a justice of the peace in Mississippi,<sup>11</sup> or before the circuit court in Vermont,<sup>12</sup> a judgment

1. Jenks v. Howland, 3 Gray 536.

7. Mitchell v. Aten, 37 Kan. 33 (14

2. Harding v. Butler, 21 Me. 191;

Pac. R. 497).

Call v. Barker, 27 Me. 97; Fessenden

8. Bailey v. McGinniss, 57 Mo. 362,

v. Chesley, 29 Me. 368; Leighton v.

374-

Pearson, 49 Me. 100.

9. Salter v. Hilgen, 40 Wis. 363; Pier

3. Downer v. Hollister, 14 N. H. 122

v. Amory, 40 Wis. 571; Ætna Life Ins.

(40 Am. D. 175).

Co. v. McCormick, 20 Wis. 265, 269—a

4. Ward v. Farwell, 97 Ill. 593, 619  
—Walker, J., *dissenting*.

case of premature action after the  
overruling of a demurrer.

5. *In re* Newman's Estate, 75 Cal.  
213 (16 Pac. R. 887)—by virtue of a  
statute.

10. White v. Crow, 110 U. S. 183.

11. Betts v. Baxter, 58 Miss. 329, 333.

6. Town of Lyons v. Cooledge, 89  
Ill. 529, 534-

12. Rider v. Alexander, 1 D. Chip-  
man (Vt.) 267, 275.

taken at that term was held void. When tax proceedings are temporarily enjoined in Wisconsin, the statute directs the court to suspend further proceedings, and not enter final judgment until a reassessment shall be made, but the failure to do so does not make the judgment subject to collateral attack.<sup>1</sup> So, while it is the law of Michigan, by judicial construction, that a justice of the peace ought to wait an hour for the appearance of the defendant, yet his failure to do so does not make his judgment void.<sup>2</sup>

§ 714. **Prisoner or person injured, absent.**—A continuance of a trial in a criminal case until the next term of the court in the absence of the prisoner, is irregular, but it does not make the conviction void.<sup>3</sup>

**VERDICT.**—The reception of the verdict and discharge of the jury,<sup>4</sup> or the impaneling of the jury, trial and judgment,<sup>5</sup> during the absence of the defendant in jail, are gross irregularities, but they do not make the sentence void. So, the reception of the verdict by a justice of the peace in Indiana in the willful absence of the defendant, and holding it until he was arrested a month afterwards, and then sentencing him, is not void.<sup>6</sup> But in Tennessee, where the prisoner escaped as the jury were bringing in their verdict, its reception and the rendition of judgment in his absence were held to be void and no bar to a new prosecution.<sup>7</sup> The Indiana bastardy statute provided that, in the preliminary proceedings before the justice, if the defendant had escaped after arrest, the trial should proceed in his absence—being a civil case—and that, if the justice should find him to be the father of the child, he should transmit the papers and a transcript of his judgment to the circuit court, where it should be heard and determined as if he were present; and that, in case of a judgment against him, he should be required to replevy the same “if he be in custody,” or in default thereof be committed to jail until security be given. In such a case, where the defendant had escaped after arrest on the justice’s warrant, and was not in custody in the circuit court, a judgment was rendered

1. *Monroe v. City of Fort Howard*, 50 Wis. 228 (6 N. W. R. 803), Orton, J., *dissenting*.

2. *Talbot v. Kuhn*, — Mich. — (50 N. W. R. 791).

3. *People v. Ruloff*, 5 Parker Crim.

4. *Ex parte Farnham*, 3 Colo. 545.

5. *Turney v. Barr*, 75 Iowa 758 (38 N. W. R. 550)—Reed, J., *dissenting*.

6. *Sturgeon v. Gray*, 96 Ind. 166, 172.

7. *Andrews v. State*, 34 Tenn. (2 Sneed) 549, 552.

against him, and it erroneously ordered him to be committed, which was done. This was held void on *habeas corpus*.<sup>1</sup> It is difficult to see where the loss of jurisdiction occurred. The court had jurisdiction over both subject-matter and person, with power to commit in bastardy cases, but made a mistake in the particular case on trial. An Indiana statute enacted "that no justice of the peace shall hear or determine any complaint for assault and battery, or assault, unless the injured party be present as a witness," or refused to attend or could not be found. A conviction showed that the injured party was neither present nor summoned, and that no attempt was made to find him, but it was decided not to be void.<sup>2</sup>

§ 715. **Prisoner not arraigned—Not interrogated.**—A trial and acquittal in a criminal case without any arraignment or plea, is erroneous but not void, and the defendant can be convicted of perjury for corrupt swearing in his own behalf ;<sup>3</sup> nor is a judgment void because the record fails to show that the defendant was asked if he had anything to say why sentence should not be pronounced against him.<sup>4</sup>

§ 716. **Substitution of parties, wrong—Defendant.**—Where one joint defendant died and his administrator came in and defended, and a judgment was rendered against the living defendant and the administrator as such, this was irregular but not void, and a receiptor to the sheriff for goods could not raise any question concerning the validity of the judgment.<sup>5</sup>

**PLAINTIFF.**—Where a record recited: "This action having been continued in consequence of the death of the plaintiff, by his executor, Samuel Webb, and the jury having found a verdict for plaintiff," which was followed by a judgment for the plaintiff, this was informal, but valid when assailed collaterally;<sup>6</sup> and the same ruling was made in Wisconsin in respect to the validity of a judgment, where, after the death of the plaintiff, without any motion to revive, the action was simply continued in the name of his administrator.<sup>7</sup> So also, a Texas judgment was held valid in Arkansas where the record showed that, upon the death of the plaintiff, and without any revivor on behalf of

1. *Patterson v. Pressley*, 70 Ind. 94, 98.

2. *State v. George*, 53 Ind. 434.

3. *State v. Lewis*, 10 Kan. 157, 162.

4. *Dictum* in *Ex parte Gibson*, 31 Cal. 619, 627 (91 Am. D. 546).

5. *Clifford v. Plumer*, 45 N. H. 269.

6. *Gregory v. Haynes*, 21 Cal. 443; *Gregory v. Haynes*, 13 Cal. 591.

7. *Tarbox v. French*, 27 Wis. 651,



It was held that, although the first verdict found him guilty of a misdemeanor only, and did not warrant imprisonment in the state prison, yet the action of the court was simply erroneous, and not void.<sup>1</sup>

VERDICT, DEFECTIVE.—In *capias* proceedings before a justice of the peace, the judgment is not void because the verdict describes the property in terms too general;<sup>2</sup> nor is a judgment for defendant in forcible entry and detainer before a justice void because the verdict was, "We, of the jury, do not think or believe" the defendant guilty.<sup>3</sup> In a foreclosure suit in Texas, the jury returned a verdict for the amount of the debt, ignoring the mortgage, but a decree of foreclosure for the amount of the verdict was rendered, and this was decided to be merely erroneous and not void.<sup>4</sup> The Missouri statute required the jury, in their verdict in replevin before a justice, to find the value of the property, the interest of the parties, and to assess damages for detention. The verdict in such a case was: "We, the jury, find the issues for the defendant." On this, the justice rendered a judgment for return, and this was held valid collaterally.<sup>5</sup> A Hawaiian statute made it an offense to sell *spirituous* liquor without a license. A person was duly charged with that offense before a magistrate, and was found "guilty of selling *liquor* without a license," omitting the word "spirituous," and was fined and imprisoned. On *habeas corpus* this was held not void.<sup>6</sup> So, a verdict in a criminal case which is general and irregular,<sup>7</sup> or which is returned sealed before a justice,<sup>8</sup> does not make the sentence void. It was recently held in Indiana, that a justice's judgment was not void because the verdict was *oral* instead of written, and that its collection would not be enjoined.<sup>9</sup>

DIRECTED IN CRIMINAL CASE.—A judgment was decided not to be void on *habeas corpus* in Iowa because the court directed the jury to return a verdict of guilty, and presented a verdict to the foreman to sign, which he did without leaving the box.<sup>10</sup>

1. *Ex parte* Max, 44 Cal. 579.

2. Willis v. Bayles, 105 Ind. 363, 370 (5 N. E. R. 8).

3. Pollard v. Otter, 4 Dana 516.

4. Burford v. Rosenfield, 37 Tex. 42.

5. Robbins v. Foster, 20 Mo. App. 519, 523.

6. *In re* Piipiilani, 7 Hawaiian 95, 101.

7. State *ex rel.* Welch v. Sloan, 65 Wis. 647 (27 N. W. R. 616).

8. State v. Orton, 67 Iowa 554 (25 N. W. R. 775).

9. Parsons v. Pierson, 128 Ind. 479 (28 N. E. R. 97).

10. Turner v. Barr, 75 Iowa 758 (38 N. W. R. 550, 552)—Reed, J., *dissenting*.

SENTENCE ON ORIGINAL VERDICT AFTER REVERSAL.—A person was convicted of murder in Colorado and sentenced to state prison, but the cause was reversed by the supreme court on the ground that the crime was only manslaughter. The court below, apparently thinking that the supreme court meant that it ought to have given him a sentence for manslaughter on the verdict for murder, set aside its first judgment and sentenced him for manslaughter on the former verdict. On *habeas corpus*, this sentence was held void, as a sentence without a trial, as the reversal set aside not only the judgment, but the verdict also.<sup>1</sup> But what the effect of the reversal was, and how the opinion of the supreme court should be construed, were questions for the trial court.

§ 719. **Withdrawal of petitioners wrongfully refused.**—A statute of New York authorized the county judge, upon the petition of a specified proportion of the tax payers of a town, to issue its bonds in aid of a railway. A proper petition was presented, but before it had been acted upon, a number of the petitioners sufficient to destroy its validity asked leave to withdraw their names, which the judge erroneously refused, and proceeded to issue the bonds. It was held by the Supreme Court of the United States that this error did not cause a loss of jurisdiction, and that the bonds were valid;<sup>2</sup> and the same rule was applied by the same court to the action of a board of commissioners in Kansas in canvassing votes;<sup>3</sup> but precisely the contrary was held in Indiana concerning the action of a board of county commissioners in respect to a petition to establish a turnpike company,<sup>4</sup> and also in New York in respect to a petition to assessors to issue town bonds in aid of a railroad.<sup>5</sup> When the petitions asking leave to withdraw were filed, a common-law question was presented to the tribunal for decision, and it had power to decide even though an erroneous conclusion was reached.

1. Ganey's Case, 7 Colo. 384, 395 (3 Pac. R. 903).

2. Orleans v. Platt, 99 U. S. 676; accord, Lyons v. Munson, 99 U. S. 684.

3. Rock Creek v. Strong, 96 U. S. 271.

4. Hord v. Elliott, 33 Ind. 220.

5. Town of Springport v. Teutonia Savings Bank, 84 N. Y. 403.

PART II.

RELIEF GRANTED, ERRONEOUS.

Scope of, and principle involved in, Part II,	§ 720	Title C.—Relief exceeds possible power of the court—
Title A.—Errors, generally,	721-729	Joint instead of several—
Title B.—Relief exceeds the power of the court in any case of that species, or is wrong in kind,	730-738	Outside of issues—Partial, incomplete, irregular or too limited,
		§ 739-761

§ 720. **Scope of, and principle involved in, part II.**—We have now reached the final judgment or decree in judicial proceedings. We assume that the parties are before the court, and that it has power to grant relief, and the question now is, When is the relief granted void? It is quite evident that mere errors of law or fact which do not touch the jurisdiction will not have that effect.<sup>1</sup> But it is evident that if it exceeds the possible power of the court, or is outside of the issues, or is so uncertain as to be unintelligible, it will be void. Between these extremes there is a large field for controversy, and the cases, as might be expected, differ widely.

TITLE A.

ERRORS, GENERALLY.

§ 721. Administration proceedings, errors in relief—(Appointment—Final settlement—Petition to sell land—Order to sell land—Appraisement disregarded—Mortgage ordered on petition to sell—Time or place, wrong—Revoking letters).	—Damages—Dismissal—Ditch—Equity—Examining.
722. Affidavit in criminal case—Error in construing—Allowances.	§ 725. Finding or report, wrongly construed—Forfeiture—Garnished.
723. Alternative or conditional judgments—Amendment—Annexing—Assessment.	726. Highway—Homestead—Infants—Injunction—Interest—Legatee—Liens—Logical—Mandamus—Married women—Partition—Poor debtor—Prize court—Receiver—Replevin.
724. Award—Bankrupt's discharge—Composition—Condemnation—Corporation—Costs	727. Supreme court—Sureties—Tax—Temperance—Title bond—Trust.
	728. Will, construed.
	729. Will, disregarded—Will probated—Will rejected—Writing construed—Other state.

§ 721. **Administration proceedings—Errors in relief.**—The appointment of a joint administrator for a husband and wife in one

1. Hassell v. Hamilton, 33 Ala. 280; Elston v. City of Chicago, 40 Ill. 514; Bridges v. Nicholson, 20 Ga. 90; (89 Am. D. 361, 365); Hampson v.

order is a novelty and irregular, but not void.<sup>1</sup> After the death of a general administrator in Alabama, the court, instead of appointing an administrator *de bonis non*, appointed another general administrator. This was held to be void as to the excess only, and that the appointee had all the power of an administrator *de bonis non*.<sup>2</sup> An administrator's *final settlement* has the force and effect of a judgment, and is not void for errors,<sup>3</sup> and the same is true concerning his *proceeding to sell land*.<sup>4</sup> An administrator's petition to sell land prayed that it might be sold "at the late residence" of the deceased. The order was to sell "according to law." This was held, collaterally, to be an order to sell at the residence of the deceased, as prayed for.<sup>5</sup> An administrator's order to sell land, erroneous because in gross,<sup>6</sup> or because it embraced too much,<sup>7</sup> or covered all the land described in the petition instead of sufficient to satisfy the debts,<sup>8</sup> or did not determine that a part could not be sold without prejudice to the remainder,<sup>9</sup> is not void for those causes. But in an early case in Massachusetts, where the order was to sell land to pay six hundred and forty dollars of debts, a sale of nine hundred and fifty-three dollars' worth, was held void.<sup>10</sup> If a confirmation was required, this case is wrong. In a later case in the same state, the petition asked leave to sell a specified portion of the land of the

Weare, 4 Iowa 13 (66 Am. D. 116); Paine v. Spratley, 5 Kan. 525, 541; Dufour v. Camfranc, 11 Mart. (La.) 607 (13 Am. D. 360); Kent v. Brown, 38 La. Ann. 802, 813; Kittredge v. Emerson, 15 N. H. 227, 262; Hollister v. Abbott, 31 N. H. 442 (64 Am. D. 342); Seguin v. Maverick, 24 Tex. 526 (76 Am. D. 117); Fox v. Cottage, etc., Association, 81 Va. 677, 683; Adams v. Preston, 22 How. 473, 488; McGoon v. Scales, 9 Wall. 23, 30; Lynch v. Bernal, 9 Wall. 315, 322; Bryan v. Kennett, 113 U. S. 179, 198.

1. Grande v. Herrera, 15 Tex. 533, 538.

2. Moseley's Adm'r v. Mastin, 37 Ala. 216.

3. Peacocke v. Leffler, 74 Ind. 327; Carver v. Lewis, 104 Ind. 438 (2 N. E. R. 705); Carver v. Lewis, 105 Ind. 44 (2 N. E. R. 714); Harlin v. Stevenson, 30 Iowa 371, 374; Lalanne's Heirs v. Moreau, 13 La. 431 (7 La. N. S. 273);

Picot v. Bates, 47 Mo. 390; Yeoman v. Younger, 83 Mo. 424, 427; Matter of Estate of Hood, 90 N. Y. 512, *reversing* 27 Hun 579.

4. Wimberly v. Hurst, 33 Ill. 166 (83 Am. D. 295); Williams v. Sharp, 2 Ind. 101; Gavin v. Graydon, 41 Ind. 559, 564.

5. Jemison v. Gaston, 21 Tex. 266, 271.

6. Runyon v. Newark India Rubber Co., 24 N. J. L. (4 Zab.) 467.

7. Spriggs, Estate of, 20 Cal. 121, 125; Boyd v. Blankman, 29 Cal. 19 (87 Am. D. 146); Hodge v. Fabian, 31 S. C. 212 (9 S. E. R. 820).

8. Griffith v. Phillips, 77 Tenn. (9 Lea) 417, 419.

9. In Matter of Dolan, 88 N. Y. 309, 319.

10. Litchfield v. Cudworth, 15 Pick. 23, 3

decendent, but notice was given that application had been made to sell it all, and the license followed the notice. This was held to make void the sale of the portion specified in the petition.<sup>1</sup> It seems to me that the license was void, if at all, only as to the excess beyond the part specified in the petition.

APPRAISEMENT DISREGARDED.—A Missouri statute provided that "No real estate of any minor, sold under the provisions of this chapter, shall be sold for less than three-fourths of its appraised value." Lands of a minor were appraised at one hundred and fifty dollars and sold for ten dollars, and the sale duly approved. This was held void in ejectment.<sup>2</sup> But it was said in Indiana that an order to sell at private sale for less than the appraised value, contrary to the statute, would not be void,<sup>3</sup> and this seems to me the better rule.

MORTGAGE ORDERED ON PETITION TO SELL.—A Michigan administrator filed a petition to sell land, but the court granted an order to mortgage, and continued the matter to a specified time, when, it having been found impracticable to mortgage, an order to sell was made without any new notice. This was held valid collaterally because the same facts were essential in order to mortgage as to sell.<sup>4</sup> But the contrary was held in Iowa where an order to mortgage land was made upon an administrator's petition to sell.<sup>5</sup> See section 170, *supra*.

TIME OR PLACE, WRONG.—A sale of land is not void because ordered to be made in the wrong county,<sup>6</sup> or at the wrong time,<sup>7</sup> nor because of an omission to fix the time.<sup>8</sup> Where a preliminary order was dated December 4, 1878, showing that a petition to sell land was then filed, upon which a hearing was fixed for January 15, 1878, at which time an order to sell was granted upon a petition verified December 4, 1877, it was held that the record, as a whole, showed that the preliminary order was made December 4, 1877, instead of 1878.<sup>9</sup> But where a judgment

1. Verry v. McClellan, 6 Gray 535.

2. Carder v. Culbertson, 100 Mo. 269 (13 S. W. R. 88)—Barclay, J., *dissenting*.

3. *Dictum* in Worthington v. Dunkin, 41 Ind. 515, 522.

4. Cahill v. Bassett, 66 Mich. 407 (33 N. W. R. 722)—a divided court.

5. McMannis v. Rice, 48 Iowa 361.

6. Goldtree v. McAlister, 86 Cal. 93 (24 Pac. R. 801); McCullough v. Estes, 20 Or. 349 (25 Pac. R. 724).

7. Lawson v. Moorman, 85 Va. 880 (9 S. E. R. 150, 153).

8. Spring v. Kane, 86 Ill. 580, 585; Benefield v. Albert, — Ill. — (24 N. E. R. 634).

9. Goodwin v. Sims, 86 Ala. 102 (5 S. R. 587).

in Illinois for taxes of 1847, did not show at what term it was rendered, it was held void for that reason.<sup>1</sup> This case seems to me to be unsound. A probate court in South Carolina made an order revoking the letters of an administrator and ordering him to pay the balance on hand into court, and for a failure to comply with this order he was imprisoned. On *habeas corpus*, this was held void because the court had no such power.<sup>2</sup>

§ 722. **Affidavit in criminal case—Error in construing.**—A justice of the peace in Texas had jurisdiction to convict a white person for an assault and battery on a slave, but jurisdiction only to examine and bind him over for cruel treatment of one. A white person was arrested and taken before a justice on an affidavit charging that “he did lay violent hands on a negro slave, Alfred, a man, and unmercifully whip and abuse said boy. The justice convicted him of assault and battery, and this was decided not to be void.<sup>3</sup> The affidavit did not actually charge either offense, and the supreme court seems to have held that the construction put upon it by the justice was conclusive collaterally.

**ALLOWANCES.**—An allowance made by the board of county commissioners in Indiana,<sup>4</sup> or by the board of supervisors of a county in California<sup>5</sup>—being judicial acts—or by a court of probate,<sup>6</sup> is not void for errors.

§ 723. **Alternative or conditional judgments.**—A late case in North Carolina (which I cannot understand because not familiar with the practice) says that alternative or conditional judgments are void at law in both civil and criminal cases;<sup>7</sup> but, in Kansas, an administrator’s order to sell land at public *or* private sale, for cash *or* on payments, was held simply erroneous and not void.<sup>8</sup> A county court in Kentucky ordered a part of a road to be altered as soon as the applicant should open it as the law required. This order was decided not to be void because not absolute.<sup>9</sup> A statute of New Hampshire authorized the court to lay

1. *Young v. Thompson*, 14 Ill. 380.

2. *Gilliam v. McJunkin*, 2 S. C. 442.

3. *Bumpus v. Fisher*, 21 Tex. 561.

4. *Board of Commissioners v. Gregory*, 42 Ind. 32.

5. *Colusa Co. v. De Jarnett*, 55 Cal. 373; *Placer Co. v. Campbell*, — Cal. — (11 Pac. R. 602).

6. *Goodrich v. Thomson*, 4 Day 215; *Harvard College v. Amory*, 9 Pick.

446, 463; *Palm’s Appeal*, 44 Mich. 637

(7 N. W. R. 200); *Pitner v. Flanagan*,

17 Tex. 7; *Smith v. Downes*, 40 Tex.

57, 60; *Richardson v. Estate of Mer-*

*rill*, 32 Vt. 27, 33; *Bulkley v. Andrews*,

39 Conn. 523, 535.

7. *Strickland v. Cox*, 102 N. C. 411 (9 S. E. R. 414).

8. *Fleming v. Bale*, 23 Kan. 88, 94.

9. *M’Ilvoy v. Speed*, 4 Bibb 85.

out highways and to assess benefits and damages, but did not provide for *donations*. A judgment that a highway be laid out upon the condition that certain donations should be paid was held to be void as to this condition only.<sup>1</sup> So, the same statute, in relation to laying out highways by selectmen, allowed no condition to be annexed, except that the person for whose benefit it was laid out should maintain gates or bars across it. It was then to be free to the public. The selectmen, in laying out such a highway, required that it should be "made by the petitioners and remain a highway so long as said petitioners shall keep it in repair, and no longer." This was a condition not permitted by the statute, and the owner of the land sued a person passing over it for trespass; but it was held that the action of the selectmen was not void, and he was defeated.<sup>2</sup>

AN AMENDMENT of the record in an administrator's proceeding to sell land;<sup>3</sup> or an order annexing territory to a city;<sup>4</sup> or the appointment of an under-tutor;<sup>5</sup> or an assessment of bank stock on its par instead of its real value;<sup>6</sup> or an assessment on a premium note of an insolvent insurance company, is not void for error.<sup>7</sup>

§ 724. An award;<sup>8</sup> or a *bankrupt's* discharge,<sup>9</sup> or *composition* with his creditors;<sup>10</sup> or a *condemnation* proceeding by a railway;<sup>11</sup> or a judgment against *corporation* officers;<sup>12</sup> or the taxation of *costs*,<sup>13</sup> is not void for error. So, a judgment is not void because the record shows that the *damages* in an action for false imprisonment were estimated by the rule governing in malicious prosecution, over which kind of an action the court had no juris-

1. Dudley v. Cilley, 5 N. H. 558.

2. Brown v. Brown, 50 N. H. 538, 555.

3. Remick v. Butterfield, 31 N. H. 70 (64 Am. D. 316, 318).

4. City of Logansport v. La Rose, 99 Ind. 117, 127.

5. Arland, Succession of, 42 La. Ann. 320 (7 S. R. 532).

6. Williams v. Weaver, 75 N. Y. 30, 34.

7. Howard v. Whitman, 29 Ind. 557.

8. Bumpass v. Webb, 4 Porter 65 (29 Am. D. 274); Zeigler v. Zeigler, 2 Serg. & Rawle 286; Morse v. Bishop, 55 Vt. 231.

9. Boyd v. Olvey, 82 Ind. 294, 306.

10. Smith v. Engle, 44 Iowa 265; Noyes v. Dobson, 30 Kan. 361.

11. Cooper v. Anniston, 85 Ala. 106 (4 S. R. 689).

12. Hampson v. Weare, 4 Iowa 13, 16 (66 Am. D. 116).

13. Law v. Vierling, 45 Ind. 25; Palmer v. Glover, 73 Ind. 529, 534; Small v. Banfield, — N. H. — (20 Atl. R. 284); Lutes v. Alpaugh, 23 N. J. L. (3 Zab.) 165; Varrell v. Church, 36 Wis. 318, 321.



diction;<sup>1</sup> and the same ruling was made in respect to an order laying out a highway where the damages were estimated on a wrong basis.<sup>2</sup> The erroneous *dismissal* of an appeal from a justice's court to the county court, is not void.<sup>3</sup> So, in a judicial proceeding to establish a *ditch*, no error of law or fact will make the final order void;<sup>4</sup> nor does a mistake of law made by tax assessors in assessing mere *equitable* claims as debts, make the assessment void.<sup>5</sup> A court of *equity* cannot overhaul a judgment at law for errors,<sup>6</sup> nor do errors make the decision of an *examining* magistrate void.<sup>7</sup>

§ 725. **Finding or report wrongly construed.**—The New York statute authorized the court, in winding up banks, to fix the personal liability of the stockholders by judgment. The report of the referee (presumably in accordance with the pleadings) was, that "Elizabeth Lee, Alfred Lee and Thomas Lee, executors, etc., of Benjamin Lee, deceased," were liable for a certain sum. A judgment against the estate of Benjamin Lee was rendered. This was held to be void because the finding was against the executors personally.<sup>8</sup> But the construction of the report was for the trial court, and its decree would not seem to be void because it adopted its obvious instead of its technical meaning. Neither a decree of *forfeiture of title* for breach of a condition subsequent,<sup>9</sup> nor the judgment of a justice of the peace in a criminal case,<sup>10</sup> is void for errors. So, where a judgment was obtained in Pennsylvania against one member of a firm composed of two persons, upon which a debtor of the firm was *garnished* before a justice of the peace, it was held that his erroneous decision that the debtor should pay one-half the debt, was not void.<sup>11</sup>

1. *Chivers v. Savage*, 5 El. & Bl. (85 E. C. L.) 697.

2. *Hankins v. Calloway*, 88 Ill. 155, 160; or were omitted—*Howard v. State*, 47 Ark. 431 (2 S. W. R. 331, 334); or not all included—*Clement v. Burns*, 43 N. H. 609, 615.

3. *Roberts v. McCamant*, 70 Tex. 743 (8 S. W. R. 543).

4. *Cox v. Bird*, 88 Ind. 142; *Smith v. Clifford*, 99 Ind. 113; *Young v. Sellers*, 106 Ind. 101 (5 N. E. R. 686); *Wishmier v. State*, 110 Ind. 523 (11 N. E. R. 291).

5. *People v. Halsey*, 53 Barb. 547, 553.

6. *Hempstead v. Watkins*, 6 Ark. (1 Eng.) 317, 368; *Bay v. Cook*, 31 Ill. 336, 344; *Smith v. McIver*, 9 Wheaton 532.

7. *In re Balcom*, 12 Neb. 316 (11 N. W. R. 312).

8. *Diven v. Lee*, 34 How. Pr. 197, 200.

9. *McLellan v. St. Louis and H. Ry. Co.*, 103 Mo. 295 (15 S. W. R. 546).

10. *In re O'Connor*, 6 Wis. 288, 290.

11. *Howard v. McLaughlin*, 98 Pa. St. 440.

§ 726. **Highway.**—A judgment so laying out a highway that the public cannot reach it without being trespassers, is erroneous but not void;<sup>1</sup> and the same rule applies to a judgment allowing a *homestead* exemption on account of a mistake of law.<sup>2</sup> *Infant* complainants in whose favor a decree is rendered cannot overhaul it collaterally for errors,<sup>3</sup> nor can errors be considered in a proceeding for contempt for the violation of an *injunction*.<sup>4</sup> So, the wrongful allowance of *interest*,<sup>5</sup> or a mistake in the amount due a *legatee*,<sup>6</sup> or in apportioning *liens*,<sup>7</sup> do not make the judgment void; nor is it void because it is not a *logical sequence* from the opinion.<sup>8</sup> Errors do not make void a *mandamus* to a board of election canvassers,<sup>9</sup> nor a decree subjecting the lands of a *married woman* to the payment of a debt,<sup>10</sup> nor proceedings in *partition*.<sup>11</sup> The statute of Maine in regard to disclosures made by a *poor debtor* gave the creditor a first lien; but where the debtor disclosed that he had six dollars in money, which the justices allowed to be paid on fees, the discharge was held void<sup>12</sup> upon the ground that they had no power to adjudge that property disclosed was not subject to the lien of the creditors' writ.<sup>13</sup> But this is a mistaken view of jurisdiction which is the power to determine, not merely the power to determine rightly. Errors in the decision of a *prize court*,<sup>14</sup> or in the appointment of a *receiver*,<sup>15</sup> do not make the proceeding void. In *replevin* for rails, the plaintiff was defeated. He then brought *trover* and sought to show that

1. *State v. Canterbury*, 28 N. H. (8 Foster) 195, 225.

2. *McDonald v. Berry*, 90 Ala. 464 (7 S. R. 838).

3. *Hanna v. Spotts' Heirs*, 5 B. Mon. 362 (43 Am. D. 132).

4. *Billard v. Erhart*, 35 Kan. 616 (12 Pac. R. 42), *citing* 2 High Inj. § 1416.

5. *Sanders' Heirs v. Gatewood*, 5 J. J. Marsh. 327; *Judge of Probate v. Robins*, 5 N. H. 246; *Supervisors v. United States*, 4 Wall. 435.

6. *Holden v. Lathrop*, 65 Mich. 652 (32 N. W. R. 879).

7. *Central Trust Co. v. Seasongood*, 130 U. S. 482 (9 S. C. R. 575).

8. *West Feliciana R. R. Co. v. Thornton*, 12 La. Ann. 736 (68 Am. D. 778).

9. *State v. County Judge*, 13 Iowa 139, 145.

10. *Rosenheim v. Hartsock*, 90 Mo. 357 (2 S. W. R. 473).

11. *Hedges v. Mace*, 72 Ill. 472, 475; *Whitman v. Heneberry*, 73 Ill. 109, 115; *Burghardt v. Van Deusen*, 4 Allen 374; *Snevilley v. Wagner*, 8 Pa. St. 396; *Welty v. Ruffner*, 9 Pa. St. 224; *Robinson v. Fair*, 128 U. S. 53, 86 (9 S. C. R. 30).

12. *Putman v. Holbrook*, 27 Me. 419, 426.

13. *Jewett v. Rines*, 39 Me. 9, 13.

14. *Ocean Ins. Co. v. Francis*, 9 Wend. 64.

15. *Richards v. People*, 81 Ill. 554, 554; *Cook v. Citizens' National Bank*, 73 Ind. 256, 259; *Bodkin v. Merit*, 108 Ind. 293, 299 (1 N. E. R. 625).

he was defeated in the first action because the rails were built into fence, by reason of which the court was of the opinion that replevin would not lie; but such error of law did not make the proceeding void, and it was held to bar the action of trover.<sup>1</sup>

§ 727. **Supreme court.**—A judgment of affirmance in the supreme court is not void because erroneous.<sup>2</sup> So, where the supreme court of Texas had power in certain cases to render the proper judgment itself instead of reversing and remanding for a new trial, a judgment so rendered by it is not void because the case was not a proper one.<sup>3</sup>

**SURETIES.**—A judgment discharging the sureties on an administrator's bond is not void because erroneous.<sup>4</sup> An appeal bond with two sureties was given in Texas by virtue of which the case was taken to the county court, where the bond was quashed, and a new one with new sureties given, when a judgment was rendered against the appellant and the sureties on both bonds. The sureties all appealed and the judgment was affirmed against all in the court of appeals. It was held that the judgment against the sureties on the quashed bond was not void; that the court might have held that it was improperly quashed, or held them liable for some other reason, but that such error did not affect the judgment collaterally.<sup>5</sup> So an order to sue the sureties on an executor's bond is not void because erroneous;<sup>6</sup> nor does the fact that a tax bill is void make the judgment on it void,<sup>7</sup> nor is a temporary restraining order void because granted hastily and erroneously.<sup>8</sup>

**TITLE BOND.**—A decree for an absolute conveyance of land based upon a title bond, is not void because the bond only authorized a release and quitclaim.<sup>9</sup> A court of equity, under proper pleadings, disposed of real estate in a manner contrary to the deed of *trust* under which it was held. It was held that, as circumstances could possibly exist which gave the court such power, the decree was not void.<sup>10</sup>

1. Bower v. Tallman, 5 Watts & Serg. 556.

2. Sturgis v. Rogers, 26 Ind. 1, 14.

3. McCrimmin v. Cooper, 37 Tex. 423, 428.

4. Veach v. Rice, 131 U. S. 293 (9 S. C. R. 730).

5. Sweetman v. Stratton, 74 Tex. 165. (11 S. W. R. 1055).

6. Clark v. Fredenburg, 43 Mich. 263, 266 (5 N. W. R. 306).

7. Knoll v. Woelken, 13 Mo. App.

275.

8. Erie Railway Co. v. Ramsey, 45 N. Y. 637, 646.

9. Thorn v. Newsom, 64 Tex. 161,

165.

10. Curtiss v. Brown, 29 Ill. 201, 229.

§ 728. **Will, construed.**—A decree founded upon an erroneous construction of a will is not void for that reason;<sup>1</sup> nor does an error in deciding that a will makes a constructive appointment of an executor, make the appointment void.<sup>2</sup> A court of equity in Illinois decided that a will gave the executor power to sell land, and by virtue of its decision he made a sale; but afterwards the cause was reversed by the supreme court, which held that the will gave no such power. Nevertheless, the sale made was decided not to be void. The opinion was rested on the fact that the court obtained jurisdiction of the cause in order to determine another question, and that, having jurisdiction for one purpose, it had the power to do other things.<sup>3</sup> But this reason seems to me to be far-fetched. The court had power to construe wills; and an error in construing one was no more serious than an error in construing a contract. A widow died in Alabama, holding land as devisee under a will. The probate court construed the will as giving her a life estate, with remainder to certain devisees. The executor took possession under the statute, and sold in order to make a division and distribution among the remaindermen. In a collateral suit, the supreme court held that the will gave the widow the fee, and that the remainders over, and the sale by the executor, were void.<sup>4</sup> This case seems clearly wrong.

§ 729. **Will, disregarded.**—A Missouri statute empowered the probate court to reserve the personal property, and to sell the real estate, unless the will provided to the contrary; but its action in that respect, contrary to the provisions of the will, is not void.<sup>5</sup>

**WILL PROBATED.**—Error in the proceeding to probate a will,<sup>6</sup> or error in holding that it was duly probated in a foreign country,<sup>7</sup> does not make it void. The appointment of an executor is an approval and probate of a will, without any express adjudication

1. Britain v. Cowen, 24 Tenn. (5 Humph.) 314.

2. Grant v. Spann, 34 Miss. 294, 303.

3. Whitman v. Fisher, 74 Ill. 147, 153.

4. Whorton v. Moragne, 62 Ala. 201, 207.

5. Overton v. Johnson, 17 Mo. 442, 448.

6. Johnson v. Johnson, 70 Mich. 65 (37 N. W. R. 712); Carpenter v. Cameron, 7 Watts 51; Loy v. Kennedy, 1 Watts & Serg. 396; Gibson v. Beckham, 16 Gratt. 321.

7. Goldtree v. McAlister, 86 Cal. 93 (23 Pac. R. 207).

admitting it to probate.<sup>1</sup> So, error in *rejecting* a will when presented for probate, does not make the decree void.<sup>2</sup>

WRITING CONSTRUED.—An error of law in construing a written instrument, holding too much to be due, does not make the judgment void.<sup>3</sup>

OTHER STATE.—Errors in the judgment of another state, when jurisdiction existed, do not make it void, and it cannot be re-examined on the merits.<sup>4</sup>

#### TITLE B.

RELIEF EXCEEDS THE POWER OF THE COURT IN ANY CASE OF THAT SPECIES, OR IS WRONG IN KIND.

§ 730. Principle involved in Title B.

Sub-title I.—Civil cases, . § 731-735 | Sub-title II.—Criminal cases, § 736-738.

§ 730. Principle involved in title B.—Where the tribunal has power to grant relief of a particular kind, an error in giving too much or not enough, is never void, so long as it does not exceed its possible power in any cause of the general class to which the one under consideration belongs. Thus excessive damages, or excessive equitable or legal relief given in a particular civil cause—the court having power to give such damages or relief in a proper civil cause—do not make the judgment void. And in criminal causes where the court has power to fine, an excessive fine, or an excessive imprisonment which the court would have power to give in a proper criminal cause, is not void. And where the court has power to fine only, or to imprison only, a proper fine or imprisonment is not void because the court adds an extra sentence beyond its power. Such extra sentence only, is void. So, of an imprisonment at the wrong place. If the court has power to imprison in different places, a mistake as to the proper place does not make the sentence void; but a sentence to imprisonment at a place to which the power of the court could not possibly extend in that general class of causes, would be sheer usurpation and void. A statute of Massachusetts provided that, unless the plaintiff recovered more than ten dollars on trustee process before a justice of the peace, he should recover no

1. Lackland v. Stevenson, 54 Mo. 108, 111.

2. Schultz v. Schultz, 10 Gratt. 358 (60 Am. D. 335).

3. Verner v. Carson, 66 Pa. St. 440.

4. Glass v. Blackwell, 48 Ark. 50 (2 S. W. R. 257); Lewis v. Adams, 70 Cal. 403 (11 Pac. R. 833); Brainard v. Fowler, 119 Mass. 262, 265; Moulin v. Ins. Co., 24 N. J. L. (4 Zab.) 222.

costs; but in such a case, where he recovered just ten dollars, the justice rendered a judgment in his favor for costs. In a collateral attack on this judgment for costs, the supreme court said: "In this case, in rendering a judgment for costs, the defendant was not acting outside or in excess of his jurisdiction; his error was an error of judgment in deciding a question of law which he was obliged to decide, and which was within the scope and limits of his jurisdiction."<sup>1</sup> In a later case, the same court said: "The better rule seems to be that, where a court has jurisdiction of the person and of the offense, the imposition, by mistake, of a sentence in excess of what the law permits, is within the jurisdiction, and does not render the sentence void, but only voidable by proceedings upon a writ of error."<sup>2</sup> The question of law is precisely the same as though the complaint demanded relief which the court had power to give in some cases, but not in that particular case.

## SUB-TITLE I.

## CIVIL CASES.

§ 731. Appellate court grants relief beyond power of inferior court.

732. Attachment and garnishment, excessive relief—Personal judgment against garnishee—Time uncertain.

§ 733. Divorce and alimony—Excessive relief—Dower—Highway.

734. Personal judgment or execution instead of order of sale, and *vice versa*.

735. Redemption barred, wrongfully.

§ 731. Appellate court grants relief beyond power of inferior court.—It is error for the court, upon an appeal from a justice of the peace, to render a judgment for a sum which exceeds his jurisdiction, but it is not void.<sup>3</sup> In an action of replevin before a justice in Iowa for cattle, they were taken and delivered to the plaintiff. On the trial, their value was found to be beyond the jurisdiction of the justice, but he rendered a judgment for the plaintiff. The defendant sued out a writ of error from the circuit court, and that court reversed the judgment for want of jurisdiction, and rendered a judgment against the plaintiff for the value of the cattle. In a collateral action, it was held erroneous for the circuit court to do any more than reverse and dismiss the case, but that its judgment for the value was not void.<sup>4</sup>

1. White v. Morse, 139 Mass. 162.

3. Hinds v. Willis, 13 Serg. & Rawle

2. Sennott's Case, 146 Mass. 489 (16 N. E. R. 448, 450).

213.

4. Finch v. Hollinger, 47 Iowa 173, 176.

§ 732. **Attachment and garnishment, excessive relief.**—When a boat was attached in Missouri and released on a bond, the statute did not authorize a judgment against it, nevertheless, such a judgment was decided not to be void.<sup>1</sup>

**PERSONAL JUDGMENT AGAINST GARNISHEE.**—In an early case in Wisconsin, a garnishee admitted having corn in his possession, in which case the statute required the justice to render a judgment that he deliver it to the officer, but he rendered one for its value. In a collateral contest concerning the validity of this judgment, the court said: "To this objection, it is sufficient to reply that the justice had, as we have seen, jurisdiction of the cause and of the parties, and was thereby clothed with authority to pronounce a *right* judgment. And I think it was clearly his prerogative to pronounce an *erroneous* judgment. If he in fact did so, the judgment might have been avoided, but it cannot be void."<sup>2</sup> While the case is correct, the logic seems to be bad. If the court had granted relief which was beyond its power in any case whatever, it would have been void; but as it had power to render a personal judgment for that amount in a proper case, doing so in an improper case was simply the wrongful exercise of power. In a later case in the same state, the statute authorized justices, in certain contingencies, to render a personal judgment against garnishees; but in a case where the answers of the persons garnished showed that the justice ought to have ordered them to deliver over the property, and upon their failure to do so, to have rendered a judgment for its value, he did both in the same judgment. This was decided to be simply erroneous and not void.<sup>3</sup> But in Arkansas<sup>4</sup> and Kansas,<sup>5</sup> a personal judgment rendered against a garnishee where the statute only authorized an order to deliver over, was held void. But a general judgment in attachment in Missouri, instead of a special one for the sale of the land, is not void, and can be amended, and will uphold the sale.<sup>6</sup>

**TIME UNCERTAIN.**—An Alabama statute authorized a judgment against a garnishee for a debt not due, with a stay of

1. St. Louis Perpetual Ins. Co. v. Ford, 11 Mo. 295.

2. Rector v. Drury, 3 Pinney 298, 303, and 4 Chandler 24.

3. Rasmussen v. McCabe, 43 Wis. 471, 478.

4. Giles v. Hicks, 45 Ark. 271, 276.

5. Missouri-Pacific Ry. Co. v. Reid, 34 Kan. 410 (8 Pac. R. 846).

6. Massey v. Scott, 49 Mo. 278, 281.



execution until due. A garnishee admitted an indebtedness of one hundred and eleven dollars and fifty cents to the defendant "when he completes my house according to contract." On this the justice rendered judgment for the plaintiff's demand, "but execution is stayed until said job is finished." This was held void for uncertainty.<sup>1</sup>

**BASTARDY PROCEEDINGS.**—Where jurisdiction exists, an erroneous order imprisoning the defendant, is not void.<sup>2</sup>

**§ 733. Divorce and alimony—Excessive relief.**—A statute of New York authorized the court, on decreeing a separation, to vest the wife with the sole control of her property, and in such a case she was authorized to sell and convey without private examination in regard to her freedom of compulsion from her husband which she did. In a suit respecting the title so conveyed, it was said that if the decree was too broad, it was still within the jurisdiction of the court, and not void.<sup>3</sup> So, where the statutes of Missouri gave the court general power to pass the title of property from one person to another, but no right to do so in a divorce case, in which the decree for alimony was to be in money, a decree transferring personal property to the wife instead of money, by consent of parties, was held valid collaterally.<sup>4</sup> This case is an authority that the deviation was not jurisdictional, because jurisdiction over the subject-matter cannot be waived. But where there was a decree in New York for a sum of money as alimony in satisfaction of future dower rights, contrary to the statute, those rights were held not to be barred.<sup>5</sup> This case seems to me to be wrong. The court had complete jurisdiction, with authority to determine all the rights of the parties, and a grant of money instead of specific property was merely an error of law which did not destroy the jurisdiction. A decree for alimony in gross, instead of in annual payments as required by the statute, is not void.<sup>6</sup>

**DOWER.**—An order in partition to sell the fee in land assigned as dower, is not void.<sup>7</sup>

1. *White v. Hobart*, 90 Ala. 368 (7 S. R. 807).

2. *Holderman v. Thompson*, 105 Ind. 112 (5 N. E. R. 175).

3. *Delafield v. Brady*, 108 N. Y. 524 (15 N. E. R. 428).

4. *Crews v. Mooney*, 74 Mo. 26, 32.

5. *Crain v. Cavana*, 62 Barb. 109.

6. *Taylor v. Gladwin*, 40 Mich. 232.

7. *Eller v. Evans*, 128 Ind. 156, 158 (27 N. E. R. 418).

**HIGHWAY.**—A decree in partition is not *vo.* because it erroneously lays out a highway across the land partitioned.<sup>1</sup>

**§ 734. Personal judgment or execution instead of order of sale, and vice versa.**—A plaintiff filed a transcript of a judgment in a court, which gave him the right to issue execution and sell defendant's land in that county. Numerous other persons having acquired liens on the same land, he brought a suit against all of them, and the judgment debtor, to determine priorities, and the court adjudged his lien prior to all others, and ordered the land sold by its decree then made, instead of simply declaring the priority of his lien and leaving him to issue an execution on his transcript, and to sell on that. This was held to be merely irregular, and not void.<sup>2</sup> A foreclosure suit was pending in Illinois before the death of the mortgagor, and was carried on against his administrator, by default, against whom a decree was rendered for the amount due; and instead of a direction for a sale of the mortgaged premises as required by the statute, an order for an execution was made, upon which the mortgaged premises were sold. This sale was decided not to be void, and to carry the title.<sup>3</sup> So, in a later case in the same state, where a mortgage was foreclosed against an administrator, and a personal judgment rendered against him, instead of an order to sell the land, and no special execution ordered, and where the land was sold on a general execution, the sale was held valid collaterally.<sup>4</sup> A statute of Michigan authorized devisees of land to take possession, by consent of the executor, and provided that, upon a deficiency of assets to pay debts, the court might fix the amount the devisee should pay, and that in default of payment, an execution should issue to collect it. In such a case, the executor first procured an order to sell the land. He then took steps to have the share to be paid by the devisee fixed, which was done. Then, instead of issuing an execution, he proceeded to sell the land under the order to raise the amount coming from the devisee. This sale was held void.<sup>5</sup> What the devisee was doing while the executor was obtaining these orders, and why he did not defend against this irregular practice, the case

1. *Turpin v. Dennis*, — Ill. — (28 N. E. R. 1065).

2. *Walker v. Sturbans*, 38 Fed. R. 298.

3. *Swiggart v. Harber*, 5 Ill. 364 (39 Am. D. 418).

4. *Rockwell v. Jones*, 21 Ill. 279, 286.

5. *Atwood v. Frost*, 51 Mich. 360 (16 N. W. R. 685).

does not show. Similar to these cases is an early one in Kentucky, where the statute authorized a sale of an infant's land in proceedings in partition, and provided that the purchase money should not be paid, but should remain in the hands of the purchaser, at interest, and a lien on the land; nevertheless, a sale in such a case was decided not to be void because the purchase money was ordered to be paid.<sup>1</sup>

§ 735. **Redemption barred, wrongfully.**—Where the federal courts sitting in Illinois<sup>2</sup> and Iowa,<sup>3</sup> respectively ordered land to be sold without right of redemption, in express violation of the statutes of those states, the decrees were held valid collaterally in the state courts. So, it was held in Kansas, that a decree erroneously barring a right of redemption, was not void.<sup>4</sup>

## SUB-TITLE II.

### CRIMINAL CASES.

§ 736. Appellate court inflicts punishment beyond the power of the inferior court.

§ 737. Place of imprisonment, wrong.  
738. Punishment excessive, or wrong in kind.

§ 736. **Appellate court inflicts punishment beyond the power of the inferior court.**—A person was tried and convicted before a police court in Massachusetts, which had power to fine, but not to imprison. On appeal to the municipal court, which had power to fine *and* imprison in cases originally brought before it, but no right to imprison when the case came to it by appeal, a fine and imprisonment was held void as to the latter, and the prisoner was discharged on *habeas corpus*.<sup>5</sup> This case is contrary to those cited in sections 730 and 731, *supra*, and is unsound in my opinion.

§ 737. **Place of imprisonment, wrong.**—Where the court has power to imprison in different places according to the offense, a mistake in sending the prisoner to the wrong place is not an usurpation of power but a wrongful exercise of power actually possessed, and so it was held in an old case in New York, where a person was sent to the county jail instead of the county penitentiary; <sup>6</sup> but a later case in the same court held to the contrary.<sup>7</sup>

1. Robinson v. Redman, 2 Duvall 82.

2. Maloney v. Dewey, 127 Ill. 395 (19 N. E. R. 848, 850).

3. Moore v. Jeffers, 53 Iowa 202 (4 N. W. R. 1084).

4. Ogden v. Walters, 12 Kan. 282, 291.

5. Feeley's Case, 12 Cush. 598.

6. People v. Cavanaugh, 2 Park. Cr. 650, 662 (2 Abb. Pr. 84), reversing 1 Park. Cr. 588, 592 (10 How. Pr. 27).

7. Merkee v. City of Rochester, 20 N. Y. Supr. (13 Hun) 157, 162.

In North Carolina, a person was convicted of a crime for which the statute provided a jail sentence; but at his own request, he was sentenced to the penitentiary. Becoming weary of that, he sought to be released by *habeas corpus*; but the supreme court refused, saying that he was held on final process of a court of competent jurisdiction.<sup>1</sup> A statute of Massachusetts empowered justices of the peace to sentence a common drunkard to the house of correction unless he took an appeal, in which case he was to be committed to jail until he found sureties. In such a case, the prisoner, in default of sureties, was committed to the house of correction instead of the jail, and this was held to be void and to make the justice a trespasser.<sup>2</sup> Precisely the same point was decided the same way in Michigan, where a person was sent to the house of correction instead of the jail for a failure to give bond in a bastardy case;<sup>3</sup> and where a statute of the United States authorized imprisonment in the penitentiary of a state where the sentence was for a period *longer* than one year, a sentence there for *one year* was held to be void, and the prisoner was released on *habeas corpus*.<sup>4</sup> But the statutes were not clear, and their construction was for the trial court. The Massachusetts statute authorized the court to commit boys directly to the reform school, or to the custody of the state board of lunacy and charity with authority to it to commit to the reform school if they proved unmanageable. The court committed a boy "to the state board to be sent to the" reform school, and he was sent direct to the reform school. On *habeas corpus*, this was held to be erroneous, but not void.<sup>5</sup> But where the statutes of New York concerning the place of imprisonment of convicts were so confused that both the county judge and the supreme court at general term held that a sentence to the state prison instead of the county jail was correct, nevertheless, the court of appeals differing from them in respect to the true construction, held the sentence void.<sup>6</sup> I think this case is unsound for the reasons given in Chapter VI, sections 89 to 212, *supra*.

§ 738. **Punishment excessive, or wrong in kind.**—Where a person was tried in Wisconsin for an assault with intent to kill, and con-

1. *In re Schenck*, 74 N. C. 607.

2. *Kendall v. Powers*, 4 Metc. 553.

3. *In re Kaminsky*, 70 Mich. 653 (38 N. W. R. 659).

4. *In re Mills*, 135 U. S. 263, 270 (10 S. C. R. 762).

5. *Sennott's Case*, 146 Mass. 489 (16 N. E. R. 448, 451).

6. *People v. Kelly*, 97 N. Y. 212.

victed simply of an assault, he was given a sentence for an assault and battery, which was greater than the law authorized for an assault. After he had served the full time allowed by law for an assault, he applied for a discharge on *habeas corpus*, but it was held that the error committed did not touch the jurisdiction, and his application was refused;<sup>1</sup> and in a later case in the same state, where the statute permitted imprisonment for a term not exceeding ten years, a sentence of fourteen years was imposed, and this was decided not to be void. It was said: "The court had jurisdiction of the person and the subject-matter or offense, but made a mistake in the judgment."<sup>2</sup> The same question was decided the same way in Massachusetts and South Carolina.<sup>3</sup> But in Missouri, where the statute authorized imprisonment not exceeding seven years, a person was sentenced for ten years. After serving four years, he applied for a release on *habeas corpus*, which was granted.<sup>4</sup> Where a person was given a sentence in New York which would expire in December, while the statute required the sentence to be so fixed that it would expire between March and November, it was held to be amendable at the same term and not void.<sup>5</sup> So, where a person was convicted of murder in Kansas, and sentenced to suffer death, and the court, laboring under a mistake in respect to the statute which governed the fixing of the execution, provided that the governor should set the day at a time not less than one year from the day of the sentence, instead of setting the day itself, this was held, on *habeas corpus*, to be merely irregular and not void.<sup>6</sup> An affidavit was filed before a justice of the peace in Alabama charging a person with an "assault and battery with a knife with intent to murder" a person named. The judgment rendered was that he was "guilty to the extent of an assault and battery, and sentenced to one year's hard labor for the use of the county." On *habeas corpus*, it was said: "The prisoner was convicted by the justice of an assault and battery with a knife, and if the knife was a deadly weapon, and other facts were made apparent, a sentence of hard

1. Crandall, Petition of, 34 Wis. 177, 179.

2. *In re* Graham, 74 Wis. 450 (43 N. W. R. 148 and 44 id. 1105).

3. Sennott's Case, 146 Mass. 489 (16 N. E. R. 448, 450), abstracted in sec-

tion 737, *supra*; *Ex parte* Bond, 9 S. C. 80 (30 Am. R. 20).

4. *Ex parte* Page, 49 Mo. 291.

5. Miller v. Finkle, 1 Park. Cr. 374.

6. *In re* Petty, 22 Kan. 477, 484.

labor for the county for the term of twelve months was authorized by law.”<sup>1</sup> It is difficult to extract the principle involved in this case. The counsel seemed to think that, the finding being for an assault and battery simply, the sentence was excessive, but the supreme court seems to have construed the finding to be guilty as charged in the affidavit, and that the right of the justice to impose so severe a penalty depended on the evidence. A justice of the peace in Texas convicted a person of a crime, and, instead of committing him to the custody of the sheriff until the fine and costs were paid, and awarding execution as provided by law, he issued a *capias pro fine*, upon which the defendant was arrested. This was held merely irregular and not void.<sup>2</sup> But where a justice of the peace in New York convicted a person of an assault and battery on a charge of an assault, the judgment was held void and no protection to him.<sup>3</sup> In the last case the punishment was excessive, but within the power of the justice.

A statute of California provided that “An assault is punishable by fine not exceeding five hundred dollars, or by imprisonment in the county jail not exceeding three months,” and another statute provided that “A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied, specifying the extent of the imprisonment, which must not exceed one day for every dollar of the fine.” With these statutes in force, a person was fined five hundred dollars for an assault, and ordered to be imprisoned five hundred days; but this order for imprisonment was held void because the first statute fixed the maximum at three months where no fine was assessed.<sup>4</sup> So, in another case in the same state, a person was sentenced to a term in state prison, and to pay a fine of two thousand dollars, and also to be imprisoned in the state prison until the fine should be satisfied. After serving the term of imprisonment, he brought *habeas corpus* proceedings to be released from serving on account of the fine. The supreme court, by construction of several statutes, held that imprisonment for non-payment of a fine could be in the county jail only, and released him.<sup>5</sup> The New Jersey statute defining crimes and their punishments

1. *Ex parte* Brown, 63 Ala. 187.

4. *Ex parte* Erdmann, 88 Cal. 579

2. *Ex parte* McGill, 6 Tex. App. 498. (26 Pac. R. 372).

3. *Peckham v. Tomlinson*, 6 Barb.

5. *Ex parte* Arras, 78 Cal. 304 (20

comprised some twenty sections, and each section provided that punishment should be by confinement in the state prison at hard labor, except the sixteenth, twentieth and twenty-first, which were silent. Where a person was sentenced to imprisonment at hard labor by reason of a conviction on the sixteenth section, it was held that the omission to prescribe such labor as a part of the punishment in that section must be regarded as intentional, and that the sentence was void.<sup>1</sup> A statute of the Australian province of New South Wales provided that "No person shall suffer death, unless for some offense punishable by death at the commencement of this act, or hereafter made so punishable ; and whosoever is convicted of an offense not punishable by death shall be punished in the manner prescribed in the statute relating thereto. And where no punishment is specially provided, shall be liable to penal servitude for five years." A person was convicted of the crime of attempting to steal from the person, and was sentenced to five years' penal servitude. This was a common-law misdemeanor, for which the penalty was two years' imprisonment, and the court, holding that the statute applied to statutory offenses only, decided that the sentence was void, and released the prisoner on *habeas corpus*.<sup>2</sup> A justice of the peace in Alaska sentenced a person to imprisonment for three months. After much construction of statutes, the federal court held that the justice had power to fine only, and discharged the prisoner.<sup>3</sup> For the reasons given in Chapter VI, sections 89 to 212, *supra*, I think the last five cases are wrong. See also sections 742 and 761, *infra*.

1. *State v. Gray*, 37 N. J. L. (8 Vr. 368.

2. *Re Price*, 6 New South Wales 140.

3. *Ex parte Martin*, 46 Fed. R. 482.



## TITLE C.

## RELIEF EXCEEDS POSSIBLE POWER OF THE COURT—JOINT INSTEAD OF SEVERAL—OUTSIDE OF ISSUES—PARTIAL, INCOMPLETE, IRREGULAR OR TOO LIMITED.

See sections 514-525, *supra*.

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| <p>§ 739. Principle involved in Title C—<br/>Civil cases—Criminal cases—<br/>(Fine excessive—Imprisonment instead of fine).</p> <p>740. Relief exceeds possible power of the court, excess void in civil cases—(Condemnation—Costs—Interest on judgment—Note too large—Land and goods—Partition—Sale and seizure).</p> <p>741. Section 740, continued—Stay of execution—Tax judgments.</p> <p>742. Relief exceeds possible power of court, excess void in criminal cases—(Indefinite imprisonment—Time uncertain).</p> <p>743. Section 742, continued—Punishment too severe.</p> <p>744. Relief joint as to all where some are not served—Damages at law.</p> <p>745. Section 744, continued—Equitable or special relief.</p> <p>746. Relief outside of issues—Principle involved.</p> <p>747. Relief outside of issues—Award.</p> <p>748. Relief outside of issues—Criminal proceedings.</p> <p>749. Relief outside of issues—(Defendants, matters between—Divorce).</p> | <p>§ 750. Relief outside of issues—Equity causes.</p> <p>751. Relief outside of issues—Highways.</p> <p>752. Relief outside of issues—Land not described.</p> <p>753. Relief outside of issues—Prayer.</p> <p>754. Relief outside of issues—Questions to witness.</p> <p>755. Relief outside of issues—Reasons given for judgment, not within issues.</p> <p>756. Relief outside of issues—(Replevin—Revivor).</p> <p>757. Relief partial, incomplete, irregular or too limited—(Annexation to city—Appeal—Common recovery—Foreclosure, too limited).</p> <p>758. Section 757, continued—(Infants—Joint instead of several—Landowners not all named—Partition).</p> <p>759. Section 757, continued—Replevin, relief too limited.</p> <p>760. Section 757, continued—Criminal sentence not alternative.</p> <p>761. Section 757, continued—Criminal sentence too light.</p> |
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§ 739. Principle involved in title C.—When the relief granted exceeds not only the rightful power of the court in the case under consideration, but also the possible power of the court in any case, the excess, at least, is void; and if it is not severable, the whole is void.

CIVIL CASES.—A justice's judgment <sup>1</sup> or a confession <sup>2</sup> for an

1. *Houser v. McKennon*, 60 Tenn. (1 Baxter) 287; *Jones v. Jones*, 3 Dev. L. 360.      2. *Griswold v. Sheldon*, 4 N. Y. 581, 585.

amount which exceeds the highest limit allowed by law, or a writ commanding a public officer to do things which the law does not empower him to do,<sup>1</sup> is void. Where the statute of Maine authorized justices in civil suits to take a recognizance from the defendant to "prosecute his appeal" to the district court, one taken requiring him to "appear" in that court, was held to be void.<sup>2</sup> An English statute authorized justices to make assessments for the relief of the poor *once a month*; but where an assessment was made for *six months*, it was decided not to be void and to be a protection to the justices, and it was said that the persons assessed ought to have appealed.<sup>3</sup> A Kentucky statute directed the county court to divide the county into districts and to appoint constables for each district. The court appointed a constable for the county at large, and this was held to be merely erroneous and not void.<sup>4</sup> The acts of the courts in the last two cases seem to me to have been usurpations and void. The acts were clearly beyond their possible power.

CRIMINAL CASES—FINE EXCESSIVE.—A statute of New York permitted justices of the peace to punish by a fine not exceeding fifty dollars, but on a conviction for an assault and battery, a fine of two hundred dollars was imposed, which the defendant paid to avoid imprisonment, and then sued the justice; but it was decided that the sentence was not void, and was a protection.<sup>5</sup> The court admitted that if he had sentenced the defendant to imprisonment when the law did not so authorize, it would have been void, "because the magistrate had no power or authority to inflict any punishment of that kind or quality. He had no such power ever conferred upon him, which he could exercise in any manner or degree. But he had authority to inflict a fine, and erred in the exercise of it in measure or degree only." But if fifty dollars was the highest limit to which the jurisdiction of the justice extended in any case, the fine imposed was beyond the possible power of the court, and was void, and it was so held in two later cases in the same court.<sup>6</sup>

IMPRISONMENT INSTEAD OF FINE.—A sentence to imprison-

1. *United States v. Labette County*, 7 Fed. R. 318.

2. *Lane v. Crosby*, 42 Me. 327.

3. *Durrant v. Boys*, 6 T. R. 580.

4. *Chambers v. Thomas*, 3 A. K. Marsh. 536, 538.

5. *Clark v. Holdridge*, 58 Barb. 61, 72 (40 How. Pr. 320).

6. *People v. Carter*, 55 N. Y. Supr. (48 Hun) 165, 167—a fine of \$100; *People ex rel. Stokes v. Riseley*, 45 N. Y. Supr. (38 Hun) 280—a fine of \$200.

ment by a justice of the peace where no statute so authorizes,<sup>1</sup> is void. The statute of California authorized a justice of the peace to enter a fine, and to direct that the defendant be imprisoned until the fine be satisfied in the proportion of one day's imprisonment for every dollar of the fine. A justice adjudged that a defendant "pay a fine of fifty dollars, or be imprisoned for fifty days." This was void as to the imprisonment and the defendant was released on *habeas corpus*.<sup>2</sup> A New Hampshire statute authorized "justices of the peace throughout the state" to bind over persons accused of crime to the court of common pleas of the county in which the crime was committed; but where a justice bound a person over to another justice in the proper county, and the defendant not appearing he forfeited the recognizance, this was held void in a suit on that instrument.<sup>3</sup>

§ 740. **Relief exceeds possible power of court—Excess void in civil cases.**—The void part of a judgment being *nothing*, it would not seem that it ought to vitiate that which is good, and make it void also, if the two parts are severable; and thus, many well considered cases hold.

CONDEMNATION.—Where a wider strip of land was condemned for a highway than the petition called for, it was held valid collaterally as to all persons except the landowner.<sup>4</sup> So, an order of selectmen laying out a highway, partially void because below high water mark, is not void in respect to the remainder.<sup>5</sup>

COSTS.—In an old case in New York, where the statute limited the jurisdiction of justices to twenty-five dollars damages and *five dollars costs*, a judgment was rendered for sixteen dollars damages and five dollars and eighteen cents costs, upon which the defendant was arrested; for this he sued in trespass, but it was held that the judgment was not void, and that he could not recover.<sup>6</sup> This case relies on a case in Salkeld, where a judgment of the common pleas for five shillings was decided not to be void, although the statute forbade it to entertain any cause involving less than twenty shillings.<sup>7</sup> It does not seem to me that the principle involved in the two cases is the same. Still the case can be supported on

1. *Ex parte McKivett*, 55 Ala. 236; *Newton v. Locklin*, 77 Ill. 103—a commitment for contempt; *Rhinehart v. Lance*, 45 N. J. L. (14 Vr.) 311 (39 Am. R. 592—also a commitment for contempt.

2. *Ex parte Baldwin*, 60 Cal. 432.

3. *State v. Fowler*, 28 N. H. (8 Foster) 184, 192.

4. *Proctor v. Andover*, 42 N. H. 348, 355.

5. *Com. v. Weiher*, 3 Metc. 445, 448.

6. *Butler v. Potter*, 17 Johns. 145.

7. *Prigg v. Adams*, 2 Salk. 674.

the principle now under consideration, according to which the judgment was void for the eighteen cents only.

**INTEREST ON JUDGMENT.**—A statute of Indiana provided that judgments should draw six per cent. interest, but by consent of parties, a justice rendered a judgment to draw ten per cent. and the extra four per cent. only, was held void.<sup>1</sup>

**NOTE TOO LARGE.**—A note was filed as a cause of action before a justice of the peace in Iowa. The amount due on the note was two hundred and seventy-four dollars, to which the justice added ten per cent. for attorneys' fees, and rendered a judgment for three hundred and one dollars and forty cents, being one dollar and forty cents in excess of his jurisdiction. In a contest with another creditor concerning the priority of their liens, the judgment was held void for the excess of one dollar and forty cents only.<sup>2</sup>

**LAND AND GOODS.**—A decree ordering a sale of land and goods, void in respect to the goods, is not void for that reason in regard to the land.<sup>3</sup>

**PARTITION.**—A decree in partition which includes a parcel of land to which the parties had no title, is not void;<sup>4</sup> but where the report of commissioners in partition set off to two of the heirs lands not described in the petition, the confirmation was held to be void as to the whole.<sup>5</sup> But this case seems clearly wrong.

**SALE AND SEIZURE.**—A probate court in Louisiana had power to order a sale of real estate, but none to order it to be seized by its officer; nevertheless it made an order for a seizure and sale. The order for the seizure was decided to be void and the remainder valid.<sup>6</sup>

**§ 741. Section 740 continued—Stay of execution.**—The Indiana statute authorized a stay of execution on a justice's judgment of a specified amount, for one hundred and fifty days, by the entry of replevin bail, which was a judgment confessed. In such a case a stay was entered for one hundred and eighty days. This was held to be cured by a statute in relation to defective recog-

1. *Berry v. Makepeace*, 3 Ind. 154.

2. *Reed v. Shum*, 63 Iowa 378 (19 N. 196 (41 Am. D. 497)).  
W. R. 254).

3. *Bernstein v. Hobelman*, 70 Md. 14.  
29 (16 Atl. R. 374).

4. *Austin v. Charlestown*, 8 Metc.

5. *Corwithe v. Griffing*, 21 Barb. 9.

6. *Wisdom v. Buckner*, 31 La. Ann.  
52, 56.

nizances.<sup>1</sup> A simpler solution was to have held the excess of thirty days void. A stay for a shorter time than the statute authorized in the particular case, was held void in Michigan.<sup>2</sup>

**TAX JUDGMENTS.**—The Ohio statute required the state auditor to transmit to the county auditors a list of the land within “their respective counties” on which taxes were delinquent, and the county auditor was to advertise the list in the “county where the land lies,” giving notice that he would move the next court of common pleas for judgment. In such a case a tract was divided by the county line, leaving a part in county H and a part in county P. The auditor of county P advertised it all, and took judgment in that county on which the land was sold. This was held void *in toto*; void as to the part in county H because outside of the limits of county P, and void as to that in county P because a judgment void in part is wholly void.<sup>3</sup> But precisely the contrary was decided in Tennessee.<sup>4</sup>

§ 742. **Relief exceeds possible power of court—Excess void in criminal cases—Indefinite imprisonment.**—Where a person is given an indefinite sentence, it ought to be construed collaterally as being valid for the longest term the court could lawfully impose. If the prisoner is dissatisfied, he ought to move to correct it, and if that should be refused, he ought to appeal. An Iowa statute declared that a justice on entering a fine “may also direct that he be imprisoned until the fine be satisfied, specifying the extent of the imprisonment, which shall not exceed one day for every three and one-third dollars of the fine.” A justice’s judgment was that defendant “stand committed . . . until the fine and costs are paid,” prescribing no time. This was decided not to be void, but that he would be entitled to a release after serving one day for each three and one-third dollars of the fine.<sup>5</sup> An indefinite commitment for contempt,<sup>6</sup> or a commitment “until the further order of the court,”<sup>7</sup> has been held void. So where the statute permitted justices to sentence persons to “stand committed for

1. Hawes v. Pritchard, 71 Ind. 166, 170. Shrigley, 80 Iowa 30 (45 N. W. R. 393); *accord*, People v. Markham, 7

2. Shadbolt v. Bronson, 1 Mich. 85. Cal. 208.

3. Barger’s Lessee v. Jackson, 9 O. 163. 6. Shanks’ Case, 15 Abb. Pr. N. S. 38.

4. Williams v. Harris, 36 Tenn. (4 Sneed) 331. 7. People *ex rel.* Hinckley v. Pirfenbrink, 96 Ill. 68; *accord*, Matter of

5. Jackson v. Boyd, 53 Iowa 536 (5 N. W. R. 734); *accord*, Elsner v. Marsh, McArthur & Mackey (D. C.) 32.

thirty days in default of payment," a sentence to "stand committed until said fine be paid," was held void;<sup>1</sup> and the same ruling was made in respect to a justice's judgment, that defendant pay a fine and specified costs within twenty-four hours, or in default thereof that he be imprisoned, because no outside limit to the imprisonment was fixed.<sup>2</sup>

TIME, UNCERTAIN.—In an old case in Pennsylvania, a person was convicted and sentenced to one year's imprisonment "to commence and take effect immediately after the *expiration* of the sentence passed on him for the larceny of the goods of Hiram Jones." The first sentence having been reversed, he applied for a discharge from the second, on *habeas corpus*, on the ground that its commencement was uncertain. It was held, that it commenced upon the reversal of the first sentence, and was not void and a discharge was refused.<sup>3</sup> But the opposite was ruled in Michigan, where such a sentence was decided to be void because the prison authorities had the power to shorten the first sentence for good conduct, thus making the time of the commencement of the second uncertain.<sup>4</sup> Why a contingency which could not by possibility harm the prisoner should destroy the jurisdiction of the court was not made very clear. In the same kind of a case in the federal circuit, where the order was that the sentences were "not to run concurrently," the prisoner was discharged after serving out one term, because the order did not specify which term should run first.<sup>5</sup> But how that affected the merits, the court did not explain, and I cannot. It was decided in New York that such cumulative sentences were void;<sup>6</sup> but as no statute expressly forbade, that was a question for the trial court.

§ 743. Section 742 continued—Punishment too severe.—Where the law authorizes imprisonment, the whole sentence is not void because the term fixed is longer than the maximum allowed,<sup>7</sup> nor because a fine<sup>8</sup> or some unwarranted thing is added. The excess only is void. Thus, in an old case, where the defendants were

1. Gurney v. Tufts, 37 Me. 130, 135.

2. People v. Carroll, 44 Mich. 371 (6 N. W. R. 871).

3. Brown v. Com., 4 Rawle 259.

4. Lamphere's Case, 61 Mich. 105 (27 N. W. R. 882); Bloom's Case, 53 Mich. 597 (19 N. W. R. 200).

5. United States v. Patterson, 29 Fed. R. 775.

6. People v. Liscomb, 60 N. Y. 559, 590 (19 Am. R. 211).

7. *Ex parte* Bulger, 60 Cal. 438—a term of three years instead of six months. *Dictum* in *Elsner v. Shrigley*, 80 Iowa 30 (45 N. W. R. 393, 394).

8. People v. Baker, 89 N. Y. 460, 467; *Ex parte* Mooney, 26 W. Va. 36 (53 Am. R. 57).

lawfully sentenced to imprisonment for a crime, and to be further imprisoned until they asked pardon upon their knees of the prosecutor and caused an account of the sentence to be printed in a named paper, they were released from this additional part on *habeas corpus*.<sup>1</sup> The California statute authorized justices to imprison for failure to pay a fine, but not to order the prisoner to labor on the streets, and such a sentence was held void.<sup>2</sup> A justice of the peace in Texas convicted a person of carrying a concealed weapon and rendered judgment that he "deliver to this court the pistol which he was in this case convicted of carrying, and that the sheriff hold said defendant in custody until this judgment is complied with." This sentence was held void on *habeas corpus*.<sup>3</sup> An attorney was fined for contempt and ordered "to purge himself of such contempt." He paid the fine, but the court construing the latter clause to require an apology, refused to allow him to appear before it until one was made, and made an order to that effect. This last order and the last clause of the first order, were held to be void, and the court was compelled to vacate them by *mandamus*.<sup>4</sup> The Florida statutes empowered justices of the peace to impose a fine of twenty-five dollars and imprisonment for sixty days, and also imprisonment for non-payment of the fine. A justice imposed a fine of twenty-five dollars and ninety days' imprisonment, and the prisoner, without paying the fine, sought to be released on *habeas corpus*; but it was held that he was lawfully imprisoned for non-payment of the fine, and a discharge was refused.<sup>5</sup> A person was committed for contempt in Maryland "until he purge the contempt by appearing before the grand jury," and it was held that he would be discharged on *habeas corpus* after the adjournment of the grand jury, but not before.<sup>6</sup> A Michigan statute authorized justices to commit minors to the reform school until they attained the age of eighteen years, and a commitment until the minor should become twenty-one was held void.<sup>7</sup>

§ 744. Relief, joint as to all where some are not served—Damages at law.—That a joint judgment for damages against several, some of whom have not been served, is not void in respect to those

1. *Rex v. Collier*, Sayer 44, as cited in 60 N. Y. 571.

2. *Ex parte Kelly*, 65 Cal. 154 (3 Pac. R. 673).

3. *Hudeburgh v. State*, 38 Tex. 535. 641.

4. *State ex rel. Rhode v. Sachs*, 2 Wash. St. 373 (26 Pac. R. 865).

5. *Ex parte Hunter*, 16 Fla. 575.

6. *Ex parte Maulsby*, 13 Md. 625,

7. *In re Amidon*, 40 Mich. 628.



served, is held in Arkansas,<sup>1</sup> Missouri,<sup>2</sup> New Jersey,<sup>3</sup> Ohio,<sup>4</sup> Oregon,<sup>5</sup> Tennessee,<sup>6</sup> Texas<sup>7</sup> and Virginia,<sup>8</sup> and by the Supreme Court of the United States;<sup>9</sup> while the contrary is held in Maine,<sup>10</sup> Maryland,<sup>11</sup> Massachusetts,<sup>12</sup> New Hampshire<sup>13</sup> and New Jersey.<sup>14</sup> The cases last cited from Maryland, Massachusetts and New Jersey were judgments from other states, and the Supreme Court of the United States reversed the Maryland case, and also a case from New Hampshire, because the judgments were valid as to the person served in the state where rendered. There is jurisdiction over the subject-matter in such cases, and the defendant served is before the court, and if it is error to render a judgment against him without first dismissing or continuing as to the defendant not served, that is a mere mistake of practice; and if the name of his co-defendant is included in the judgment, the record shows that it is *nothing*, and how that can vitiate anything else it is difficult to determine. Where there were three defendants in North Carolina, and judgment was rendered against one, by name, it is not void because the record fails to show what was done with the others;<sup>15</sup> and where an action against three partners in Montana was dismissed as to two and judgment taken against the other, this was erroneous, but not void.<sup>16</sup> In Minnesota, where a part only of the joint makers of a note were served, the statute required the judgment to be rendered against all, to be made from the separate property of those served and the joint property of all; but, in such a case, a judgment against those served only, is not void.<sup>17</sup> So, it was decided in California

1. Cheek v. Pugh, 19 Ark. 574.
2. Lenox v. Clarke, 52 Mo. 115, 117; Brawley v. Ranney, 67 Mo. 280, 282; Holton v. Towner, 81 Mo. 360, 366; Asbury v. Odell, 83 Mo. 264, 267.
3. Schuyler v. McCrea, 16 N. J. L. (1 Harr.) 248, *disapproving* Mills v. Slegt, 5 N. J. L. (2 South.) 565.
4. Douglas v. Massie, 16 O. 271.
5. Swift v. Stark, 2 Or. 97 (88 Am. D. 463).
6. Winchester v. Beardin, 29 Tenn. (10 Humph.) 247 (51 Am. D. 702).
7. Hollis v. Dashiell, 52 Tex. 187, 197.
8. Gray v. Stuart, 33 Gratt. 351, 358.
9. Hanley v. Donoghue, 116 U. S. 1, *reversing* 59 Md. 239; Renaud v. Abbott, 116 U. S. 277, *reversing* 64 N. H. 89.
10. Buffum v. Ramsdell, 55 Me. 252, 255.
11. Hanley v. Donoghue, 59 Md. 239 (43 Am. R. 554).
12. Wright v. Andrews, 130 Mass. 150; Knapp v. Abell, 10 Allen 485.
13. *Dictum* in Rangely v. Webster, 11 N. H. 299, 306.
14. Mackay v. Gordon, 34 N. J. L. (5 Vr.) 286, 289.
15. Carter v. Spencer, 7 Ired. 14.
16. Wells, Fargo & Co. v. Clarkson, 5 Mont. 336, 341 (5 Pac. R. 894).
17. Dillon v. Porter, 36 Minn. 341 (31 N. W. R. 56).

that a judgment of another state against the separate property of those served and the joint property of all, was not void.

§ 745. **Section 744 continued—Equitable or special relief.**—That an omission to make all the heirs or devisees parties to an administrator's proceedings to sell land, or to obtain service upon all, does not make the order to sell and the sale void in respect to those made parties and served, is held in Illinois<sup>2</sup> and Kentucky;<sup>3</sup> while the contrary has been decided in Mississippi.<sup>4</sup> So, the failure to make one joint landowner,<sup>5</sup> or a lienor,<sup>6</sup> a party in a foreclosure suit, does not make it void as to those served; and the same rule holds in respect to a decree compelling heirs to convey the legal title,<sup>7</sup> or a judgment laying out a highway.<sup>8</sup> But where the statute of Illinois, in escheat proceedings, required the actual occupants of the land to be made defendants, the judgment was decided to be void when there were two occupants and service only upon one.<sup>9</sup> So, the failure of proceedings in partition,<sup>10</sup> or to revive,<sup>11</sup> to name all the heirs, does not make them void as to those named and served.

§ 746. **Relief outside of issues—Principle involved.**—It is difficult to extract the exact principle involved in this very important matter. Still, from the points upon which the cases all agree, and from the general principles which underlie the doctrine of collateral attack, it may be approximated. All the cases agree, that a judgment within the general scope of the allegations is not void because not warranted by the prayer. So also, as the omission of special allegations from the pleadings do not touch the validity of the proceedings collaterally, of course a judgment or decree finding and adjudicating upon such omitted matters is not void. And, when the matter in controversy is referred to

1. *Stewart v. Spaulding*, 72 Cal. 264 (13 Pac. R. 661).

2. *Botsford v. O'Conner*, 57 Ill. 72, 79; *Harris v. Lester*, 80 Ill. 307, 317.

3. *Downing's Heirs v. Ford*, 9 Dana 391.

4. *Hamilton v. Lockhart*, 41 Miss. 460, 478; *Martin v. Williams*, 42 Miss. 210 (97 Am. D. 456); *Rule v. Roach*, 58 Miss. 552, 555—following, but disapproving the earlier cases.

5. *Dwiggins v. Cook*, 71 Ind. 579.

6. *Board of Supervisors v. Mineral Point R. R. Co.*, 24 Wis. 93, 130.

7. *Wickliffe v. Dorsey*, 1 Dana 462.

8. *State v. Richmond*, 26 N. H. (6 Foster) 232, 244; *State v. Weare*, 38 N. H. 314, 316; *Proctor v. Andover*, 42 N. H. 348, 353.

9. *Wallahan v. Ingersoll*, 117 Ill. 123 (7 N. E. R. 519).

10. *Doe ex dem. Hain v. Smith*, 1 Ind. 451, 458; *Rice v. Smith*, 14 Mass. 431; *Stark v. Carroll*, 66 Tex. 393, 398 (1 S. W. R. 188).

11. *Warren v. Hall*, 6 Dana 450; *Lynch v. Sanders*, 9 Dana 59, 63.

appraisers, commissioners, referees, or other similar officers to take evidence and report, the report becomes a paper in the cause, and is a part of the record, and if it is broader in its scope, or includes property or matters not mentioned in the pleadings, a judgment or decree in accordance therewith ought not to be held void. When the report is filed, the parties ought to have it corrected or amend the pleadings so as to conform to it. See section 784, *infra*. In the celebrated case of Windsor v. McVeigh, there are *dicta* by Mr. Justice Field, that "if the action be upon a money demand, the court has no power to sentence the party to imprisonment; if it be for a personal tort, the court cannot order the specific performance of a contract; if it be for the possession of real property, the court is powerless to admit in the case the probate of a will."<sup>1</sup> But it is not safe to draw principles from imaginary cases which never have occurred, and doubtless never will occur. On the contrary, the supreme court of Missouri—one of the very ablest in the Union—lays it down that a judgment is never void "because the pleadings did not warrant the judgment;"<sup>2</sup> while the court or errors and appeals of New Jersey has ruled that a decree on matters outside of the issues raised by the pleadings, is a nullity collaterally.<sup>3</sup> In an Indiana case, neither a mortgage nor the complaint to foreclose showed any right to a personal judgment against the defendant; but he appeared and consented to one, and one was rendered. On a contention that it was void, the court said: "We can conceive of no reason why a judgment entered by agreement, by a court of general jurisdiction, having power in a proper case to render such judgment, and having the parties before it, should not bind those by whose agreement it is entered, notwithstanding the pleadings would not, in a contested case, authorize such a judgment. The object of a complaint is to inform the defendant of the nature of the plaintiff's case. It is for his protection that it is required. If he wishes to waive it, or agrees to the granting of greater relief than could otherwise be given under its averments, without amendment, and such relief is given by his consent, we think that the judgment is not even erroneous, much

1. Windsor v. McVeigh, 93 U. S. 274, 282, 283.

2. Lewis v. Morrow, 89 Mo. 174 (1 S. W. R. 93).

3. Jones v. Davenport, 40 N. J. Eq. 77 (17 Atl. R. 570).

less void, as to him.”<sup>1</sup> This case is an authority that the defect under consideration does not touch the subject-matter, as jurisdiction over that cannot be given by consent.

§ 747. **Relief outside of issues—Award.**—The plan of a building was altered after the contract to build had been let, and the question of the increase of the cost was submitted to arbitrators who awarded the plaintiff a certain sum for such increase, *after he shall have filled up the outside paved ways*. The matters in *italics* not having been submitted to them, the award was held void.<sup>2</sup> But in a late case in Texas, the plaintiff had sued to recover the half of a league of land, and the matter had been submitted to arbitrators who awarded him the whole league, for which a judgment was rendered. This judgment being assailed collaterally, the court said: “A decree within the jurisdiction of the court, its terms alone will determine its extent; and it will not, in a collateral attack, be restricted by the pleadings. A judgment erroneous for want of issues by the pleadings will be corrected on error or appeal, but it is not void.”<sup>3</sup>

§ 748. **Relief outside of issues—Criminal proceedings.**—On an examination before a justice of the peace in Illinois of a charge of larceny, the accused was fined for disorderly conduct. This was decided to be void because disorderly conduct was not included within the charge.<sup>4</sup> An ex-overseer of the poor in England was proceeded against, criminally, for refusal to deliver over to his successor a book called the “Bastardy Ledger,” and was convicted. The judgment was that he be committed until he should turn over all the books of the office. As there was no charge in regard to the detention of other books, the justices were held liable in trespass.<sup>5</sup> Where the papers were lost, a conviction for larceny in Alabama is not void because another entry shows that the charge was for receiving stolen goods.<sup>6</sup>

§ 749. **Relief outside of issues—Defendants, matters between.**—A person conveyed land in New Jersey to a trustee to be held for himself and wife during their lives, with remainder to a daughter.

1. Fletcher v. Holmes, 25 Ind. 458, 463.

2. Butler v. Mayor, 7 Hill 329.

3. Williamson v. Wright, Texas Un-reported Cases 711, 718.

4. Frankfurter v. Bryan, 12 Ill. App. 549, 553.

5. Groome v. Forrester, 5 M. & S. 314.

6. Gandy v. State, 86 Ala. 20 (5 S.R. 420).

A creditor brought a suit to set aside this conveyance as fraudulent, and succeeded. The decree not only declared the conveyance void in respect to the complainant, but also declared it void as between the parties to it, and ordered it to be delivered up and canceled. So much of this decree as declared the deed void as between the parties and ordered its cancellation, was held void as being outside of the issues. The court said: "It is impossible to concede that because A and B are parties to a suit, a court can decide any matter in which they are interested, whether such matter be involved in the pending litigation or not. Persons by becoming suitors do not place themselves for all purposes under the control of the court, and it is only over those particular interests which they choose to draw in question that a power of judicial decision arises. If, in any ordinary foreclosure case, a man and his wife being parties, the court of chancery should decree a divorce between them, it would require no argument to convince every one that such decree, so far as it attempted to affect the matrimonial relation, was void; and yet the only infirmity in such a decree would be found, upon analysis, to arise from the circumstance that the point decided was not within the substance of the pending litigation. In such a case the court would have acted within the field of its authority, and the proper parties would have been present; the single but fatal flaw having been the absence from the record of any issue on the point determined. The invalidity of such a decree does not proceed from any mere arbitrary rule, but it rests entirely on the ground of common justice. A judgment upon a matter outside of the issue must, of necessity, be altogether arbitrary and unjust, as it concludes a point upon which the parties have not been heard."<sup>1</sup> This argument is not of much force when it is considered that no court would ever intentionally render a decree without any evidence to support it; and that the chances are ten to one that the court assumes that the pleadings are all right and decides the cause on the merits as shown by the evidence. A case in Wisconsin is contrary in principle. A bill in equity for partition against husband and wife alleged that the wife owned the undivided one-third. On these allegations, without any cross-bill between the defendants, a decree was rendered that the husband *and* wife owned the undivided one-third, and it was set

1. Munday v. Vail, 34 N. J. L. (5 Vr.) 418, 422.

off to them. Afterwards, the wife alone brought an action to recover the land so set off, on the theory that the decree, so far as the husband was concerned, was outside of the issues and void; but the court held that it was not void, and was binding on her, collaterally.<sup>1</sup> It is settled law that, where a case is made out between the defendants on issues between the complainant and defendants, a court of equity will decide the rights of the defendants as between themselves without any cross-pleadings.<sup>2</sup> It has been decided several times in Indiana, that a judgment determining that one defendant is surety for another, when no issue concerning that question was made either in the complaint or cross-complaint, was void.<sup>3</sup> So where a widow filed a bill for the assignment of dower, making the heirs defendants, and the court on its own motion ordered the interest of the heirs to be sold, this was held void as being outside of any pleading.<sup>4</sup>

**DIVORCE.**—A restraining order in a divorce case prohibiting defendant from collecting a judgment, when there was no issue in regard to it, was held void in California, and a writ of prohibition was granted to prevent its enforcement.<sup>5</sup>

§ 750. **Relief outside of issues—Equity causes.**—A New Jersey insurance company had reinsured the risks of a New York company, and then both had failed, and the same person was appointed receiver in both states. The New York company had deposited certain securities with the superintendent of the insurance department of that state to secure its risks, and certain policy holders brought a suit in the New York court against the superintendent of insurance, the receiver and both companies to restrain all parties from disposing of those securities, and to have them applied upon their claims. There was no allegation in the complaint that the plaintiffs desired to recover judgment upon their claims, except so far as might be necessary to an equitable division of the proceeds of the securities. The answers were mere denials and did not broaden the issues tendered by the complaint. On these pleadings, and by default, the court rendered a judgment for plaintiffs of one million, ten thousand, four

1. *Allie v. Schmitz*, 17 Wis. 169, 173.

2. 2 Dan. Ch. Pr. 1370, n. 6; Story Eq. Pl. § 392a.

3. *Knopf v. Morell*, 111 Ind. 570 (13 N. E. R. 51), and earlier cases.

4. *Seamster v. Blackstock*, 83 Va. 232 (2 S. E. R. 36).

5. *Remington v. Superior Court*, 69 Cal. 633 (11 Pac. R. 252).

hundred and ninety-six dollars and twenty-nine cents against the receiver. This judgment was presented to the New Jersey court and was held void as being outside of the issues,<sup>1</sup> and this was affirmed by the Supreme Court of the United States.<sup>2</sup> It is quite evident that the opinion of the latter court confuses the doctrines of collateral attack and *res judicata*, because it quotes from Lord Coke that "a matter alleged that is neither traversable nor material shall not estop," and also from one of its own cases<sup>3</sup> concerning what is *res judicata*. It seems to me that the case is unsound. There was no want of allegations or issues, but merely a defect in the prayer, which does not make the judgment void, as all the cases directly on that point, hold.<sup>4</sup> The allegations of the complaint showed the facts constituting each claim against the New York company, the deposit by that company with the superintendent of insurance, the assumption of the risks of the New York company by the New Jersey company, the failure of both companies, and the appointment of the same person as receiver for both; and in order to grant the relief prayed for, the court was compelled to determine the amount of each claim sued upon, and that it was a just demand against the New York company, and to fix the amount of each claim in the decree; and the rendition of a personal judgment against the receiver, as such, was simply outside of the prayer. A bill for an injunction in Iowa prayed that a "writ of injunction issue restraining defendants and their successors in office from collecting said ditch tax." The decree restrained the defendants from collecting "any tax now on the county treasurer's books, or which may be hereafter entered therein," etc. It was held that the enjoining of the future tax was erroneous, but not void.<sup>5</sup> So in Wisconsin, it was held to be erroneous to adjudicate concerning the priority of the different mortgages involved in a foreclosure suit when there was no prayer for such relief, but that it was not void.<sup>6</sup> A bill was filed in Illinois to dissolve a corporation and to appoint a receiver. It charged that one of the defendants had received a large amount of property under a certain "bill of sale." from a firm named,

1. Reynolds v. Stockton, 43 N. J. Eq. 211 (10 Atl. R. 385).

2. Reynolds v. Stockton, 140 U. S. 254, 264 (— S. C. R. —).

3. Packet Company v. Sickles, 24 Howard 333, 341.

4. See section 753, *infra*.

5. McCrillis v. Harrison County, 63

Iowa 592 (19 N. W. R. 679).

6. Board of Supervisors v. Mineral

Point R. R. Co., 24 Wis. 93, 122.



which, in fact, belonged to the corporation, and it prayed that he should be ordered to turn it over to the receiver. After a hearing, the court appointed a receiver, and ordered the defendant to deliver to him all the property received by virtue of the bill of sale "or otherwise from said firm." This order he refused to obey, and was committed for contempt, and appealed on the ground that the clause "or otherwise from said firm," was outside of the issues and void; but the court decided otherwise, saying that if the evidence showed that he had other property of the corporation not mentioned in the bill, the court could properly order him to turn it over also.<sup>1</sup>

A suit was brought in Missouri to cancel a deed made in a partition sale on the ground of fraud, and there was a prayer for general relief. The court set aside the deed and ordered the premises to be sold, and the proceeds to be divided according to the interests of the parties, which was done. Afterwards, ejectment was brought on the theory that the order to sell was void; but the court said that, conceding the course pursued to have been erroneous, it was not wholly void, and could not be impeached collaterally.<sup>2</sup> In ejectment to recover land in the same state, on the ground that the order concerning it was outside of the issues made on an executor's petition to sell, the court said: "It is true the petition hardly lays the foundation for the relief given; but the court had jurisdiction both of the subject-matter of the petition and the subject-matter of the decree. The object of the petition was for authority to raise money out of the land to pay the legacies, and the court added to the order sought, substantially, an election by the legatee to take the legacy and release the land, with an order carrying out that election. The court had a right to do both; and if the petition did not lay a foundation for both, the decree is simply erroneous, but cannot be impeached collaterally. A judgment, though informal, even to the extent of granting a relief not contemplated in the petition, when the parties are before the court and the relief is within its jurisdiction, is not a void proceeding."<sup>3</sup> In partition proceedings against infants in California, the guardian *ad litem* filed an answer deny-

1. Tolman v. Jones, 114 Ill. 147, 154  
(— N. E. R. —).

3. O'Reilly v. Nicholson, 45 Mo. 160,  
163.

2. Real Estate Savings Institution v.  
Collonious, 63 Mo. 290, 293, 295.

ing that the plaintiff held any land in common with the defendants, and setting forth that he, the plaintiff, owned in severalty a described portion of the land sought to be divided. After a trial, the court found the answer to be true and quieted the title of the plaintiff to the portion described in it. It was held that the guardian *ad litem* had no power to file such an answer, and that the decree, therefore, was within no lawful issue and was void.<sup>1</sup> This seems to me to be unsound. The bill asked that a portion of the land should be set off to the complainant in severalty, and, necessarily, that his title to it should be quieted. The court granted that kind of relief to him in respect to that land, although not the specific relief sought. Whether or not the guardian *ad litem* had power to file a cross-bill was a question for the trial court to decide. If the court had pointed out just where and why the trial court lost jurisdiction and all concerned became trespassers, the case would have been more satisfactory. A bill to foreclose a mortgage in Wisconsin made a person a defendant, alleging that he "has or claims some interest" in the land. The decree, *pro confesso*, barred all his rights. In a collateral suit this decree was decided to be void, and he was permitted to show that he held a prior mortgage.<sup>2</sup> This case was specifically approved in Ohio.<sup>3</sup> After personal service, a mortgage was duly foreclosed in Illinois, barring all the rights of the defendant. But this decree was held not to bar his homestead right, because the bill was silent on that point.<sup>4</sup> It is evident that the last three cases confound the doctrines of collateral attack and *res judicata*. If the defendant in either case knew of any reason why the plaintiff should not have a decree barring *all* his rights, he was called upon to make it known. So, it was said in a recent case in Indiana that a guardian's final report and discharge was no bar to an action against him for negligence in the management of the ward's real estate, unless that subject was embraced in the report.<sup>5</sup> For the reason just given, I think this is wrong.

§ 751. **Relief outside of issues—Highways.**—A petition to a county court in Iowa to establish a road nine miles long gave the exact

1. *Waterman v. Lawrence*, 19 Cal. 210, 217.

2. *Strobe v. Downer*, 13 Wis. 11.

3. *Spoor v. Cowen*, 44 O. St. 497 (9 N. E. R. 132, 135).

4. *Silsbe v. Lucas*, 36 Ill. 462, 471.

5. *Dictum* in *Wainwright v. Smith*, 106 Ind. 239 (6 N. E. R. 333).

location desired, and notice was given and a commissioner appointed, who reported favorably. The order established the road according to the petition, except that, at the east end, instead of running along the north line of a quarter section, it ran down the west and along the south line one-half mile distant. This was held not to make the order void, although the court exceeded its statutory powers. It was said that if the parties felt aggrieved they might have appealed.<sup>1</sup> But a later case in the same state held that a judgment establishing a highway beyond the terminus described in the petition, was void as to the excess.<sup>2</sup> An order of selectmen in New Hampshire laying out a highway with termini substantially different from those described in the petition, was held to be void;<sup>3</sup> and the same ruling was made where the petition began at a definite point and ran thence "southerly to the Cocheco river," and the order began at the same point and ran thence "south, twenty-one degrees west, to said river."<sup>4</sup> But where a petition for a highway in the same state described one terminus at a stake and stones seventy feet *northerly* of a certain monument, and the order laying it out fixed the terminus at a stake and stones seventy feet *northeasterly* of the same monument, this was ruled not to be void, because *northeasterly* was also *northerly* in common acceptance.<sup>5</sup>

§ 752. **Relief outside of issues—Land not described.**—The sale of land by an administrator which is included in the order to sell, but not described in the petition, is void in California<sup>6</sup> and Massachusetts.<sup>7</sup> So, where the report of commissioners appointed in Arkansas to assign dower, included a parcel of land not described in the petition, the order assigning it to the widow was decided to be void;<sup>8</sup> and a decree in a tax foreclosure which correctly describes the land as in K's second addition, is void when the petition described it as in K's addition.<sup>9</sup> Where the proceed-

1. Davenport Mutual Savings Fund and Loan Association v. Schmidt, 15 Iowa 213, 215.

2. State v. Molly, 18 Iowa 525.

3. Eames v. Northumberland, 44 N. H. 67, 69.

4. Clement v. Burns, 43 N. H. 609, 614.

5. State v. Rye, 35 N. H. 368, 376.

6. Townsend v. Gordon, 19 Cal. 188, 208.

7. Verry v. McClellan, 6 Gray 535 (66 Am. D. 423).

8. Falls v. Wright, 55 Ark. 562 (18 S. W. R. 1044); *accord*, Corwithe v. Griffing, 21 Barb. 9. See section 746, *supra*.

9. Milner v. Shipley, 94 Mo. 106 (7 S. W. R. 175).

ings in Iowa to quiet title by a tax purchaser were against "lots 1, 11, 12, 15, 17, and other lots," a decree quieting title to lot 6, was void.<sup>1</sup> So, a sale by a trustee of a tract of land not described in the petition or order but duly confirmed, is void.<sup>2</sup> In an action on a note in Georgia, the answer was filed under the relief act and it alleged that the defendant had tendered Confederate money in payment which had been refused to his great damage. The verdict was: "We, the jury, find for the plaintiff the return of the land with cost of suit." On this, a judgment for the recovery of the land by the plaintiff was rendered, and this was decided to be valid collaterally. The parties were permitted to show in the collateral action that the question of the recovery of the land was tried.<sup>3</sup>

§ 753. **Relief outside of issues—Prayer.**—A judgment of a justice of the peace,<sup>4</sup> or of the circuit court,<sup>5</sup> or a judgment entered by the clerk under the statute,<sup>6</sup> is not void because it exceeds the prayer of the complaint. So, a sale of land in attachment proceedings after service by publication, is not void in ejectment because the affidavit and writ were for one thousand and fifty-six dollars and the judgment and order of sale for five thousand three hundred and twenty-two dollars.<sup>7</sup>

§ 754. **Relief outside of issues—Questions to witness.**—A commitment for contempt in refusing to answer a question in regard to a matter outside of the issues, is void, and the prisoner will be discharged on *habeas corpus*.<sup>8</sup> A person was committed for contempt by a mayor's court in Texas for refusing to answer this question: "What occurred between you and any one of the inmates of Fanny Kelley's house that was calculated to satisfy or convince you it was a house of prostitution?" It was held that the subject-matter of the question lay outside the juris-

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| 1. Gaylord v. Scarff, 6 Iowa 179, 182.   | v. White, 72 Iowa 193 (33 N. W. R.   |
| 2. Shriver's Lessee v. Lynn, 2 How. 43, 58.  | 627); Smith v. Keen, 26 Me. 411, 420;  |
| 3. McWilliams v. Walthall, 65 Ga. 109.   | Savage v. Hussey, 3 Jones' L. 149;   |
| 4. Gillitt v. Truax, 27 Minn. 528 (8 N. W. R. 767); Vandyke v. Bastedo, 15 N. J. L. (3 Green) 224, 230; Baizer v. Lasch, 28 Wis. 268, 271. | Kendall v. Mather, 48 Tex. 585, 598; Chaffee v. Hooper, 54 Vt. 513, 515.   |
| 5. Chase v. Christianson, 41 Cal. 253; Buice v. Lowman Gold and Silver Mining Co., 64 Ga. 769, 772; Ketchum                                | 6. Bond v. Pacheco, 30 Cal. 530, 533.  |
|  | 7. First National Bank v. Hughes, 10 Mo. App. 7, 11.   |
|  | 8. <i>Ex parte</i> Zeehandelaar, 71 Cal. 238 (12 Pac. R. 259); <i>In re</i> Macknight, —Mont. — (27 Pac. R. 336, 338). |

diction of the mayor, and that the commitment was void, and he was released on *habeas corpus*.<sup>1</sup>

§ 755. **Relief outside of issues—Reasons given for judgment, not within issues.**—A statement in an administrator's order to sell personal property that it was "perishable and liable to assessment and taxation," does not make the order void when the petition shows that its sale is necessary to pay debts.<sup>2</sup> But where an administrator filed a petition in Mississippi to sell land to pay debts, and gave due notice, and the record showed that the court granted the license to sell for another reason—namely, because it would promote the interests of those interested—the sale was held void because the order was not within the petition.<sup>3</sup> This looks to me like a remarkable misapprehension of the rule under consideration. A bad reason was given for a good judgment strictly within the issues. But the same point was ruled the same way in an old case in South Carolina. The libel filed against a vessel in a British prize court, alleged the vessel to be enemy's property, but the sentence of confiscation was for a breach of blockade. This was held not binding, and the decree was overhauled.<sup>4</sup> A British admiralty court condemned an American vessel because of an unlawful rescue "or otherwise." This was held not to be conclusive that the condemnation was on account of a rescue, and the owner was allowed to show that there was none.<sup>5</sup> These last three decisions confound the doctrines of *res judicata* and collateral attack. In each case the owner was called upon to show cause why the relief sought should not be granted; and the granting of the relief was conclusive against him, reason or no reason.

§ 756. **Relief outside of issues—Replevin.**—The Indiana replevin statute provided that, where the plaintiff obtained possession of the property and then dismissed his action, "judgment for the defendant may be for the return of the property, or its value in case a return cannot be had, and damages for the taking and withholding." A person obtained possession of property under this statute on his complaint, alleging, not that he was the owner, but that he was entitled to the possession, and giving the value, and then dismissed his action, and thereupon the court adjudged

1. *Holman v. Mayor*, 34 Tex. 668.

2. *Halleck v. Moss*, 22 Cal. 266.

3. *Williams v. Childress*, 25 Miss. Am. D. 114).

78, 82.

4. *Blacklock v. Stewart*, 2 Bay 363.

5. *Robinson v. Jones*, 8 Mass. 536 (5

that the defendants were the *owners*, and entitled to possession and fixed its value at the amount stated in the affidavit, and adjudged that the plaintiff should return it or pay its value as found. In an action on the replevin bond, this judgment that the defendants were the *owners* was held void because outside of the issues.<sup>1</sup> But whether or not any affirmative pleading was necessary under that statute on behalf of the defendants, was a question for the circuit court to decide. But in a later case, as it appeared in the first opinion,<sup>2</sup> where the case was tried on the merits upon an issue concerning the right to possession only, and a judgment for the full value rendered in favor of the defendant as the owner, it was held not void in an action on the bond. But upon a rehearing, no such question appears in the case.<sup>3</sup> But conceding that the court had no power to adjudicate upon the title, it did have the power to fix the damages, and that judgment would not be void because they were fixed too high.

REVIVOR.—It was held in Virginia, that a money judgment instead of a revivor, rendered on a *scire facias*, was void.<sup>4</sup>

§ 757. **Relief partial, incomplete, irregular, or too limited—Annexation to city.**—The Indiana statute in relation to the annexation of lands to cities, provided that the city should present a petition describing the lands, to the board of county commissioners, and give notice by publication of the time set for hearing; that the board should hear testimony, and if it “is of the opinion that the prayer of the petition should be granted, it shall cause an entry to be made in the order book, specifying the territory annexed, with the boundaries of the same, according to the survey” filed with the petition. In such a case, the board made an order for the annexation of a *part* of the lands prayed for; but this was held void because the entire prayer was not granted.<sup>5</sup> This case seems clearly wrong.

APPEAL.—Where an Iowa statute provided that “the justice rendering a judgment against a defendant must inform him of his right to an appeal therefrom, and make an entry on the docket of the giving of such information,” it was held that the failure of

1. *McFadden v. Ross*, 108 Ind. 512 (8 N. E. R. 161).

2. *Ringgenberg v. Hartman*, 20 N. E. R. 637.

3. *Ringgenberg v. Hartman*, 124 Ind. 186 (24 N. E. R. 987).

4. *Lavell v. McCurdy*, 77 Va. 763. See *Wade v. Hancock*, 76 Va. 620.

5. *City of Peru v. Bearss*, 55 Ind. 576, 582.

the justice to give such information and to make such entry, did not make his judgment void.<sup>1</sup>

**COMMON RECOVERY.**—A common recovery is not void because it fails to grant such a judgment against the vouchee as will give those in remainder the nominal recompense belonging to them.<sup>2</sup>

**FORECLOSURE TOO LIMITED.**—On a bill by a mortgagor to set aside a decree of foreclosure and sale, and for permission to redeem, a decree granting such relief is not void because it fails to provide for a resale in case he should not redeem;<sup>3</sup> nor is a decree of foreclosure void because it gave the defendant a homestead for life, when, by law, he was entitled to one in fee.<sup>4</sup> In a foreclosure suit, the court found that one of the defendants had a prior lien on five lots, a part of the property covered by the plaintiff's mortgage. The decree was that all the property except these five lots, should be sold to satisfy the claim of the plaintiff, and that if the sale should fail to do so, then the plaintiff should "have the right to redeem said five lots within ninety days from the date of this decree," by paying the amount of the prior lien. The plaintiff was not able to sell the other property within the ninety days, and could not redeem; and six years afterwards he brought a new suit to redeem on the ground that the first decree was void; but his prayer was denied.<sup>5</sup>

§ 758. Section 757, continued—**Infants.**—Where the law requires a judgment against an infant to give him a day in court after his majority to show cause against it, a failure to do so does not make it void collaterally.<sup>6</sup>

**JOINT INSTEAD OF SEVERAL.**—A decree for alimony in gross, instead of in annual payments as required by statute;<sup>7</sup> or a decree directing two pieces of property, mortgaged by separate instruments, to be sold together;<sup>8</sup> or an assessment of the damages for laying out a *highway* in gross instead of to each person separately;<sup>9</sup> or a foreclosure of *tax-bills* on two lots *in solido*, instead

1. Jacoby v. Waddell, 61 Iowa 247 (16 N. W. R. 119).

2. Ransley v. Stott, 26 Pa. St. 126.

3. Huyck v. Graham, 82 Mich. 353 (46 N. W. R. 781).

4. Derr v. Wilson, 84 Ky. 14.

5. Kolle v. Clausheide, 99 Ind. 97.

6. Joyce v. McAvoy, 31 Cal. 273,

283 (89 Am. D. 172), citing Dan. Ch.

Pr. 205; Ralston v. Lahee, 8 Iowa 17;

Porter's Heirs v. Robinson, 3 A. K.

Marsh. 254; Bennett v. Hamill, 2 Sch.

& Lef. 566.

7. Taylor v. Gladwin, 40 Mich. 232, 234.

8. Reynolds v. Harris, 14 Cal. 667.

9. Brimmer v. Boston, 102 Mass.

19, 23.



of upon each lot for its own tax;<sup>1</sup> or a tax judgment for the amount due upon several lots, *in solido*;<sup>2</sup> or a justice's judgment on a joint note against the defendant served, alone, when the statute required it to be against both,<sup>3</sup> is not void.

LAND OWNERS NOT ALL NAMED.—The Indiana statute concerning the establishment of private roads required the petition to state the names of the owners of the lands sought to be taken, but it was decided that the failure to give the names of all the owners did not make the order of establishment void in respect to those named.<sup>4</sup> In a late case the supreme court of Alabama said: "In *McCorkle v. Rhea*,<sup>5</sup> we held, that an order of sale, granted on an application for the sale of property for partition, which shows *on its face* that it has failed to set forth the names of all the persons interested in the property, is void, and a purchaser at a sale made thereunder acquires no title. From this ruling we find no reason to depart; but our decisions have gone no farther;"<sup>6</sup> and it was held that the fact that there were others interested and not made parties, where that was not disclosed by the record, did not make the sale void.

PARTITION.—The Delaware statute authorized the court in certain cases in partition to assign the land to the eldest son, upon his paying or securing the value of the shares of the other tenants; and further provided that "the person or persons, whether minor or others, to whom or for whose use, payment or satisfaction shall be made as aforesaid for his, her or their respective part or share . . . shall be forever debarred of his, her or their right, title and demand, of, in and to such share or part," etc. Under this statute, where the whole was assigned to a person, without ordering or taking any security to pay for the shares of two minor children, the decree was held void as to them, and they were allowed to recover in ejectment.<sup>7</sup> But in Massachusetts, where a larger share was set off to one co-tenant in partition, and an order made that he should pay the difference in value to the others, but no security taken as required by statute, the decree was held to be merely erroneous, and not void collaterally.<sup>8</sup> It

1. *Gray v. Bowles*, 74 Mo. 419.

2. *Anderson v. Rider*, 46 Cal. 134, 137; *Pritchard v. Madren*, 31 Kan. 38, 49; *Jones v. Driskill*, 94 Mo. 190 (7 S. W. R. 111).

3. *Allen v. Mills*, 26 Mich. 123.

4. *Wild v. Deig*, 43 Ind. 455.

5. *McCorkle v. Rhea*, 75 Ala. 213.

6. *Whitlow v. Echol*, 78 Ala. 206, 210.

7. *Townsend's Lessee v. Rees*, 2 Har. (Del.) 324.

8. *White v. Clapp*, 8 Metc. 365, 370.

seems to me that the Massachusetts case is right and the Delaware case wrong. The co-tenants were in court, and had an opportunity to protect their interests, but neglected to do so.

§ 759. Section 757 continued—**Replevin, relief too limited.**—The statutes generally require the judgment in replevin to be for the return of the property, and an alternative judgment for its value in case a return can not be had; but it is not void because for the value only,<sup>1</sup> or for a return only.<sup>2</sup> On a recovery in replevin before a justice of the peace in Wisconsin, the statute required him to find the value of the property and that the plaintiff was entitled to possession, and to assess his damages for the unjust taking or detention. This done, he was to enter an order in his docket that the officer should deliver the property to the plaintiff. The docket entry in such a case was: "A trial was had, and judgment was rendered against the defendant for the one cow, the property claimed." This was held void.<sup>3</sup> This decision seems to me to be wrong. A judgment in replevin is not void because it fails to order a return, or to find the value of the property.<sup>4</sup>

§ 760. Section 757 continued—**Criminal sentence not alternative.**—A sentence in a criminal case in New Hampshire, which is not in the alternative as required by statute, is not void for that reason.<sup>5</sup> An affidavit was filed in a county court in Texas charging that a justice of the peace and a constable had disregarded a writ of *certiorari*, and they were arrested and brought into court. The affidavit was then read, and they were called upon to purge themselves of the contempt, which they declined to do, and the court fined each of them one hundred dollars, spreading all the facts of record. On *habeas corpus*, this was held void because the fine was not made conditional on their not purging themselves, and because of other irregularities of practice.<sup>6</sup> But they had an opportunity to defend against these irregular orders, and I think the case is unsound. The same court held that where a person was sentenced to six months in jail and to pay a fine of one hundred dollars, the judgment was not void because it failed to

1. Robertson v. Davidson, 14 Minn. 554, 559; Wright v. Card, — R. I. — (19 Atl. R. 709). 4. Fromlet v. Poor, 3 Ind. App. 425 (29 N. E. R. 1081).

2. Marix v. Franke, 9 Kan. 132, 135. 5. State v. Shattuck, 45 N. H. 205, 211;—the case does not show what the

3. Beemis v. Wylie, 19 Wis. 318, 319. sentence ought to have been.

6. *Ex parte Kilgore*, 3 Tex. App. 247.

order an execution to issue to collect the fine, as required by statute.<sup>1</sup>

§ 761. Section 757 continued—Criminal sentence too light.—It would not seem that jurisdiction ought to be lost because of too light a sentence, and so it was held in Ohio in respect to a sentence of one year to the penitentiary where the statute required at least three.<sup>2</sup> A sentence in Indiana to pay a fine is not void because it is smaller than the statute permits,<sup>3</sup> and a sentence to imprisonment only where the statute requires a fine to be added, is not even reversible error on behalf of the prisoner;<sup>4</sup> and the same ruling was made in New York where the term of imprisonment was fixed at three months while the shortest allowed was one year.<sup>5</sup> A California statute authorized police courts, in cases where a fine was assessed, to direct that the defendant “be imprisoned until the fine be satisfied, in proportion of one day’s imprisonment for every dollar of the fine.” In such a case the judgment was that the defendant be imprisoned one day for every *two* dollars of the fine, and this was decided not to be void.<sup>6</sup> A justice of the peace in Virginia had power to fine, and to imprison indefinitely until the fine should be paid. In such a case, the defendant was sentenced to imprisonment for one year unless the fine should be sooner paid. This was held to be void, on *habeas corpus*.<sup>7</sup> These cases admit that the sentence was less than the court had power to make, but hold it void simply because it did not follow the terms of the statute. And in Hawaii, where the statute required imprisonment at hard labor, a sentence to imprisonment only was decided to be void, and the prisoner was discharged on *habeas corpus*,<sup>8</sup> and precisely the same ruling was lately made in a federal circuit court.<sup>9</sup>

1. *Ex parte* Dickerson, — Tex. App. — (17 S. W. R. 1076).

2. *Ex parte* Shaw, 7 O. St. 81.

3. Harrod v. Dismore, 127 Ind. 338 (26 N. E. R. 1072).

4. Nichols v. State, 127 Ind. 406 (26 N. E. R. 839).

5. People v. Bauer, 44 N. Y. Supr. (37 Hun) 407.

6. *Ex parte* Soto, 88 Cal. 624 (26 Pac. R. 530)—Garoutte, J., *dissenting*.

7. *Ex parte* Marx, 86 Va. 40 (9 S. E. R. 475, 478); Marx v. Milstead, — Va. — (9 S. E. R. 617, 620).

8. *In re* Cooper, 3 Hawaiian 17; *In re* Apuna, 6 id. 732.

9. *In re* Johnson, 46 Fed. R. 477, 481—*relying upon Ex parte* Karstendick, 93 U. S. 396, and *In re* Graham, 138 U. S. 461 (—S. C. R. —).

PART III.

FINAL ENTRY, INFORMAL OR UNCERTAIN.

Title A.—Informal entries of inferior courts, . . . . .	§ 762-765	Title C.—Informal entries in superior courts, . . . . .	§ 767-770
Title B.—Informal entries of probate courts—(Order to mortgage land—Will probated).	766	Title D.—Entry uncertain, . . . . .	771-780

TITLE A.

INFORMAL ENTRIES OF INFERIOR COURTS.

§ 762. Confessions—Witnessing confession.	§ 765. General informalities — Interlineations — Verdict — Want of formal judgment—Witnessing stay of execution.
763. Contempt entries—Costs.	
764. Criminal case.	

§ 762. Confessions.—A justice’s record in Missouri showed the filing of a note as a complaint, the issuing and service of process, and that the defendant “appeared and confessed judgment on said note for the sum of \$30 debt and \$5.90 damages—one dollar cost,” and the signature of the justice.<sup>1</sup> An Indiana entry was: “At request of plaintiff, the defendant appeared and confessed judgment in favor of the plaintiff,” etc. This was signed by the justice, but failed to say “It is adjudged,” etc.<sup>2</sup> A Texas entry read :<sup>3</sup>

“H. SEWELL  
v.  
A. C. BEASLEY,  
S. M. BROWN.

} Note, \$67.50, due December 1, 1859; citation issued January 4th, 1860; F. H. Patrick, deputy sheriff; executed by copy, January 7th.

Defendants appeared and acknowledged judgment for principal, interest and costs of suit. C. P. CAMPBELL, J. P.”

Another entry in Texas was as follows :

(Title of suit) “Debt on note, . . . . .	\$68.67
Credit by cash, . . . . .	22.17
	<u>\$46.50</u>

Summons issued 11th day of November, A. D. 1846, returnable the 21st day of November, 1846. November 21st, 1846. The defendant came forward and acknowledged judgment. Appeal taken by defendant to district court.”<sup>4</sup>

Each of the foregoing records was held to show a valid judgment, collaterally.

1. Franse v. Owens, 25 Mo. 329, 331.

2. Mavity v. Eastridge, 67 Ind. 211.

3. Davis v. Rankin, 50 Tex. 279, 285.

4. Wahrenberger v. Horan, 18 Tex. 57.

**WITNESSING CONFESSION.**—A statute of Michigan provided that confessions of judgment before justices “shall be in writing and signed by the person making the same, in presence of the justice and one or more competent witnesses,” and it was decided that a record of confession, not witnessed in writing by the justice and a witness, was void.<sup>1</sup>

§ 763. **Contempt entries.**—At the close of a trial before a justice two persons got into a fight. The justice announced that he fined them five dollars each. One paid his fine, but the other refused. Thereupon the justice made this entry upon his docket:

“THE PEOPLE OF THE STATE OF ILLINOIS

vs.

ALFRED LANE

The case is docketed for an assault and battery. The *fine* was willingly *fit* in view of the justice. The justice imposed a fine of five dollars each, giving no *rite* of evidence or jury.” This was held not void, and a protection to the justice.<sup>2</sup>

**COSTS.**—A justice’s entry read: “The court is of the opinion that the plaintiff has no cause of action. Judgment against the plaintiff for costs of suit. Costs \$13.31.”<sup>3</sup> A county court entry was: “I hereby render judgment against plaintiffs for costs herein. Judgment rendered against plaintiffs for costs.”<sup>4</sup> These entries were held sufficient to repel collateral attacks.

§ 764. **Criminal case.**—A justice’s record in Pennsylvania was as follows:

“CUMBERLAND CO., SS.:

Com. v. Sue Osborne,

[and a list of others.]

1884, January 1st—

Defendants were convicted before me, one of the justices of the peace, of vagrancy on their own conf. Be it remembered that on January 1st, 2d, 3d, 4th, 5th and 7th, the dates set opposite each name, said defs. were convicted before me, one of the justices of the peace in and for said county, of vagrancy, contrary to an act of assembly. Sentenced them to jail at hard labor for 30 days each.”

These sentences were held valid when assaulted collaterally.<sup>5</sup> A person was committed by a police judge for failing to pay a fine of forty dollars on conviction of a “misdemeanor.” The statute required the record to state “briefly the offense for which the

1. Beach v. Botsford, 1 Doug. (Mich.) 199 (40 Am. D. 45).

2. Lancaster v. Lane, 19 Ill. 242.

3. Nett v. Serwe, 28 Wis. 663.

4. Marsh v. Snyder, 14 Neb. 8 (14 N. W. R. 804).

5. County of Cumberland v. Boyd, 113 Pa. St. 52 (4 Atl. R. 346).

conviction has been had." It was held that, as the court had jurisdiction to convict for misdemeanors and fine forty dollars, the presumption was, collaterally, in favor of jurisdiction.<sup>1</sup>

§ 765. **General informalities.**—The Indiana statute requires the amount in a justice's judgment to be "written out in words," but it is not void because in figures;<sup>2</sup> nor is it void because it is rendered "in favor of" the plaintiff without saying "against" the defendant.<sup>3</sup> So entries of "judgment \$90,"<sup>4</sup> "judgment for plaintiff against defendant for damages, \$84,"<sup>5</sup> are not void. A justice's record in Vermont read: "Continued to Sept. 24, 1845, at eight o'clock forenoon, at which time judgment on verdict of jury for plf. to recover of dft. four dollars damages and his costs; said cause was continued for taxation of cost to Sept. 25, at which time said cost was taxed at \$8.92, and allowed at \$5.95."<sup>6</sup> An entry in Tennessee was:<sup>7</sup>

"H. C. Anderson vs. M. L. Elcan, judgment granted vs. defendant, for M. L. Elcan, for \$433.90.

May 17, 1867.

C. J. SPENCER, J. P."

These were decided not to be void. In another case in the same state, the justice's entry indorsed on the warrant was: "Judgment in favor of plaintiff for the sum of \$107 and costs. L. C. Smith, J. P." The court said: "We have repeatedly decided that a judgment which is not void on its face cannot be collaterally attacked."<sup>8</sup> Another Tennessee justice's record read:<sup>9</sup>

EDWIN HARRIS	AMOUNT OF JUDGMENT
vs.	\$200
J. H. & J. L. BELL	

A justice's record in Illinois read: "The jury retired and returned the following verdict: We, the jury, find for the plaintiff in the sum of two hundred dollars, and the same is the judgment of the court with costs."<sup>10</sup> A justice's entry in Tennessee gave the names of the parties and recited that the defendant confessed judgment on a note for a specified

1. *Ex parte Murray*, 43 Cal. 455.

2. *Hopper v. Lucas*, 86 Ind. 43, 50.

3. *Aldrich v. Maitland*, 4 Mich. 205, 211; *accord*, where the judgment was "against the defendant" without saying in favor of the plaintiff. *Madison County v. Rutz*, 63 Ill. 65.

4. *Fairchild v. Keith*, 29 O. St. 156.

5. *Barrett v. Garragan*, 16 Iowa 47.

6. *Starbird v. Moore*, 21 Vt. 529.

7. *Anderson v. Kimbrough*, 45 Tenn. (5 Coldw.) 260.

8. *Hall v. Heffly*, 25 Tenn. (6 Humph.) 444.

9. *Bell v. Williams*, 36 Tenn. (4 Sneed) 196.

10. *Schemerhorn v. Mitchell*, 15 Ill. App. 418, 423.





nts of costs.<sup>1</sup> The return, as shown by the

"Summons returned as served on the 8th  
appeared in person. Defendants made de-  
collateral suit, that the record was not  
meant: "Summons returned as  
day, plaintiff appeared;" and  
on the day of service.<sup>2</sup> A

ce was returned on "Bow-  
appeared," and judgment  
Martin and R. M.  
n and Martin."

n, trespass to  
against him

the court held other-

in New York read:

99-100 damages, besides

costs. Dated the 6th day of

, Justice." This was held to be

der of the county commissioners in

out a road is not void because "indefi-

When a verdict is returned before a justice in Cali-

, Michigan or New York, that amounts to a judg-

operation of law, and the failure of the justice to enter

is not make the proceeding void.<sup>6</sup>

WANT OF FORMAL JUDGMENT.—A justice's record in Mis-  
issippi showed the names of the parties, plaintiff and defend-  
ant, the filing of a note as a cause of action, giving date  
and amount, and that the defendant appeared and "confessed  
judgment in open court in favor of plaintiff for one hundred  
and forty-five dollars and interest at ten per cent. per annum  
from date and all costs of suit," to which his signature was ap-  
pended. This was held not void, although no formal judgment  
was rendered.<sup>7</sup> The docket of a justice of the peace in New York

1. Dyke v. Bank of Orange, 90 Cal. 397 (27 Pac. R. 304).

2. Jeffries v. Wright, 51 Mo. 215, 217.

3. Heck v. Martin, 75 Tex. 469 (13 S. W. R. 51).

4. Kopperl v. Nagy, 37 Ill. App. 23.

5. State v. Witherspoon, 75 N. C.

6. Lynch v. Kelly, 41 Cal. 232; Porter v. Parker, — Dak. — (33 N. W. R. 70); Gaines v. Betts, 2 Doug. (Mich.) 99; Overall v. Perb, 7 Mich. 315, 316; Felter v. Mulliner, 2 Johns. 181.

7. Swain v. Gilder, 61 Miss. 667.

showed all the proceedings down to the return of a verdict for the plaintiff for one hundred and seventy-five dollars damages. Under this were set the different items of costs, and the whole added up, making one hundred and eighty-three dollars and twenty-five cents. There was no formal rendition of judgment and no signatures by the justice. This was held to be void.<sup>1</sup> But this case is inconsistent with *Fish v. Emerson*, cited in section 688, *supra*.

**WITNESSING STAY OF EXECUTION.**—An Indiana statute authorized a stay of execution in justices' courts to be entered on the docket, and required it to be authenticated thus: "Test.—E. F. Justice." But the omission of this attesting clause was held not to make the entry void.<sup>2</sup> The Michigan statute required a stay of execution before a justice to be attested thus: "Witness, E. W. Justice." Where the form used was, "I approve of Warren S. Crippen as stay, B. Bennett, J. P.," the entry was held to be void.<sup>3</sup> As there was simply a change of phraseology with no change of meaning, the action of the justice would not seem erroneous, much less void.

#### TITLE B AND SECTION 766.

##### INFORMAL ENTRIES OF PROBATE COURTS—(ORDER TO MORTGAGE LAND—WILL PROBATED).

**§ 766. Informal entries of probate courts.**—An administrator's order to mortgage land and the mortgage made are not void because the order did not specify the amount of money that should be raised;<sup>4</sup> and the same ruling was made concerning an administrator's sale where the record failed to recite jurisdictional facts, or the necessity of the sale.<sup>5</sup>

**WILL PROBATED.**—The following entries were held sufficient to show, collaterally, the admission of the will to probate: "The will of Roger Bratcher, proved by Henry Sikes. Executor

1. *Stephens v. Santee*, 51 Barb. 532, Ind. 235, 237; *State ex rel. Buck v. Trout*, 75 Ind. 563.

2. *Miller v. McAllister*, 59 Ind. 491, *overruling* *Hougland v. State*, 43 Ind. 537 and *Fentriss v. State*, 44 Ind. 271, and denying *Cox v. Crippen*, 13 Mich. 502; *accord*, *Eltzroth v. Voris*, 74 Ind. 459; *Stone v. State ex rel. Burdsall*, 75

3. *Cox v. Crippen*, 13 Mich. 502, 506 —Manning, C. J., *dissenting*.

4. *Morgan's Appeal*, 110 Pa. St. 271 (4 Atl. R. 506).

5. *Pursley v. Hayes*, 22 Iowa 11 (92 Am. D. 350).

Thomas Bratcher qualified; ordered, that letters issue." <sup>1</sup> "The above will being proven to the satisfaction of the court, it is ordered to record." <sup>2</sup> "The foregoing will was proven in open court September, 1876, by the oaths of Mont. Hoss and Jacob McNeese, the subscribing witnesses, and ordered to be recorded. G. W. Wright was qualified as executor." <sup>3</sup> A probate court duly admitted a will to probate without annulling any part of it, but it expressed the opinion in the order that it was "in violation of the legal and constitutional rights of the said widow," and was in so far void, and that she recover of the estate "all her just, legal and equitable rights." This opinion was held to be void, and not to affect the probate. <sup>4</sup> A probate order read: "It is ordered that Stephen Gibbs be appointed administrator of the estate of Jeremiah Gibbs, on his entering into bond in the sum of \$4,000 with John J. Bonner and William Selby, securities." This was held to be a present appointment, the same as though it read, "on entering into bond, he is appointed." <sup>5</sup>

## TITLE C.

## INFORMAL ENTRIES IN SUPERIOR COURTS.

§ 767. Abbreviations — Attachment —  
Clerk or court—Contempt.  
768. Costs—Criminal case—Dismiss-  
al—Foreclosure decree.

§ 769. General informalities—Insol-  
vency.  
770. Personal judgment—Settled.

§ 767. **Abbreviations.**—The use of "Bk" for block, "cts" for cents, "\$" for dollars, "Lt" for lot, "Pt" for part, "tx" for tax, "Vl" for valuation, <sup>6</sup> or any mere irregularities in form, <sup>7</sup> do not make a tax judgment void.

**ATTACHMENT.**—A judgment in attachment which reads "that the plaintiff have and recover a judgment against the said attached property for the sum of," and so forth, is not void. <sup>8</sup>

**CLERK OR COURT.**—The clerk had no power to enter judgment in term time without an order from the court. The record of an action on a note showed service, want of an answer, an assess-

1. *Marshall v. Fisher*, 1 Jones L. 111, 115.

2. *Clark's Heirs v. Barham's Heirs*, 8 Mart. 208 (4 Mart. N. S. 411).

3. *Wright v. Mongle*, 78 Tenn. (10 Lea) 38, 41.

4. *O'Docherty v. McGloin*, 25 Tex. 67, 71.

5. *Spencer v. Cohoon*, 1 Dev. & Bat. L. 27.

6. *Jackson v. Cummings*, 15 Ill. 449, 453.

7. *Bennett v. Couchman*, 48 Barb. 73, 84.

8. *Crowell v. Johnson*, 2 Neb. 146, 155.

ment of the amount due by the clerk, and judgment in term time in the usual form signed by the clerk, at the foot of which was the following: "Let execution issue on the above judgment for damages and costs," which was dated and signed by the judge. This was held to be a judgment by the court, and not void.<sup>1</sup>

CONTEMPT.—An entry in a proceeding for contempt in Mississippi, read: "Ordered that George H. Adams be sent to jail, and remain there until he signifies his assent to the court to answer questions to the grand jury, or until the final adjournment of said grand jury at this term of the court." This was held void because it showed no adjudication of anything, and Adams was discharged on *habeas corpus*.<sup>2</sup> A person was tried for contempt in refusing to pay over trust moneys. The record recited that the party came, in obedience to the writ, to show cause why she should not be punished for refusing to pay over said moneys, "which it has duly appeared, and yet does appear to the court, is the property of the said" estate, "and said defendant, Sarah J. Brown, . . . was interrogated and examined by the court, and, thereupon, being fully advised in the premises: It is ordered by the court that the defendant be discharged from the said writ of attachment, and that she go thereof without day. And it is further ordered that a warrant of commitment issue to the sheriff requiring him . . . to imprison the said Sarah J. Brown . . . until she comply with the said order of this court requiring her to pay" over said money, "and that thereafter she be discharged." On *habeas corpus*, it was held that this order was a final discharge, and that the imprisonment was "utterly void."<sup>3</sup> This case seems to me to be clearly erroneous.

§ 768. *Costs*.—A California statute required the clerk to include the costs in the judgment, which was not done. The judgment was entered and authenticated on the record. Below this authentication, on the same page, were "Costs, 63.20\$." On this an execution was issued for sixty-three dollars and twenty cents, and land sold. This was held to be no judgment, and the sale was decided to be void.<sup>4</sup>

CRIMINAL CASE.—An entry in a criminal case is not void on *habeas corpus* because it does not follow the statute by showing

1. *McKinley v. Weber*, 37 Wis. 279, 281.

2. *Ex parte Adams*, 25 Miss. 883 (59 Am. D. 234).

3. *In re Brown*, 4 Colo. 438.

4. *Emeric v. Alvarado*, 64 Cal. 529.

"the offense for which the conviction was had," where it shows that the punishment affixed was within the limits of the general charge. If it shows a trial for murder, and a sentence for ten years, which would be appropriate for manslaughter, the conviction is not void because the judgment does not specifically show a conviction of manslaughter.<sup>1</sup> If the attorney-general had presented a complete copy of the record so as to show the indictment and verdict, the court would have had no difficulty, as the judgment would have been construed with reference thereto.

**DISMISSAL.**—A record read that the plaintiff "moves to dismiss this action, without prejudice to a future action, at costs of plaintiff, which is accordingly done." On this an execution was issued for the costs and the plaintiff's property was sold, and the sale was held to be valid.<sup>2</sup>

A **FORECLOSURE DECREE** read: "And that the equity of redemption in said real estate be sold, . . . and that special execution issue therefor," omitting the words "foreclosed, and the said real estate," between the words "be" and "sold." This was held to be a valid decree when attacked collaterally.<sup>3</sup>

§ 769. **General informalities.**—A recital in a proceeding in Iowa to establish a road that "due *application* of this *notice* having been given," was held not to affect the judgment collaterally, because it obviously meant that "due *notice* of this *application*" was given.<sup>4</sup>

An entry "that the plaintiff, from having and maintaining his suit ought to be barred, and the defendant recover his costs," is not void, and will bar another action.<sup>5</sup> An entry at law reading, "It is therefore ordered, adjudged and decreed by the court," etc., is not void collaterally. It is equivalent to "considered and adjudged."<sup>6</sup> Another entry was: "Ordered judgment in this action in favor of said plaintiffs against said defendant for four hundred and forty-five dollars, with costs of motion." In a collateral proceeding this was held not to be a judgment on which an execution could issue, but a mere order for one.<sup>7</sup>

A North Carolina judgment sued upon in Alabama was as follows: "The following jury was sworn and empaneled (giving

1. *Ex parte Gibson*, 31 Cal. 619 (91 Am. D. 546).

2. *Houston v. Clark*, 36 Kan. 412 (13 Pac. R. 739).

3. *McDonald v. Frost*, 99 Mo. 44 (12 S. W. R. 363).

4. *State v. Pitman*, 38 Iowa 252.

5. *Dixon v. Sinclair*, 4 Vt. 354 (24 Am. D. 610).

6. *Ware v. Pennington*, 15 Ark. 226.

7. *Lincoln v. Cross*, 11 Wis. 91, 95.

names) who find all the issues in favor of the plaintiff, and assesses his damages to five hundred and eighty-five dollars; then judgment at September term, 1844, \$585; the cost arising in this suit, due to the county, to witnesses and officers of court, is \$134.92." This was decided to be no judgment.<sup>1</sup>

A transcript of a Pennsylvania judgment, sued upon in Iowa, was as follows:

<p>"Howell, Hennikers, Attys. for tor. .50 Pro. Sloan, . . 2.41 Atty St. . . . 3.50 Shiff A . . . 2.53 \$8.44</p>	<p>STATEMENT. Taylor, Shipton &amp; Co. vs. Runyan &amp; Brown.</p>	<p>Summons.—Debt. Issued May 21st. Summoned by copy of original, left at the residence of the defendants, May 23d, 1838—\$2.53. June 14, 1838. Judgment <i>sec. reg.</i> for want of plea. January 9th, 1839, sum ascertained at \$155.07. Interest from June 14th, 1838. <i>Fi. fa.</i> for debt, interest and costs, to March term, 1839."</p>
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This entry was held void because nothing was *adjudged*.<sup>2</sup>

INSOLVENCY.—An entry in proceedings in insolvency was: "June 21, 1879. Certif. Pub. notice filed. Same day petitioner finally discharged." This was held, collaterally, to be a valid discharge from all provable debts.<sup>3</sup>

§ 770. *Personal judgment.* — In a gravel road proceeding in Indiana, the court having the right to render a personal judgment, made this entry: "It is ordered and adjudged by the court, that the assessment for the construction of the said gravel road, upon the lands of the said William Needham, be as follows: Upon the east half of the northwest quarter of section 16, township 12, range 5 east, 80 acres, one hundred and fifty dollars. . . . And that the clerk of this court make out and certify to the auditor of Johnson county a true and complete transcript of this judgment, and that said auditor correct his tax duplicate, so as to make the same correspond with this assessment." This was held to be no personal judgment and not to warrant an execution against Needham.<sup>4</sup> The Illinois statute did not authorize a personal judgment against the owner of land for taxes, but a judgment against the land only. A personal judgment was rendered

1. Hinson v. Wall, 20 Ala. 298.

3. Lerian v. Rohr, 66 Md. 95 (5 Atl.

2. Taylor, Shipton & Co. v. Run-  
yan, 3 Iowa 474.

R. 867).

4. Needham v. Gillaspay, 49 Ind. 245.

against the owner, and the record read: "This judgment is to be entered against the land itself." This was held valid as against the land.<sup>1</sup>

"SETTLED."—In an action on a note, after some continuances, the record showed that the case was "settled." This was held to be a bar to a new action.<sup>2</sup>

## TITLE D.

## ENTRY UNCERTAIN.

- |  |  |
|--|--|
| <p>§ 771. Amount in blank.</p> <p>772. Amount in figures without dollar marks—Tax judgments in figures, only.</p> <p>773. Amount of justice's judgment, uncertain—(Penalty—Reference to complaint for amount).</p> <p>774. Description of land by reference to map, paper, plan or survey.</p> <p>775. Description of land by reference to person named or described as owner.</p> | <p>§ 776. Description of land aided by extrinsic evidence, or true meaning obvious.</p> <p>777. Description of land to be sold left to discretion of officer.</p> <p>778. Description of land as a "half," or "part," or omitted—Width of highway.</p> <p>779. Person against whom judgment is rendered, uncertain.</p> <p>780. Person for whom judgment is rendered, uncertain—Names.</p> |
|--|--|

§ 771. **Amount in blank.**—The Tennessee statute authorized an order to sell the lands of a decedent when "it shall be made to appear to the satisfaction of the court that the personal estate has been exhausted in the payment of *bona fide* debts, and that the debts or demands for which the sale is sought are justly due and owing." A report was made to the court that the personal assets amounted to fourteen dollars, and that the indebtedness was two thousand and sixty dollars. On this, it made an order to sell, reciting that the indebtedness "amounts to — dollars or more, and that the personal assets amounts only to the sum of about — dollars." This was held void, because the decree showed on its face that it was not warranted.<sup>3</sup> This case seems to me to be unsound. A judgment on a promissory note "for the sum of — damages and — costs," is not void, and it will bar another action on the note, as it can be amended.<sup>4</sup> Where, by statute, the clerk in Iowa assesses the damages in an action on a note, the judgment is not void because its amount and the amount of the costs, are left blank; and if the blanks are filled after an

1. Chesnut v. Marsh, 12 Ill. 173, 177 —Trumbull, J., *dissenting*.

2. Tabler v. Castle, 22 Md. 94, 100.

3. Young v. Young, 80 Tenn. (12 Lea) 335, 340.

4. Wells v. Dench, 1 Mass. 232.



execution has been issued and land has been sold, the sale will not be void, and it cannot be enjoined by a subsequent purchaser from the defendant.<sup>1</sup> So, an entry against a defendant in Indiana for the costs and charges by the plaintiff in that "suit laid out and expended, taxed at \$——," is not void.<sup>2</sup> An Iowa circuit court record read: "It is therefore adjudged that the plaintiff do recover of defendant herein —— damages, with interest at the rate of —— per cent. per annum, and \$4.95 costs of suit." The court calendar, or judge's minutes read: "Default as to G. M. Carson, clerk to assess." The judgment, or abstract, docket showed \$265 damages. From this, it appears that the clerk assessed the damages and neglected to fill the blanks in the record; but in a collateral action, this was held to be a judgment for four dollars and ninety-five cents, only.<sup>3</sup>

§ 772. **Amount in figures without dollar marks.**—A justice's judgment in figures only, with no character or sign to indicate their meaning, has been decided not to be void in Kansas<sup>4</sup> and Tennessee,<sup>5</sup> while the contrary has been held in Illinois<sup>6</sup> and Indiana.<sup>7</sup> In the last case, the judgment was for "133.95, with costs taxed at 1.00," and the court said that if the account sued upon showed that it was one hundred and thirty-three dollars and ninety-five cents, it would aid the judgment. So, where a judgment of a circuit court in Illinois was for "four hundred and sixty-one and  $\frac{23}{100}$  damages," without saying "dollars," it was held void in ejectment;<sup>8</sup> but precisely the contrary was held in Mississippi.<sup>9</sup> As all the papers and entries which go to make up the complete record are to be construed as one instrument, like a deed or will, so as to make all parts harmonize, if possible, there would seem to be no legal difficulty in supplying the character \$, or the word dollars.

**TAX-JUDGMENTS IN FIGURES, ONLY.**—The states of Illinois, Minnesota, Missouri and Tennessee authorize a judgment to be entered against land for delinquent taxes on the collector's

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|--|--|
| 1. Lind v. Adams, 10 Iowa 398 (77 Am. D. 123).                                 | Elliott v. Jordan, 66 Tenn. (7 Baxter) 376, 381—a judgment for "346.82".           |
| 2. Pittsburg, Cincinnati and St. Louis Ry. Co. v. Town of Elwood, 79 Ind. 306. | 6. Avery v. Babcock, 35 Ill. 175, 177—a judgment for "383.18 debt and 2.39 costs." |
| 3. Case v. Plato, 54 Iowa 64 (6 N. W. R. 128).                                 | 7. Hopper v. Lucas, 86 Ind. 13, 51.  |
| 4. Dickens v. Crane, 33 Kan. 344.  | 8. Carpenter v. Sherfy, 71 Ill. 471.   |
| 5. Johnson v. Billingsley, 22 Tenn. (3 Humph.) 151—a judgment for "43.15."     | 9. Carr v. Anderson, 24 Miss. 188.   |

report. The record authorized is very simple, and ruled off into columns, which are headed "Name of owner," "Number of lot," "Value," "State tax," "County tax," "Total tax," and so forth, according to the provisions of the respective statutes. When the amounts in the columns are simply indicated by figures, with no dollar or cent marks, the cases differ concerning the collateral validity of the judgments. In the earliest Illinois case,<sup>1</sup> there were simply the figures "4.80" in the column for the amount of taxes, and this judgment was held valid, collaterally, without noticing the point now under consideration. In the next case, there were, in the tax column, the figures "2 48," with no decimal point between them, and this was decided to be void.<sup>2</sup> In this case, Breese, J., dissented, and said: "Courts must draw the same conclusions from the same facts which the mass of community would draw from them. Taking the columns with their headings, and the figures in them as they stand, can any reasonable man doubt that dollars and cents, or cents only were intended?" His brethren did not attempt to answer him. Where the figures in the column for "Total amount" were "10 48," with a space, but no decimal mark between them, the supreme courts of Minnesota<sup>3</sup> and of the United States<sup>4</sup> held the judgments void. But where the figures had a straight line between them, thus, "7 | 57," the judgment was held valid collaterally in Minnesota,<sup>5</sup> and void in Illinois;<sup>6</sup> and where there was a comma between the figures, thus "5,68," the supreme court of Missouri ruled that it meant five dollars and sixty-eight cents, and was not void.<sup>7</sup> But in Tennessee, where the tax column simply had the figures "125," the judgment was held void for uncertainty.<sup>8</sup>

§ 773. **Amount of justice's judgment, uncertain.**—A justice's judgment "for thirty-seven dollars and thirty cents, on note due 25th December, 1840, bearing interest from that date, and cost of

1. *Atkins v. Hinman*, 7 Ill. (2 Gilman) 437, 443.

2. *Lawrence v. Fast*, 20 Ill. 338, 343 (71 Am. D. 274).

3. *Tidd v. Rines*, 26 Minn. 201, 208 (2 N. W. R. 497).

4. *Woods v. Freeman*, 1 Wall. 398—concerning the validity of an Illinois tax-judgment.

5. *Gutzwiller v. Crowe*, 32 Minn. 70 (19 N. W. R. 344).

6. *Lane v. Bommelman*, 21 Ill. 143; *Eppinger v. Kirby*, 23 Ill. 469 (76 Am. D. 709); *Dukes v. Rowley*, 24 Ill. 210, 222; *Potwin v. Oades*, 45 Ill. 366.

7. *Raley v. Guinn*, 76 Mo. 263, 272.

8. *Randolph v. Metcalf*, 6 Coldw. (46 Tenn.) 400, 403.

suit," is not void, and is a valid judgment for thirty-seven dollars and thirty cents.<sup>1</sup> A justice's entry in New York, read :

"5th damages, . . . \$30.00  
4.60"

This was held, on appeal, to be a valid judgment for thirty dollars damages, and four dollars and sixty cents costs.<sup>2</sup>

**PENALTY.**—A judgment on a bond with a penalty of ten thousand dollars, that the plaintiffs recover "the said sum of \$10,000, their debt aforesaid ; and it is ordered by the court that the said plaintiffs have an execution against the said defendants for the sum of \$308, their damages," was held to be informal, but not void ;<sup>3</sup> and the same ruling was made in North Carolina where a bond with a penalty of five hundred pounds was sued upon, and the judgment was for "the penalty of the bond."<sup>4</sup>

**REFERENCE TO COMPLAINT FOR AMOUNT.**—A justice's entry in Mississippi was as follows :

<p>"CELESTINE LADNIER v. ELI LADNIER</p>	<p style="font-size: 2em;">}</p>	<p>Eighty-one dollars, Assumpsit.</p>
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Summons issued July 9, 1885, returnable July 18, 1885; continued till August 8, 1885. Now comes the case to be heard, parties appearing in person and by counsel, the court having satisfaction in the premises, it was therefore ordered and considered by the court that the plaintiff, Celestine Ladnier, recover of and from defendant, Eli Ladnier, the sum as claimed in the above case, together with all costs of this suit, for which let execution issue this, the 18th day of August, 1885."

This was held informal, but not void.<sup>5</sup> A judgment of the probate court found that the administrator was indebted to the estate in a certain number of dollars. In a suit on his bond it was held that he could not show that the dollars were depreciated currency dollars.<sup>6</sup>

**§ 774. Description of land by reference to map, paper, plat or survey.**—The papers and entries in a judicial proceeding, from the summons or initiative paper to the final judgment or decree of confirmation, being one single instrument, in a collateral attack

1. Lightsey v. Harris, 20 Ala. 409, 411.

2. Goodrich v. Sullivan, 1 Thomp. & Cook 191, *overruling* Stephens v. Santee, 51 Barb. 532.

3. Wales v. Bogue, 31 Ill. 464.

4. Marshall v. Fisher, 1 Jones L. 111,

116.

5. Ladnier v. Ladnier, 64 Miss. 368.

6. Bailey v. Dilworth, 10 Sm. & M. (18 Miss.) 407 (48 Am. D. 760).

on account of a misdescription of land, the same rules are applied as in the construction of grants, and if there are certain things which identify the *corpus* or thing intended to be affected or sold, the addition of a false or mistaken description will not vitiate it, as was expressly decided by the supreme court of Arkansas;<sup>1</sup> and the Supreme Court of the United States recently decided, that all decrees must be construed with reference to the pleadings, and so limited that their effect shall be such, and such only, as is needed for the purposes of the cases that have been made, and the issues that have been decided.<sup>2</sup> So, it has been decided in Alabama that misdescriptions in an entry do not make it void, when the whole taken together furnish the data for correction;<sup>3</sup> and where a judicial sale was collaterally attacked in Indiana, because the decree, instead of describing the land, referred to a deed which did, the court said: "It is not the office of a description to identify the land, but to furnish the means of identification," and the sale was decided not to be void.<sup>4</sup> The same court ruled that a judgment laying out a highway was not void for want of description, where the data given would enable a surveyor to go upon the land and mark it out.<sup>5</sup> In partition proceedings in the same state, the court ordered the commissioners to plat the land, and to record the plat, which they did. In their report, which was confirmed, they divided the land by the numbers of the lots given on their plat, but gave no copy of it. It was held, collaterally, that the plat could be referred to for identification, and that the decree was not void;<sup>6</sup> and the same ruling was made where a decree described a part of a lot in a city "according to Emmerson and Johnson's survey."<sup>7</sup> A commissioners' deed in England so described the land that, taken in connection with a map referred to, the boundaries could be ascertained. The name of the land was "Muckland," which the deed failed to give, and it erroneously described it as a part of another lot named. This was decided not to be void, in ejectment.<sup>8</sup> An administrator's order to sell land as "So much of the hundred

1. *Montgomery v. Johnson*, 31 Ark. 74, 80.

2. *Barnes v. Chicago, etc., Ry.*, 122 U. S. 1, 14, *citing* *Graham v. Railroad Co.*, 3 Wall. 704.

3. *King v. Martin*, 67 Ala. 177, 181.

4. *Thain v. Rudisill*, 126 Ind. 272, 278, 279 (26 N. E. R. 46).

5. *McDonald v. Payne*, 114 Ind. 359, 361 (16 N. E. R. 795).

6. *Miller v. City of Indianapolis*, 123 Ind. 196 (24 N. E. R. 228).

7. *Allen v. Shannon*, 74 Ind. 164, 166.

8. *Rorke v. Errington*, 7 H. L. Cases 617, 625.

acres on lot No. 4 as is known and distinguished by the town plat called the village of Jefferson," is not void.<sup>1</sup> So, an entry in ejectment which refers to the declaration,<sup>2</sup> or an order establishing a highway which refers to the petition,<sup>3</sup> for a description, is not void where those papers contain a correct one. But where the pleadings contain a correct description, an express reference to them in the judgment is not necessary, as the implied adjudication is that all the allegations of the pleadings upon which it is founded are true.<sup>4</sup> A petition to a board of county commissioners for a road in Indiana described it, and on the filing of the report of the viewers recommending that it be established, the record read: "And the board having duly examined and considered said report, accept and approve the same, and it is now here ordered that said road be, and the same is hereby located to the width of twenty-five feet." This was decided to be valid collaterally, as the petition could be referred to for the description.<sup>5</sup> But, in a trial of a case for the restitution of land before a justice of the peace in Kansas, the entry was: "Parties appeared ready for trial. After hearing the evidence, the court decides in favor of the plaintiff against the defendant. Costs taxed to defendant \$6.85," and this was properly signed, but it was held to be void.<sup>6</sup> I think this case is wrong for the reason just given.

§ 775. Description of land by reference to person named or described as owner.—An administrator's order to sell land which describes it as "all the real estate of the decedent,"<sup>7</sup> or as the land "bought from J. A. Davis,"<sup>8</sup> or as "three hundred and twenty acres known as the headright of William H. Merrill,"<sup>9</sup> is not void. And where there was no description of the land in the administrator's order to sell, nor in the record made in that proceeding, the sale was held to be impervious to collateral attack when the inventory showed that the land sold was all that was owned by the decedent.<sup>10</sup> The same was ruled in New York in

1. Jackson v. Irwin, 10 Wend. 442.

7. Doe v. Henderson, 4 Ga. 148 (48

2. Morse v. Hewitt, 28 Mich. 481, Am. D. 216).

491.

8. Davis v. Touchstone, 45 Tex. 490.

3. Mossman v. Forrest, 27 Ind. 233. 497.

4. Montgomery v. Johnson, 31 Ark. 74, 79.

9. Robertson v. Johnson, 57 Tex. 62, 64.

5. Ruston v. Grimwood, 30 Ind. 364.

10. Hurley v. Barnard, 48 Tex. 83, 88.

6. Allen v. Corlew, 10 Kan. 70.

respect to the proceedings of a surrogate, which described three sides of a rectangle, or "Richard Morrison's quarter-acre lot" in a specified town, when it was shown that the decedent owned no other lot of that description.<sup>1</sup> The Georgia statute required the order to sell the land of a decedent to specify it "as definitely as possible." An order was: "It is ordered that Thomas A. Blanchard, administrator, have leave to sell the lands belonging to the estate of Urich Blanchard, deceased." The notice of the application to sell, and of the sale, were no more definite, but the sale was decided not to be void.<sup>2</sup> A judgment in Tennessee against heirs, naming them, ordered it "to be levied of the lands and tenements and real estate of the said William T. Gholson, the defendants' ancestor, to them descended." On this, their land so inherited was sold, and the sale was held valid collaterally.<sup>3</sup> A description of land in an Illinois judgment as "the house and lot and mill lot" of the defendant, was held not to be subject to collateral attack because the section was misnamed.<sup>4</sup> An Indiana decree correcting a mistake in a deed is not void because it describes the land as "forty acres of land west of a tract of land sold by John W. Marshall to John McQuiston, and east of thirty-eight acres sold by John W. Marshall to Elisha Marshall, and now owned by John F. Myers, and north of the Indian boundary line adopted by the treaty at Greenville in 1795, in fractional section four, township thirty-one north, of range twelve east"—giving the county and state.<sup>5</sup> But where the defendant in the same state was ordered to deliver to the sheriff "all the goods covered by the mortgage of the plaintiff, received by him from Thomas W. Harris," this was decided to be void.<sup>6</sup> This case seems clearly wrong. An order made in North Carolina "to sell the land of the ward named in the petition, adjoining the lands of John Bailey and others, containing about one hundred and ten acres," when the ward had no other land, was held not void.<sup>7</sup>

§ 776. Description of land aided by extrinsic evidence, or true meaning obvious.—Where commissioners in partition marked the

1. Laub v. Buckmiller, 17 N. Y. 620, 627, *citing* Dygert v. Pletts, 25 Wend. 402.

2. Davie v. McDaniel, 47 Ga. 195, 205.

3. Planters' Bank v. Chester, 30 L. 96. Tenn. (11 Humph.) 577.

4. Swift v. Lee, 65 Ill. 336, 340.

5. Thain v. Rudisill, 126 Ind. 272, 276, 278 (26 N. E. R. 46)

6. Privett v. Pressley, 62 Ind. 491.

7. Pendleton v. Trueblood, 3 Jones'

boundary lines of the parcels intended to be set off, and placed stakes at the corners, and made a report to the court which did not correctly describe the parcels as staked out, which was duly confirmed, it was held that, in an action of ejectment to recover the land lying between the boundary as described in the report and the boundary as staked out, the action might be defeated by proving where the stakes were actually set—thus varying the description in the decree of confirmation by parol evidence.<sup>1</sup> A mortgage covered eighty acres of land “except twenty acres from the northeast corner of said above-described tract of land, formerly deeded to Wm. Davis and Emeline Ann Davis,” and it was foreclosed and the same exception carried into the decree and sheriff’s deed. The mortgagor brought ejectment to recover “twenty acres in a square form out of the northeast corner” of the eighty acres described. But the purchaser at the sheriff’s sale was allowed to defeat the action by showing that the mortgagor had formerly deeded twenty acres to *Amelia* Davis off the *south end*, instead of out of the *northeast* corner, and that no other part of the land had ever been conveyed by the mortgagor to any person.<sup>2</sup> The true description of a parcel of land was: “Lot four, in block 5, in S. & C.’s subdivision of lots 8 and 13, in S. and L’s outlots.” The description in a tax-judgment was “Lot 4, in S. and C’s subdivision,” etc., giving it all correctly except to state that it was in “block 5.” It was held that parol evidence was admissible to show that there was no such “lot 4” as described, except in “block 5,” and that the judgment was not void.<sup>3</sup>

MEANING OBVIOUS.—A decedent owned the S. E.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$ , and the N. E.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  of a certain section of land in Missouri, and the administrator duly procured an order to sell it. In his report of sale and deed, the land was described as the S. E.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  and the N. W.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$ . The report averred that the sale was made “in pursuance” of the order of the court. It was held that, as the order described the land correctly, it was evident that he had sold the right land, but made a clerical error in using the letters “S” and “W” for “N”

1. *Hedge v. Sims*, 29 Ind. 574, 576; *accord*, *Griffin v. Bixby*, 12 N. H. 454 —a dower case.

2. *Lanman v. Crooker*, 97 Ind. 163; *approved*, *Thain v. Rudisill*, 126 Ind. 272, 279 (26 N. E. R. 46).

3. *Stewart v. Colter*, 31 Minn. 385, 388 (18 N. W. R. 98).



and "E," and that the sale was not void, and that the heirs could not recover in ejectment—the court saying that they would now fain "reap where they have not sown, and gather where they have not strown."<sup>1</sup> A decree foreclosing a mechanic's lien in Wisconsin described the land as all that part of lot eighteen lying north of a line drawn from a specified point on the east line to a point on the west line three hundred and sixty-one feet *north* of the northwest corner, instead of *south* of that corner. In ejectment to recover this lot, it was held that the true meaning was obvious, and could deceive no one, and the action was defeated.<sup>2</sup> An estate in Arkansas owned the "north fractional *half* of the northwest quarter" of a certain section of land. In the probate proceedings to sell, it was described as the "N. frl  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$ " of the section. It was held that, as there was no such designation in the public surveys as the *north quarter* of a section, the "N. frl  $\frac{1}{4}$ " meant the "north fractional half," and that the sale was not void.<sup>3</sup> Opposed to these cases, and wrong on principle as it seems to me, are several cases in Minnesota. The supreme court of that state said: "The final judgment of a court—the sentence of the law—must possess that degree of certainty as to the thing adjudged as to admit of no reasonable doubt as to its meaning, and not rest upon any inferences to be deduced from facts, either apparent or *aliunde* the record."<sup>4</sup> A description of land in a tax-judgment in that state under the heading of "Subdivision of Section" was "S. 2 N E 4 and N. W. 4 S E 4," giving the section, township and range, and the number of acres as 120. This was held void, the court saying that "it would never do to hold that judgments of domestic tribunals may be explained by experts, or by proof of the local meaning of their language."<sup>5</sup> This judgment was in surveyors' terms, and admitted of no possible doubt.

§ 777. Description of land to be sold left to discretion of officer.—An administrator's order to sell land which left it to his discretion as to what part and how much to sell, was held to be merely erroneous and not void in New Jersey,<sup>6</sup> while the opposite was

1. *Agan v. Shannon*, 103 Mo. 661 (15 S. W. R. 757).

2. *McCoy v. Quick*, 30 Wis. 521.

3. *Montgomery v. Johnson*, 31 Ark. 74, 80.

4. *Collins v. Welch*, 38 Minn. 62 (35 N. W. R. 566).

5. *Keith v. Hayden*, 26 Minn. 212 (2 N. W. R. 495).

6. *Pittenger v. Pittenger*, 3 N. J. Eq. (2 H. W. Green) 156, 165; *Wilmurt v. Morgan*, cited in 9 N. J. L. (4 Halst.) 341.

decided in Ohio.<sup>1</sup> In a guardian's proceeding to sell land in North Carolina, the statute required the order to sell to "particularly specify what property may be sold," and the order was "to sell as much of the lands belonging to the orphans of Stephen Mullen, dec'd, as will satisfy the debts against said deceased's estate." This order was held void;<sup>2</sup> and the same was ruled in Texas, where the order was to sell "so much land lying in Robinson county and west of the Trinity river as will pay \$1,500 of debts."<sup>3</sup> It seems to me that the New Jersey cases are sound and the others unsound. In other words, when all the land of the decedent is described, either specially or generally, I am unable to see why there is a loss of jurisdiction because the order to the administrator is to sell it all, unless he thinks it best not to do so. The heirs ought to object then.

§ 778. Description of land as a "half," or "part," or omitted.—A description of land in a judgment as the "half,"<sup>4</sup> or a "part"<sup>5</sup> of a certain lot or parcel; or as "Pt. S. E.  $\frac{1}{4}$ ;"<sup>6</sup> or as "one hundred acres more or less," with no boundaries fixed;<sup>7</sup> or as "one acre, more or less, lying north of, and adjoining the northwest corner of Sixby's addition" to a town,<sup>8</sup> is void. So, where no description can be obtained from the complete record, the proceeding is void.<sup>9</sup> But an administrator's order to sell a parcel in the "southwest corner" of a specified lot is not void, although *prima facie* it would be in a square form which was not the form of the decedent's land.<sup>10</sup> A tax-judgment showed a plat of certain land divided into four irregular pieces, and designated that ordered to be sold as "lot No. 2." The plat contained no such designation, and failed to show which piece was intended for lot No. 2, and this was held void.<sup>11</sup>

[ 1. *Tiernan v. Beam*, 2 O. 383.

2. *Leary v. Fletcher*, 1 Ired. L. 259, 261.

3. *Graham v. Hawkins*, 38 Tex. 628, 633.

4. *Porter v. Byrne*, 10 Ind. 146 (71 Am. D. 305).

5. *Boatman v. Macy*, 82 Ind. 490; *McDonald v. Red River County Bank*, 74 Tex. 539 (12 S. W. R. 235)—a sale in attachment in which it was held, erroneously as it seems to me, that the

levy could not be referred to in order to show what "part" was ordered to be sold.

6. *Ross v. State*, 119 Ind. 90 (21 N. E. R. 345).

7. *Spruill v. Davenport*, 3 Jones L. 42, 44.

8. *Munger v. Green*, 20 Ind. 38.

9. *Ratliff v. Stretch*, 117 Ind. 526 (20 N. E. R. 438).

10. *Bloom v. Burdick*, 1 Hill 130, 137.

11. *Williams v. Central Land Co.*, 32 Minn. 440 (21 N. W. R. 550).

**WIDTH OF HIGHWAY.**—An English statute in respect to the change of footways by magistrates, prescribed a form which gave the length and breadth of the new way and provided that it should be used. An order made changing such a way without giving the length or breadth of the new one, was held void.<sup>1</sup> The Indiana statute authorized the board of county commissioners to lay out highways of a width not exceeding forty feet, and required the width to be defined and specified; and several cases in that state hold that the failure to do this makes the order void.<sup>2</sup> But, on principle, I think these decisions unsound. If the landowner will lie by and not call attention to the defect, and then assails the order collaterally, he ought to be defeated if possible, which could be done by holding that the commissioners exercised their full power and made the highway forty feet wide, or the width prayed for in the petition. Where a road was laid out in Mississippi by a county court as “leading from Woodville to St. Francisville, near the line of demarkation, at or near Col. Stockett’s plantation,” it was held void.<sup>3</sup>

**§ 779. Person against whom judgment is rendered, uncertain.**—A municipal corporation in Vermont known as “School District No. 1,” was divided into two new ones designated as “No. 1” and “No. 2.” In an action on a judgment against “No. 1,” it was held that the pleadings could be examined in order to show that it was the old district. The court said: “Whenever there is doubt as to what person is the real party defendant in a judgment record by reason of the same being applicable to more than one person, reference may be had to the process, pleadings and proceedings in the action for the purpose of determining with certainty the real party.”<sup>4</sup> Where a Tennessee judgment was against the “defendants,” without naming them, or where the name of one was omitted from the caption of the entry, it is good, collaterally, against all.<sup>5</sup> So, in the same court, a justice’s judgment “in favor of the plaintiff,” is a good judgment collaterally against all the defendants.<sup>6</sup> Where there are several defendants, a confession

1. Davison v. Gill, 1 East 64.

2. White v. Conover, 5 Blackf. 462; Carlton v. State, 8 Blackf. 208; Barnard v. Haworth, 9 Ind. 103; Erwin v. Fulk, 94 Ind. 235.

3. Stockett v. Nicholson, Walker (Miss.) 75, 80.

4. Moulthrop’s Adm’r v. School District, 59 Vt. 381 (9 Atl. R. 608).

5. Wilson Wheeler v. Nance & Collins, 30 Tenn. (11 Humph.) 189.

6. Parker v. Collier, 20 Tenn. (1 Humph.) 80.

by "one of the defendants,"<sup>1</sup> or a judgment against "the defendant,"<sup>2</sup> is void. It seems to me that the judgment in the last case ought to have been held good against each defendant served. A justice's record in Michigan showed service on "defendant" without saying which one, and the judgment by default was: "And after considering the evidence, judgment is this day rendered for \$300 damages and \$3.00 costs." This was held void.<sup>3</sup> A justice's judgment against "Joseph" may be shown, collaterally, to be against "Joseph Vacaro;"<sup>4</sup> and when it is against "D. Bridges,"<sup>5</sup> or "Miller and Cox,"<sup>6</sup> it is merely erroneous, and not void. It was decided in South Carolina, that a judgment against "Brown, guardian of Owens," was a judgment against Brown only, and void as to Owens.<sup>7</sup> But the pleadings would show who was sued. A claim was filed against an estate. The judgment was that the plaintiff "do have and recover of and from the said defendants, J. D. Langworthy and Agnes Langworthy, administrators of the estate of said James L. Langworthy, deceased, the sum of \$5,657.50 . . . and that he have execution therefor." This judgment was rendered in Wisconsin, and the plaintiff sued the administrators personally on it in Iowa. It was held that the judgment, *in form*, was against them personally; but, construed in the light of the pleadings, it was against the estate, and that the action could not be maintained."<sup>8</sup> A Missouri record showed a judgment against "William N. Fulkerson, guardian *ad litem* of Gabriel Latrielle." It was held to be conclusive that Latrielle was the defendant represented by his guardian *ad litem*.<sup>9</sup> The Alabama code, in case of the death of one or more defendants pending the suit, authorized a judgment against the survivors. In such a case, a judgment was rendered against the five defendants, "or such of them as are now surviving," without naming any of them, and without the death of any having been suggested. In fact, three of the defendants were dead; but the judgment was held valid, collaterally, against the other two.<sup>10</sup>

1. Koechlept v. Hook, 10 Md. 173 (69 Am. D. 133).

2. Thomas v. Holcombe, 7 Ired. 445.

3. Sherman v. Palmer, 37 Mich. 509.

4. Hammond v. People, 32 Ill. 446, 472.

5. Bridges v. Layman, 31 Ind. 384.

6. Hopper v. Lucas, 86 Ind. 43, 50.

7. Tobin v. Addison, 2 Strobbart 3.

8. Tyler v. Langworthy, 37 Iowa 555, 558.

9. Latrielle v. Dorleque, 35 Mo. 233, 236.

10. Downs v. Allen, 22 Fed. R. 805, 809—Shipman, J.

§ 780. Person for whom judgment is rendered, uncertain. — A justice's record in Tennessee read as follows:

No.	Date.	Parties' Names.	Am't of Judgment.
45	23	June 13th, 1842. J. C. Williams vs. William Jones.	For Plaintiff, \$9.37½
46	23	Same vs Elias Reese, Cordy Reese.	For Plaintiff, \$100.46¼

It was held that the second judgment was void for the failure to show who the plaintiff was; that neither the preceding judgment nor parol evidence could be introduced to show that J. C. Williams was plaintiff.<sup>1</sup> Certainly the judges who concurred in that opinion had no doubt from the face of the record that J. C. Williams was the plaintiff. It is as plain as though it read: "The plaintiff in this case is the same as in the last preceding case." But judgments are frequently held void for uncertainty upon a point about which no one has any doubt. The next case is one of the same kind.

A justice's entry in Michigan properly entitled the cause with the names of the plaintiffs and defendants, and then read: "It is therefore considered, that the said P do recover of the said D the sum of," etc. (using the letters P and D presumably for plaintiff and defendant). This was decided to be void, and parol evidence was ruled inadmissible to show that P stood for plaintiff, and D for defendant.<sup>2</sup> A probate order contained a list of fourteen estates by name and recited that "Justin Castaine be, and he is hereby, appointed administrator of *this* estate." One of the estates named was that of Robert Evans, and the record showed an inventory and bond filed by Castaine in that estate, and that he sold land. This sale was held void for uncertainty in the order of appointment.<sup>3</sup> The sale of land would not be void because the appointment was void.<sup>4</sup> Decrees in Alabama in favor of "the personal

1. McClellan v. Cornwell, 42 Tenn. (2 Coldwell) 298, 303.

3. Harwood v. Wylie, 70 Tex. 538 (7 S. W. R. 789).

2. Rood v. School District, 1 Doug. (Mich.) 502.

4. See section 591, *supra*.

## TITLE A.

## EFFECT OF CONFIRMATION ON ERRORS MADE IN OR BEFORE THE FINAL JUDGMENT OR ORDER TO SELL.

§ 782. General irregularities—Legacy used by administrator—Limitation—Tax purchaser.	§ 784. Petition or order, wanting—Petition or order defective in description of land.
783. Original notice, defective or wanting.	

§ 782. **General irregularities.**—That an administration of an estate was carried along for twelve years, and that property was lost and squandered by the various administrators; that the administration was not formally extended by the court from year to year; that there were intervals of several years in which nothing was done, do not make a sale of land duly confirmed void collaterally, was held by the supreme court of Texas.<sup>1</sup> Nor is the confirmation of a foreclosure sale void for mere irregularities.<sup>2</sup>

**LEGACY USED BY ADMINISTRATOR.**—An administrator in New York wrongfully used funds devised to legatees to pay off a purchase made by the decedent at a foreclosure sale, and these acts were duly confirmed at his final settlement. This was held to bar an action by the legatees for a devastavit.<sup>3</sup>

**LIMITATION—TAX PURCHASE.**—A confirmation of a tax sale made after the statute of limitations had barred the purchaser's right, was held to be void in Arkansas in respect to the defendant in possession, because his possession and the question of limitation was not put in issue.<sup>4</sup> But the defendant had an opportunity to make his defense, and he ought to have made and proved that issue.

§ 783. **Original notice, defective or wanting.**—An administrator's sale of land in New York, made December 27, 1883, was void for want of notice to certain persons. On April 29, 1884, notice was ordered to be given them to appear and show cause on June 20, 1884, why the sale should not be confirmed. Notice was duly given, and upon their failure to appear, it was confirmed. This was held void upon the ground that they had the right to appear

1. Baker v. De Zavalla, Texas Unreported Cases 621, 632.

2. Nagle v. Macy, 9 Cal. 426, 429.

3. Denton v. Sanford, 103 N. Y. 607 (9 N. E. R. 490).

4. Buckingham v. Hallett, 24 Ark. 519.

and bid at the sale.<sup>1</sup> An action was brought against an administrator in Pennsylvania to charge the lands of the decedent, and a judgment of one hundred and one dollars was recovered, and a tract of land was sold for five thousand dollars,—apparently its full value. When the proceedings were commenced, the statute did not require notice to the heirs, and none was given; but during their pendency a statute was passed requiring such notice. One of the heirs was a lunatic, and her committee received her share of the surplus and reported it to the court. An exception to this report was taken by a relative upon the ground that the sale was unlawful, and that the committee had no right to receive this money, but the court overruled the exception and charged it to him. Afterwards he was discharged and a new committee appointed, to whom the money was paid. The new committee then brought an action to recover the land, but he was defeated because, as the court might have ordered a sale in the first instance, it could and did ratify and confirm the unlawful sale made.<sup>2</sup> There were two other reasons for defeating this rashly case, namely: It was a doubtful question of law whether the statute requiring notice applied to pending proceedings, and it took a decision of the supreme court to determine that it did;<sup>3</sup> and because the trial court erred on that point, its decision was not void. Again: This ward was not only an infant but an idiot, and service on her would have been a mere technical farce, the omission of which caused her no harm, as the court actually protected her rights.

§ 784. **Petition or order, wanting.**—A Texas statute authorized an administrator to procure an order to sell land upon an application showing certain things, and enacted that “No sale of any property belonging to an estate shall be made by an administrator without an order of court authorizing the same.” An administrator sold without making any application or obtaining any order, and reported the sale to the court, which confirmed it, but this was held void.<sup>4</sup>

**PETITION OR ORDER DEFECTIVE IN DESCRIPTION OF LAND.**—An administrator’s petition to sell land in Kentucky gave no

1. Matter of Mahoney, 41 N. Y. Supr. (34 Hun) 501, 503.

2. Warden v. Eichbaum, 3 Grant’s (Pa.) Cases 42, 46—two judges *dissenting*.

3. Warden v. Eichbaum, 14 Pa. St. 121, 124.

4. Ball v. Collins, — Tex, — (5 S. W. R. 622).



description. The judgment followed the language of the petition and directed the commissioner to sell so much of the land of the decedent as would be necessary to pay the sum of \$—, the amount of the indebtedness. The commissioner surveyed and sold it, and made a deed with a good description, which was confirmed by the court, and this was held valid collaterally.<sup>1</sup> An administrator's petition to sell in Missouri set forth a list of lands as belonging to the estate, which omitted a certain parcel; but in the same petition an attachment was alleged to exist on this parcel, referred to as being in the list, when, in fact, it was not, and he also asked leave to sell that. The order of publication for the heirs to appear and show cause against the sale and the publication made were general for the sale of so much of the land of the deceased as would be sufficient to pay the debts. The order of sale referred to the publication as having been duly made, and set forth a list of lands to be sold which did not include this parcel; notwithstanding that fact, the administrator advertised it as being included in the order, had it appraised, sold it and made a report of the sale, which was duly approved and a deed ordered, and made. Years afterward, the heirs brought ejectment to recover this parcel, but they were defeated on the ground that the intention of the court was to embrace it in the order, and that they had their day in court at the time of confirmation.<sup>2</sup>

## TITLE B.

## EFFECT OF CONFIRMATION ON ERRORS MADE AFTER THE FINAL JUDGMENT OR ORDER TO SELL.

§ 785. Administrators, one not acting  
—Deed irregular.

786. Execution, irregular.

787. Notice of sale, defective or  
wanting.

§ 788. Sale, errors in—(Administrator's sale, public or private—  
Purchase price—Purchaser's  
name).

789. Second order to sell—Time of  
creditor's election.

§ 785. **Administrators—One not acting.**—Where a license was granted to joint administrators to sell land, the refusal of one to act does not make a sale by the other void, after confirmation.<sup>3</sup>

**DEED IRREGULAR.**—The New York statute required an administrator's deed of land to set forth at large the orders directing

1. *Dorsey v. Kendall*, 8 Bush. 294, 298; *accord*, *Johnson v. McDyer*, — Ky. — (9 S. W. R. 778).

2. *Tutt v. Boyer*, 51 Mo. 425, 429—*Vories, J., dissenting. Accord*, *Tutt v. Zenir*, *id.* 431.

3. *Osman v. Traphagen*, 23 Mich. 84, 88.

the sale. A deed in setting forth the orders reversed the dates so as to be absurd, but it was confirmed. It was held that no one could have been misled, and that the confirmation was not void collaterally.<sup>1</sup>

A guardian duly sold land in Indiana and then made a deed without reporting the sale to the court. Discovering his mistake, he made a report and asked the court to confirm the sale and deed made, which was done. This was decided not to be void because a new deed was not made.<sup>2</sup> But contrary to the last case, and wrong on principle, as it seems to me, are two cases from New York, which held that a deed made before the confirmation, when the statute required the confirmation to precede, was void.<sup>3</sup>

§ 786. **Execution, irregular.**—A judgment was rendered in Kansas for the sale of real estate attached, with no personal judgment. An execution was issued commanding the amount of the judgment to be made from the goods of defendant, and for want thereof, ordering the sale of the land attached. The land was sold and the sale confirmed, and it was decided that the irregularity in the execution did not make the confirmation void.<sup>4</sup> A judgment in a state court was paid to the plaintiff's attorney, except six dollars of clerk's costs, and a receipt in full given. Afterwards the clerk caused an execution to issue, and land of defendant's was sold to satisfy it, and the sale was reported to and confirmed by the court. Subsequently, the defendant moved to set aside the sale, which was denied. After that, the land having been transferred to a *bona fide* purchaser, the defendant brought a suit in equity in the federal court to quiet title, and it granted the relief prayed for, on the ground that the clerk had no authority to issue the execution and that the confirmation only cured irregularities in the sale.<sup>5</sup> The judgment was not satisfied of record, and the record did not show that the clerk ordered the execution, and there was no error apparent to put a purchaser on inquiry; besides, the denial of the defendant's motion to set aside the sale necessarily

1. Sheldon v. Wright, 7 Barb. 39, 51.

2. Hammann v. Mink, 99 Ind. 279, 286.

3. Rea v. M'Eachron, 13 Wend. 465 (28 Am. D. 471); Stillwell v. Swarthout, 81 N. Y. 109, 114.

4. Merwin v. Hawker, 31 Kan. 222, 225.

5. Wills v. Chandler, 2 Fed. R. 273 —McCrary, J

adjudged that it carried his title. A statute of Kansas provided that if, upon the return of an execution, the court "shall, after having carefully examined the proceedings of the officer, be satisfied that the sale has in all respects been made" according to law, it should confirm the same. In speaking of action under this statute, the court said: "The order of confirmation is an adjudication merely that the proceedings of the officer as they appear of record are regular," and that if the execution was irregular or unauthorized, the confirmation did not cure it.<sup>1</sup> But without any statute, the law called upon the defendant to show any cause that might exist why the sale should not be confirmed, and the statute did not repeal it. In a later case, the same court held that a confirmation was not void because the execution was prematurely issued.<sup>2</sup> It is held in Pennsylvania that, while a confirmation of a sheriff's sale cures all defects in the writ and its execution,<sup>3</sup> it will not cure a sale made after the return day, in express violation of the statute.<sup>4</sup> But I do not see why it will not.

§ 787. **Notice of sale, defective or wanting.**—A confirmation of an administrator's sale cures all defects in the advertisement of the sale,<sup>5</sup> or the failure of the notice to give the terms,<sup>6</sup> or the place,<sup>7</sup> or the time and place;<sup>8</sup> or any departure from the order of sale,<sup>9</sup> or the fact that the notice was too short,<sup>10</sup> or that the sale was made by the auctioneer instead of the administrator.<sup>11</sup>

§ 788. **Sale, errors in.**—A departure from the order in making an attachment sale,<sup>12</sup> or a commissioner's sale;<sup>13</sup> or a disregard of the law by adjourning the sale too long,<sup>14</sup> or by selling for less than the appraisement,<sup>15</sup> or by failing to sell in parcels,<sup>16</sup> or by

1. Koehler v. Ball, 2 Kan. 160, 172.

2. Cross v. Knox, 32 Kan. 725, 735.

3. Thompson v. Phillips, 1 Baldwin 246, *as cited* in 14 Pa. St. 78.

4. Dale v. Medcalf, 9 Pa. St. 108; Cash v. Tozer, 1 Watts & Serg. 519.

5. Jackson v. Magruder, 51 Mo. 55, 58.

6. Brubaker v. Reeves, 23 Kan. 411, 414.

7. Blodgett v. Hitt, 29 Wis. 169, 178.

8. Beidler v. Friedler, 44 Ark. 411, 414; Cadwallader v. Evans, 1 Disney 585, 592.

9. Hammann v. Mink, 99 Ind. 279, 288.

10. Wyant v. Tuthill, 17 Neb. 495 (23 N. W. R. 342).

11. Hawkins v. Ragan, 20 Ind. 193.

12. Hess v. Rader, 26 Gratt. 746, 749; Lancaster v. Wilson, 27 Gratt. 624, 630.

13. McGavock v. Bell, 3 Coldwell (43 Tenn.) 512, 521.

14. Gager v. Henry, 5 Sawyer 237, 247.

15. Spaulding v. Baldwin, 31 Ind. 376.

16. McCampbell v. Durst, 73 Tex. 57 (13 S. W. R. 187)—an administrator's sale; Smith v. Scholtz, 68 N. Y. 41, 53—a sale by an assignee in bankruptcy; Emery v. Vroman, 19 Wis. 689, 700 (88 Am. D. 726)—a sale by a guardian.

selling privately when a public sale was ordered ;<sup>1</sup> or the failure to sell upon the terms,<sup>2</sup> or at the time<sup>3</sup> prescribed ; or the sale of too much ;<sup>4</sup> or the omission to verify the report of sale,<sup>5</sup> are all cured by the confirmation.

ADMINISTRATOR'S SALE—PUBLIC OR PRIVATE.—An administrator's report of sale of land in Iowa showed that it was made publicly, as ordered by the court, and this was duly approved and a deed was ordered and made. Eighteen years afterwards, the heirs were permitted to recover this land from an innocent purchaser by proving that the administrator's sale was made privately ;<sup>6</sup> and the same ruling was made in Mississippi in respect to a private sale of a chattel by an executor when the statute required it to be public, although in this case the report of the sale did not show how it was made.<sup>7</sup>

PURCHASE PRICE.—Where the record shows that an administrator's sale was made for cash, it cannot be contradicted collaterally ;<sup>8</sup> nor is a judicial sale void because made for too small a price, being for less than a prior special mortgage.<sup>9</sup>

PURCHASER'S NAME.—An administrator's sale was reported as made to J. C. Kendrick, and was confirmed and deed ordered. A deed was made to W. C. Kendrick. In ejectment by the heirs, it was held competent to show that the sale was actually made to W. C. Kendrick.<sup>10</sup> The description of land sold by an administrator did not strictly follow the order to sell, but as it was capable of being construed so as to comply with the order, it was held to be cured by the confirmation.<sup>11</sup> So, where the statute required the plaintiff, before selling on a foreclosure decree, to execute a prescribed bond, a sale upon a defective bond is made valid by the confirmation.<sup>12</sup>

1. *Apel v. Kelsey*, 52 Ark. 341 (12 S. W. R. 703); *Kirkman, Ex parte*, 40 Tenn. (3 Head) 517.

2. *Jacob's Appeal*, 23 Pa. St. 477.

3. *Brown v. Christie*, 27 Tex. 73 (84 Am. D. 607).

4. *Dawson v. Litsey*, 10 Bush 408, 410; *Contra*, *Adams v. Morrison*, 4 N. H. 166 (17 Am. D. 406).

5. *Spragins v. Taylor*, 48 Ala. 520.

6. *Van Horn v. Ford*, 16 Iowa, 578, 583.

7. *Warten v. Howard*, 2 Sm. & M. (10 Miss.) 527 (41 Am. D. 607).

8. *Kellam v. Richards*, 56 Ala. 238; *May v. Marks*, 74 Ala. 249, 254; *Jones v. Woodstock Iron Co.*, — Ala. — (10 S. R. 635); *Worthington v. Dunkin*, 41 Ind. 515, 525; *M'Iver v. Stephens*, 101 N. C. 255 (7 S. E. R. 695, 697); *Farrell v. Hennesy*, 21 Wis. 632.

9. *Whitaker v. Ashby*, 43 La. Ann. 117 (8 S. R. 394).

10. *Dodd v. Templeman*, 76 Tex. 57 (13 S. W. R. 187).

11. *Berry v. Young*, 15 Tex. 369.

12. *Cockey v. Cole*, 28 Md. 276 (92 Am. D. 683, 685).

§ 789. **Second order to sell.**—In an administrator's proceeding to sell land in Kentucky, the court ordered a sale, fixing the manner and price. Two years afterwards, the sale not having been made, the court, apparently on its own motion, without any new pleading or evidence, made a new order fixing a different manner of sale without restriction on the price. The commissioner then made a sale in the manner prescribed in the first order and on the terms prescribed in the second, and reported it. This report having been laid over five days for exceptions, and none being filed, was confirmed. This second order was held to be void, and as the sale followed it in part, it was also decided to be void.<sup>1</sup> I cannot agree with this case.

**TIME OF CREDITOR'S ELECTION.**—A confirmation of a sheriff's sale and deed in Pennsylvania is not void in ejectment because the creditor did not signify his election to permit the defendant to retain the premises levied on at the valuation made, "within ten days thereafter," as required by the statute, but waited a longer time.<sup>2</sup> Of course no mere irregularity in the order of confirmation itself, makes it void.<sup>3</sup>

#### TITLE C.

##### NECESSITY OF CONFIRMATION—CONFIRMATION, HOW SHOWN— CONFIRMATION WANTING.

§ 790. Principle involved in Title C.

§ 791. Confirmation, how shown—  
What makes

§ 790. **Principle involved in Title C.**—Where the law requires a sale or deed to be confirmed, the purchaser does not obtain the *legal* title until that is done. But where the proceedings have been regular, and the purchaser has paid his money and taken possession of the land, the holder of the legal title will not be able to oust him for want of a confirmation. While the failure to confirm an administrator's sale of land,<sup>4</sup> (even when no statute so required),<sup>5</sup> or a mortgage made by him,<sup>6</sup> or a sale made by a guardian,<sup>7</sup> makes the sale void, yet a purchaser at a guardian's sale, on motion and notice to the wards seventeen years afterwards, was held entitled to have a confirmation entered;<sup>8</sup> and where a mortgage

1. Bethel v. Bethel, 6 Bush 65.

2. Shields v. Miltenberger, 14 Pa. 210, 225.  
St. 76.

3. Tabb v. Collier, 68 Ga. 641.

4. Neill v. Cody, 26 Tex. 286, 290.

5. Learned v. Matthews, 40 Miss.

6. Battell v. Torrey, 65 N. Y. 294.

7. Penn v. Heisey, 19 Ill. 295 (68  
Am. D. 597).

8. *In re Harvey*, 16 Ill. 127.

given by an administrator had not been confirmed, the mortgagee was allowed to apply for and procure a confirmation after a suit had been brought to cancel it as being void ;<sup>1</sup> and contrary to the case just cited from 40 Mississippi, it was held in Illinois that the failure to confirm a sale by a master in chancery, where no statute so required, did not make the sale void.<sup>2</sup> In Texas, where law, equity and good sense are happily combined, the supreme court, in speaking of a collateral assault on an executor's sale, said: "Where there is any evidence of confirmation, or of something from which an intention to confirm might be inferred, *or something entitling the purchaser to have the sale confirmed*, the purchaser will be entitled to claim title to the land."<sup>3</sup>

§ 791. Confirmation, how shown—What makes.—There was no confirmation of an administrator's sale, but the judge's minutes read: "Report of sale of real estate of William Camden, deceased, approved. Deed ordered and deed acknowledged." This was decided to be sufficient evidence of confirmation, collaterally.<sup>4</sup> The confirmation of a tax sale was void ; but afterwards, a deed was executed and possession given by a valid order of the court, and this was held to amount to a confirmation.<sup>5</sup> A guardian was appointed by the clerk in vacation, but this appointment was not confirmed by the court, as required by the statute. The court subsequently authorized him to sell land, which was decided to be an implied confirmation of his appointment, and the sale was held valid collaterally.<sup>6</sup> So, where an administrator's report of sale was ordered to be spread upon the record, and the court accounted with him for the proceeds in his annual settlements, and approved a deed to the purchaser, this was equivalent to an approval of the sale.<sup>7</sup>

The Missouri statute provided that, if the report of an administrator's sale should not be approved, it should be void ; but that if it was approved, he should make a deed. It was held that the fact that the deed was acknowledged before the probate judge, and that the administrator was charged with the money

1. Morgan's Appeal, 110 Pa. St. 271 (4 Atl. R. 506).

2. Miller v. McMannis, 104 Ill. 421, 427.

3. Moody v. Butler, 63 Tex. 210, 212.

4. Camden v. Plain, 91 Mo. 117 (4 S. W. R. 86, 89).

5. Miller v. Reynolds, — Ark. — (13 S. W. R. 597).

6. Shumard v. Philips, 53 Ark. 37 (13 S. W. R. 510).

7. Grayson v. Weddle, 63 Mo. 523, 538.

received, showed an approval of the report, although none was made of record, and that the heirs could not recover the land.<sup>1</sup>

A guardian's sale in the same state was regularly made and reported, and the report spread of record, but no formal approval was entered. A deed was made and the purchase money received, with which the guardian was charged in his annual settlement. This was held sufficient evidence, collaterally, of an approval of the sale.<sup>2</sup> So, in Texas, where a confirmation of an executor's sale was indorsed on the report, but not transcribed by the clerk into the record, this was ruled to be sufficient to bar a collateral attack.<sup>3</sup> The confirmation of a guardian's sale was entered on the probate docket by the judge, as follows: "June, 1867, term. Ordered by the court, that the report of the sale of 160 acres of land sold by S. Elliot, guardian, be affirmed, and title made as the law directs." The clerk failed to transcribe this entry upon the minutes of the court, but the sale was held to be proof against collateral attack.<sup>4</sup> So, where no formal entry of the approval of an administrator's sale can be found, it is not void, as an approval will be presumed.<sup>5</sup>

1. *Agan v. Shannon*, 103 Mo. 661 (15 S. W. R. 757).

2. *Moore v. Davis*, 85 Mo. 464.

3. *Moody v. Butler*, 63 Tex. 210, 212.

4. *Calloway v. Nichols*, 47 Tex. 327.

5. *Jones v. Manly*, 58 Mo. 559, 564.



## CHAPTER XV.

### STATUTES DECLARING THE EFFECT OF JUDICIAL PROCEEDINGS. COLLATERAL EFFECT OF, CONSIDERED.

PART I.—PRINCIPLE INVOLVED IN CHAPTER XV—"JURISDICTION."—"VOID," . . . . .	§ 792
PART II.—ADMINISTRATORS' AND GUARDIANS' PROCEEDINGS TO SELL LAND, . . . . .	793-798

§ 792. **Principle involved in Chapter XV.**—In several states statutes have been enacted making certain specified things, or their absence, sufficient grounds for avoiding or setting aside or annulling judicial proceedings of a specified kind; and, as might be expected, there is some diversity of opinion in respect to their influence on the proceedings when assailed collaterally. On principle, such statutes should have no influence collaterally, unless a contrary construction be impossible. Of course, if a statute provided that any specified defect should make the judgment "void collaterally," or that rights acquired under such a judgment should be void in the hands of a *bona fide* purchaser, there would be no room for construction; but no statute has ever yet gone that far.

"JURISDICTION."—A statute of Kentucky concerning guardians' proceedings to sell land provided that "no court shall have jurisdiction" to decree a sale unless commissioners, appointed for that purpose, shall have reported certain facts. This was said in an early case to mean *rightful* jurisdiction, which, of course, would not affect the proceedings collaterally.<sup>1</sup> Another Kentucky statute read: "The court shall have no jurisdiction to make any such order . . . until notice of the filing of the petition . . . shall be published . . . in a newspaper designated by the court." It was held that a failure to *designate* the paper did not make the decree void; that the end was equally well answered when the approval of the court came after the publication.<sup>2</sup>

1. *Dictum* in Thornton v. McGrath, 1 Duvall 349, 351.

2. Mann v. Martin, 14 Bush 763, 767.

Section 3460, of the Georgia code, reads: "Parties, by consent, express or implied, cannot give jurisdiction to the court as to the person or subject-matter of the suit. It may, however, be waived, so far as the rights of the parties are concerned, but not so as to prejudice third persons." Under this statute, it was decided that a judgment against an executor, by consent, in a county where he did not reside, was void as to third persons who claimed property levied upon.<sup>1</sup> So, where a judgment was rendered on a note which appeared to be due on its face, it was held competent to show, in a contest between garnishment creditors, that the note was ante-dated, and not, in fact, due, in order to avoid the judgment.<sup>2</sup> If there ever was a statute which a court would be justified in construing out of existence, this is one. It seems to me that it ought to have been held simply declaratory in the case first cited, because at common law third persons never are "prejudiced" or affected in the least by any judgment; and the persons who claimed the property levied upon could not be prejudiced by having property taken from them *which they did not own*. The second case cited seems to me wrong on principle, because the defect was not a matter of jurisdiction but simply a defense. It seems to me that the statute, so far as jurisdiction over the subject-matter is concerned, ought to be construed as simply declaratory of the common law.

"VOID."—So, where the statute provided that a purchase at a judicial sale by an appraiser "shall be considered fraudulent and void;"<sup>3</sup> or that an attachment issued without taking a bond should be "void;"<sup>4</sup> or "illegal and void, and shall be dismissed;"<sup>5</sup> or that, in guardians' proceedings to sell land, "unless bond be given as required, the decree and sale shall be void,"<sup>6</sup> it was held to mean void in a direct proceeding, and that the defect did not make the proceeding void collaterally. It will be noticed that these cases are all old, and that, in the one last cited, the proviso that "the decree and sale shall be void," is very strong; and further, that the construction adopted made the statutes simply declaratory, adding nothing to the law. A New York statute

1. *Suydam v. Palmer*, 63 Ga. 546.

2. *Beach v. Atkinson*, 87 Ga. 288 (13 S. E. R. 591).

3. *Terrill v. Auchaner*, 14 O. St. 80, 85, *relying* on *Allis v. Billings*, 6 Metc. 417, and *The King v. Inhabitants of Hipswell*, 8 B. and C. 471.

4. *Camberford v. Hall*, 3 McCord

345.

5. *Banta v. Reynolds*, 3 B. Mon. 8a.

6. *Thornton v. McGrath*, 1 Duvall 349, 351.

forbade any executor, administrator or guardian to purchase at his own sale, either directly or indirectly, and provided that "all sales made contrary to the provisions of this section shall be void," and the courts of that state construed this to mean "void collaterally."<sup>1</sup> This statute was copied by Wisconsin, and land sold was purchased in violation of its provisions. This land having become a part of the territory of Michigan, the supreme court of that state was equally divided as to whether it meant "void collaterally."<sup>2</sup> But Mr. Justice Graves showed that the section was simply a codification of a rule in equity, and that a part of the rule was that such a purchase was not void as to *bona fide* purchasers.<sup>3</sup> An Iowa statute provided that "no action for the recovery of any real estate sold by an executor can be sustained by any person claiming under the deceased, unless brought within five years next after the sale." This was held not to apply to a sale void for want of notice.<sup>4</sup> The Alabama statute in regard to sales of lands by administrators, provided that "any order of sale, and sale made without a compliance with the requisitions of this act, shall be wholly void." The court construed the word *act* to mean *section* in order to avoid absurd results, such as making a title void for matters *dehors* the record.<sup>5</sup> A better construction would be to hold the word "void" to mean invalid in a direct proceeding. Where a statute of Massachusetts provided that the discharge of an insolvent "shall be void and of no effect" where an unlawful preference had been given, it was decided that such a preference made the discharge void collaterally.<sup>6</sup>

## PART II.

### ADMINISTRATORS' AND GUARDIANS' PROCEEDINGS TO SELL LAND.

§ 793. Administrator's appointment, wrongful.  
 794. Bond, defective or wanting.  
 795. "Court of competent jurisdiction."

§ 796. "Made to appear."  
 797. Oath, defective or wanting.  
 798. Petition, defective or wanting.

§ 793. Administrator's appointment, wrongful.—Where the statute provided that a sale made by an administrator should not be

1. Forbes v. Halsey, 26 N. Y. 53, 65; Terwilliger v. Brown, 44 N. Y. 237, 241; *contra*, Cline's Heirs v. Catron, 22 Gratt. 378, 394.

2. Hoffman v. Harrington, 28 Mich. 90.

3. *Id.* page 109.

4. Boyles v. Boyles, 37 Iowa 592. In Goad v. Norly, 28 Iowa, 188, the judges were equally divided on the same point.

5. Satcher v. Satcher, 41 Ala. 26 (91 Am. D. 498).

6. Morse v. Reed, 13 Metc. 62.

avoided if certain specified things appeared, among which the due appointment of the administrator was not mentioned, it was held in both Michigan<sup>1</sup> and Minnesota<sup>2</sup> that the appointment could not be inquired into in an action concerning the title to the land sold. These decisions were both placed upon the statute, but might just as well have been placed upon the common law, as shown in sections 589-591, *supra*.

§ 794. **Bond, defective or wanting.**—The revised statutes of Indiana of 1852, page 156, read: "No sale of any real estate, made by an executor, administrator or guardian, shall be avoided on account of any irregularity or defect in the proceedings, if it shall appear—2. That the executor, administrator or guardian . . . gave bond, as may be required by law." The failure to give a bond under this statute was held not to make the sale void where the proceeds had been accounted for.<sup>3</sup> In the next case that came before the court, where the proceeds of the sale had been lost, the failure to give a bond was held sufficient ground for the wards more than seven years afterwards, to set aside the sale and to have an accounting and their title quieted.<sup>4</sup> In a still later case, where the proceeds had been lost, the wards brought ejectment to recover the land sold because of the failure to give a bond, and the same judge who wrote the opinion in the last case said that the attack there was direct, while in the present case it was collateral, intimating that the want of a bond would not make the sale void collaterally, but not so deciding, as the case was defeated on the statute of limitations.<sup>5</sup> Under statutes of similar import in Michigan<sup>6</sup> and Minnesota,<sup>7</sup> the courts hold that the omission to give a bond makes the sale void collaterally. But where the Oregon statute provided that no guardian's sale should be avoided by "the ward or any person claiming under him," if it should be made to appear, among other things, that "the guardian gave a bond that was approved by the county judge," it was held that the want of a bond did not make the sale void as to one not claiming under the ward.<sup>8</sup> The

1. Woods v. Monroe, 17 Mich. 238, 240.

2. Davis v. Hudson, 29 Minn. 27 (11 N. W. R. 136, 138).

3. Foster v. Birch, 14 Ind. 445.

4. McKeever v. Ball, 71 Ind. 398, 406.

5. Davidson v. Bates, 111 Ind. 391 (12 N. E. R. 687).

6. *Dictum* in Woods v. Monroe, 17 Mich. 238, 241; Stewart v. Bailey, 28 Mich. 251.

7. Babcock v. Cobb, 11 Minn. 347, 353.

8. Goldsmith v. Gilliland, 23 Fed. R. 645

Kentucky statute provided that "before a court shall have jurisdiction to decree a sale of infants' lands," the guardian should give a bond to faithfully discharge his duties, and that if such bond should not be given, "any decree, sale or conveyance thereof shall be void." Where a sale was ordered and no bond given until twenty days afterwards, it was held to be void;<sup>1</sup> but in a later and better considered case, where a sale was made May 2, 1831, reported June 22, 1832, and confirmed March 20, 1833, and a bond then ordered and given, this was decided to be a substantial compliance with the statute and not to make the sale void.<sup>2</sup>

§ 795. "Court of competent jurisdiction."—A statute of Michigan provided that a guardian's sale of land, when drawn in question by a person not claiming through the ward, should not be held void if it appeared that the guardian was licensed by "a court having jurisdiction," and that he had executed and acknowledged a deed in legal form. Under this statute, it was decided that such a person could not attack such a deed for a defect in the petition;<sup>3</sup> or, in other words, that a defect in the petition had no connection with "a court having jurisdiction." The Minnesota statute read: "In case of an action relating to any estate sold by a guardian under the provisions of this chapter, in which the ward or any person claiming under him shall contest the validity of the sale, the same shall not be avoided on account of any irregularity in the proceedings, provided it shall appear—1. That the guardian was licensed to make the sale by a probate court of competent jurisdiction." Under this statute, it was held that the phrase "probate court of competent jurisdiction" meant the proper probate court, and that neither a defective petition,<sup>4</sup> nor the entire absence of one,<sup>5</sup> could be taken into consideration in determining its jurisdiction; but, in Massachusetts, under a statute exactly the same, the license was to sell land sufficient to raise four hundred and seven dollars. After one parcel was sold for enough to raise that sum, another was sold. The second sale was held to be outside of the license, and void.<sup>6</sup>

1. *Megowan v. Way*, 1 Met. (Ky.) 418, 424.

2. *McKee's Heirs v. Hann*, 9 Dana 526, 537.

3. *Marvin v. Schilling*, 12 Mich. 356, 359.

4. *Montour v. Purdy*, 11 Minn. 384 (88 Am. D. 88).

5. *Rumrill v. First National Bank*, 28 Minn. 202, 204 (9 N. W. R. 731).

6. *Gregson v. Tuson*, 153 Mass. 325 (26 N. E. R. 874).

§ 796. "**Made to appear.**"—The Indiana statute<sup>1</sup> under consideration, like those of the other states, provided that the sale should not be avoided "if it shall be made satisfactorily to appear" that certain things took place, one of which was that the guardian "took the oath . . . required by law." Where the question was whether or not, in a collateral assault on a guardian's sale, it was "made satisfactorily to appear" that the guardian "took the oath required by law," the court said: "We think as the probate court entertained and granted his petition, we must *presume* that it was shown to *that* court that he was a duly appointed and qualified guardian of said ward. Indeed, the court must be deemed to have decided that the guardian had been duly appointed and qualified; otherwise, the order could not have been made authorizing him to sell his ward's land. We are of opinion, therefore, that it does appear conclusively that the guardian took the necessary oath."<sup>2</sup> This decision holds, and correctly, in my opinion, that, where the assault is collateral, the ordinary rules of evidence should apply; and that unless the record shows the defect affirmatively, it cannot be shown to exist by extrinsic evidence; and hence, it will conclusively and satisfactorily appear not to exist. But precisely the contrary was held in Iowa,<sup>3</sup> where the failure of the record to show affirmatively that the oath was taken, was decided to make the sale void.

§ 797. **Oath defective or wanting.**—The statutes of Massachusetts, Michigan, Minnesota and Wisconsin provide that the ward, etc., cannot avoid a sale of his land if it shall appear that the guardian, etc., "took the oath prescribed by statute," and they required the oath to be taken "before fixing on the time and place of sale;" and the omission to take any oath,<sup>4</sup> or the failure to take it until after fixing the time and place,<sup>5</sup> makes the sale void. But in Minnesota where the oath required was that he would "exert his best endeavors to dispose of the same in such manner as will be most for the advantage of all persons interested," and the oath taken was that "in conducting the sale of the real estate of the said minors, under the order of the probate court, I will in all respects conduct the same according to law, and for the

1. Indiana R. S. 1843, p. 458, § 27.

4. Parker v. Nichols, 7 Pick. 111, 116;

2. Worthington v. Dunkin, 41 Ind. 515, 524.

Wilkinson v. Filby, 24 Wis. 441, 444-

3. Cooper v. Sunderland, 3 Iowa 114 (66 Am. D. 52).

5. Ryder v. Flanders, (30 Mich. 336

343; Blackman v. Bauman, 22 Wis. 611.

benefit and best interests of the wards," this was held to be a substantial compliance with the statute, and not to make the sale void;<sup>1</sup> and where an oath was that he would conduct the sale "most to the advantage of my said ward," instead of "most for the advantage of all interested therein," the same ruling was made.<sup>2</sup> So, where an oath in due form, purporting to be made before the sale, was found among the papers, this was held sufficient to shield the sale from collateral attack, although it was not indorsed by the judge as filed.<sup>3</sup> But, in Iowa, where the sale was made without taking the prescribed oath, and without notice, and not at public auction, it was held void.<sup>4</sup>

§ 798. *Petition, defective or wanting.*—The supreme court of Minnesota holds that, because the statute provides that the sales of administrators and guardians may be avoided for certain defects, among which the petition is not mentioned, its entire absence does not make the sale void;<sup>5</sup> and for the same reason it is held in Michigan that the failure to verify it;<sup>6</sup> or the omission from it of the amount of the debts, or the charges of administration, or the value of the personal estate;<sup>7</sup> or the failure of the record to show its making or filing,<sup>8</sup> does not make the sale void. So, where an Indiana probate record showed that the application for letters of administration and the petition for the sale of the land were both filed at the same time, and that the appraisers were selected and the appraisement made before the administrator was appointed, these defects were held to be cured by the statute.<sup>9</sup> Section 1537 of the California Code of Civil Procedure provides what an administrator's petition to sell land shall set forth, and then says: "But a failure to set forth the facts showing the sale to be necessary will not invalidate the subsequent proceedings, if the defect be supplied by the proofs at the hearing, and the general facts showing such necessity be stated in the decree." Where both the petition and the decree failed to show the necessity for the sale, it was held void.<sup>10</sup>

1. *Montour v. Purdy*, 11 Minn. 384 (88 Am. D. 88, 91).

2. *Frazier v. Steenrod*, 7 Iowa 339 (71 Am. D. 447).

3. *West Duluth Land Co. v. Kurtz*, 45 Minn. 380 (47 N. W. R. 1134).

4. *Thornton v. Mulquinne*, 12 Iowa 549 (79 Am. D. 548).

5. See sec. 795, *supra*.

6. *Coon v. Fry*, 6 Mich. 506.

7. *Howard v. Moore*, 2 Mich. 226, 230; *accord*, as to omission to state the value of the personal estate, is *Reynolds v. Schmidt*, 20 Wis. 374, 379.

8. *Blanchard v. DeGraff*, 60 Mich. 107 (26 N. W. R. 849).

9. *Rice v. Cleghorn*, 21 Ind. 80, 87.

10. *Estate of Rose*, 63 Cal. 346; *Kertchem v. George*, 78 Cal. 597 (21 Pac. R. 372).



## CHAPTER XVI.

### JUDICIAL ACTION.

§ 799. Principle involved in Chapter XVI.

800. Action, what is or is not judicial—(Annexation to city—Appeal—Attachment writ—Auditing public accounts—Bail—Dismissal of an appeal—Fees and costs—Infant's disabilities removed—Replevin bond—Warrant for arrest).

801. Officer's, when action of, is judicial—(Boards of commissioners—City council).

§ 802. Section 801, continued—(Clerk's entries for want of answer—Pennsylvania vacation entries).

803. Section 801, continued—(Clerk's vacation entries—Replevin bail).

804. Section 801, continued—(Fence viewers—Justice of the peace—Police board—School trustees—Selectmen—Surveyor—Tax assessors).

§ 799. Principle involved in Chapter XVI.—In a collateral assault on a right or title held by virtue of the action of a tribunal, it is of vital importance whether its action was judicial or ministerial; because, if judicial, no error will affect the right or title unless so grave as to prevent jurisdiction from attaching, or to destroy it afterwards; but if ministerial, any substantial error will defeat it. The court of appeals of New York said: "Where any power is conferred upon a court of justice, to be exercised by it as a court, in the manner and with the formalities used in its ordinary proceedings, the action of such court is to be regarded as judicial, irrespective of the original nature of the power."<sup>1</sup> It was said by the supreme court of Indiana that acts performed under a given state of facts in a prescribed manner in obedience to law without any discretion as to their propriety, are ministerial and not judicial, even though the person must first satisfy himself that a state of facts exist which calls on him to act.<sup>2</sup> The court said that the issuing of writs of attachment and *capias* by the clerk, the administering of a poor debtor's oath by a justice, and taking bail by a sheriff, were ministerial acts. The action of any court upon any case seems exactly

1. Matter of the Graduates, 11 Abb. Pr. 301, 326.

2. Flournoy v. City of Jeffersonville, 17 Ind. 169, 174, relying upon Betts v. Dimon, 3 Conn. 107.

to fit this definition, as it acts, under a given state of facts, in a prescribed manner in obedience to law without any discretion as to the propriety of so doing—the legislature being sole judge of the propriety.

§ 800. **Action, what is or is not judicial—Annexation to city.**—A proceeding before the board of county commissioners in Ohio to annex land to a city is judicial, and cannot be overhauled collaterally in a suit to enjoin the collection of city taxes, for errors committed by the board.<sup>1</sup> The same proceeding is held to be judicial in Indiana.<sup>2</sup>

**APPEAL.**—The action of a justice of the peace in New Hampshire in granting or refusing an appeal,<sup>3</sup> and of a probate judge in Michigan in allowing an appeal to the circuit court from the report of the commissioners of a decedent's estate on a claim,<sup>4</sup> are judicial acts. So, where the Maryland statute did not prescribe the penalty of an appeal bond to carry a case up from a justice, it was held that his action in prescribing the penalty and taking the bond was judicial;<sup>5</sup> and the same ruling was made in Massachusetts, where it was held that the justice was not liable because the bond taken was in such a form as to be invalid in law.<sup>6</sup>

**ATTACHMENT WRIT.**—After a justice had rendered a judgment in proceedings in attachment in Kansas, he was sued because of defects in the writ, and it was held that his action in issuing it was ministerial and not judicial.<sup>7</sup> But he had to ratify and confirm it before he could take any action on the merits. It might be held with as much propriety that the clerk and sheriff could be sued because of defects in the summons after the court had rendered judgment by default.

**AUDITING PUBLIC ACCOUNTS.**—A Missouri statute gave the county court power, among other things, "to audit, adjust and settle all accounts to which the county shall be a party," and an appeal to the circuit court was allowed from the rejection of any demand. This action was decided not to be judicial, because "no petition is filed, no parties are summoned to answer the demand and no issues are triable by a jury, except in the discretion

1. *Blanchard v. Bissell*, 11 O. St. 96, 101.

2. *City of Peru v. Bearss*, 55 Ind. 576.

3. *Jordan v. Hanson*, 49 N. H. 199 (6 Am. R. 508); *State v. Towle*, 42 N. H. 540, 546.

4. *Dickinson, Appellant*, 2 Mich. 337, 339.

5. *Knell v. Briscoe*, 49 Md. 414, 420.

6. *Chickering v. Robinson*, 3 Cush. 543.

7. *Connelly v. Woods*, 31 Kan. 359.

of the court."<sup>1</sup> It seems that upon the objection of a taxpayer to any claim, a trial of its merits can be had, and that a jury may be called at the discretion of the court. Why that is not judicial action, I am at a loss to know.

**BAIL.**—It was decided in New York that the action of an officer in issuing an order to hold to bail in a civil case, was judicial;<sup>2</sup> but the contrary has been held in Connecticut, Michigan and England concerning the action of a justice in making a preliminary examination and holding to bail in a criminal case.<sup>3</sup> But if this action is not judicial, I cannot see why a trial on the merits is judicial. The two proceedings are precisely the same, except the final judgments and the quantity of evidence. The case above cited from 49 New Hampshire says that the action of pilot commissioners in California and Maine,<sup>4</sup> the issuing of an execution by a justice of the peace in Mississippi,<sup>5</sup> and the taking of a bond by commissioners in Maryland from a collector of taxes,<sup>6</sup> are judicial acts, but I have not examined these cases. So the dismissal of an appeal from a justice for want of jurisdiction, is judicial action, and *mandamus* will not lie to compel the court to proceed when an appeal lies.<sup>7</sup>

**FEES AND COSTS.**—A justice acts judicially in taxing or refusing to tax fees of the prosecuting attorney in criminal cases in Indiana, and is not liable for refusing to tax them.<sup>8</sup> So the taxation of costs in favor of the district attorney in New York is a judicial act, and not void for errors.<sup>9</sup>

**INFANT'S DISABILITIES REMOVED.**—A Texas statute provided for the removal of the disabilities of a minor upon his petition to the district court, after notice to his father, if living, and if not, after notice to the county judge. If the court, after a hearing, should deem it advisable, or advantageous to the minor, to have his disabilities removed, then a decree was to be entered removing them. It was held, collaterally, that such action of the court was not judicial, and that no presumptions could be in-

1. Gammon v. Lafayette Ins. Co., 79 Mo. 225; *approved*, Sears v. Stone County, 105 Mo. 236 (16 S. W. R. 878).

2. Harman v. Brotherson, 1 Denio 537.

3. Kingsbury v. Dickinson, 2 Day 1; Daniels v. People, 6 Mich. 381, 388; Cox v. Coleridge, 1 B. and C. 37.

4. Downer v. Lent, 6 Cal. 94; Tyler v. Alford, 38 Me. 530.

5. Wertheimer v. Howe, 30 Miss. 420.

6. State v. Dunnington, 12 Md. 340.

7. Goheen v. Myers, 18 B. Mon. 423.

8. State *ex rel.* Orr v. Jackson, 68 Ind. 58.

9. Supervisors v. Briggs, 2 Denio 24.

dulged in its favor. The court said of such a decree: "It fixes no right; it settles no dispute. It acts merely upon the *status* of the applicant, enlarges his capacity as a free agent, and, as to all matters not political, places him upon the plane of persons who have attained their majority. . . . It is true that, in the proceeding under consideration, the judge should hear evidence, and exercise a discretion whether to grant the application or not. The proceeding is *ex parte*, and the interest of the applicant alone is to be affected or considered. Even the public has no interest as against his interest. He has no adversary."<sup>1</sup> This case seems to me to be wrong, both upon principle and authority. The judgment of removal destroys the parental authority of father or county judge, after due notice and a hearing, and the fact that the legislature might do the same thing makes the action of the court no less judicial, as is shown by the New York case cited in section 799, *supra*.

REPLEVIN BOND.—The approval of a replevin bond in Iowa by a justice of the peace, is judicial.<sup>2</sup>

WARRANT FOR ARREST.—A judge acts judicially in hearing evidence in regard to an offense, and in refusing to order a warrant of arrest, and he cannot be compelled to issue it by *mandamus*.<sup>3</sup> But it was held in an early case in Illinois that a justice acted ministerially in issuing a warrant, and that if he issued one without a complaint, he would be liable.<sup>4</sup>

§ 801. Officers, when action of, is judicial—Boards of Commissioners.—Orders of county commissioners in New Hampshire allowing a claim of a town against the county for the support of paupers;<sup>5</sup> gravel road assessments made by the board of county commissioners in Indiana;<sup>6</sup> and the powers exercised by county commissioners in Maine in respect to roads,<sup>7</sup> are judicial, and not void for errors; and the same is true concerning the proceedings of the board of supervisors in Wisconsin to remove a county clerk; and when it has obtained jurisdiction by a petition and notice, its order of removal cannot be collaterally attacked on *quo warranto* for errors or irregularities.<sup>8</sup>

1. Brown v. Wheelock, 75 Tex. 385 (12 S. W. R. 111).

2. Howe v. Mason, 14 Iowa 510.

3. United States v. Lawrence, 3 Dall. 42.

4. Flack v. Harrington, Breese 213 (12 Am. D. 170).

5. Salisbury v. Merrimack County, 59 N. H. 359.

6. Loesnitz v. Seelinger, 127 Ind. 422 (26 N. E. R. 887).

7. Longfellow v. Quimby, 29 Me. 196.

8. State v. Prince, 45 Wis. 610.

**CITY COUNCIL.**—The action of a city council in laying out a street,<sup>1</sup> or in making a sewer assessment,<sup>2</sup> is judicial, and not void for errors.

§ 802. Section 801, continued—Clerk's entries for want of an answer.—Such entries are held in Minnesota and Wisconsin to be the action of the court, and not void for errors.<sup>3</sup>

**PENNSYLVANIA VACATION ENTRIES.**—A confession entered by the prothonotary or clerk in Pennsylvania on a cognovit in vacation was held to be of no validity in Missouri;<sup>4</sup> and where the confession was entered after the defendant had become a resident of Illinois, it was held void in the latter state;<sup>5</sup> but exactly the contrary was decided in Kansas and New York,<sup>6</sup> and with better reason, it seems to me. So also, such a judgment was held valid in Iowa,<sup>7</sup> but whether or not the defendant had left Pennsylvania before the judgment was entered, the case does not show.

§ 803. Section 801, continued — Clerk's vacation entries. — The theory upon which judgments entered by the clerk in vacation or in the absence of the judge are to be upheld, has troubled the courts much. The court being a perpetual corporation, is always in existence. At certain times it has no power to do business without the consent of the parties. But when the parties, at any time, write up, or cause to be written up, a judgment on the records so that the world may take warning and act accordingly, the doctrine of estoppel ought to close their mouths from attempting to gainsay what they have done. It is contrary to public policy to allow any person to trifle with the records of the courts. Thus, in an old case in Pennsylvania, a debtor and creditor went to the office of a justice of the peace in his absence and the creditor wrote up a confession of judgment on the justice's docket and the debtor signed it. On this entry, an execution was issued and levied upon a horse which a stranger claimed, and he sued the officer for trespass, who justified under the writ and judgment. The plaintiff in that suit proved how the judgment was entered, and claimed that it was void. But the courts,

1. *Parks v. Boston*, 8 Pick. 217; *Dwight v. Springfield*, 4 Gray 107; *Gay v. Bradstreet*, 49 Me. 580, 584.

2. *City of Fort Wayne v. Cody*, 43 Ind. 197.

3. *Dillon v. Porter*, 36 Minn. 341 (31 N. W. R. 56); *Frankfurth v. Anderson*, 61 Wis. 107 (20 N. W. R. 662).

4. *Hill v. Fiernam*, 4 Mo. 316.

5. *Sim v. Frank*, 25 Ill. 125 (109).

6. *Ritter v. Hoffman*, 35 Kan. 215 (10 Pac. R. 576); *Teel v. Yost*, 128 N. Y. 387 (28 N. E. R. 353), *affirming*, 8 N. Y. Supp. 552; *Trebilcox v. McAlpine*, 17 N. Y. Supp. 221.

7. *Crafts v. Clark*, 38 Iowa 237.

both below and above, decided against him.<sup>1</sup> If this case is sound, as I deem it to be, it relieves the question concerning the clerk's power of much embarrassment. The supreme court of Arkansas held that such entries did not involve the exercise of judicial power, and said: "The exercise of judicial power from its very nature presupposes a controversy or subject of dispute between the parties litigant, a right claimed on one side and denied or withheld on the other, upon which the court is called upon to investigate facts, determine rights and pronounce judgment. The rights and interests of the parties litigant are to be ascertained from the examination of facts and the exercise of judgment; and when the facts are so ascertained, the judgment of the law is pronounced upon them by which the parties are concluded. No such power is conferred or attempted to be conferred upon the clerks of circuit courts by the section of the act under consideration, but precisely similar duties are authorized to be performed in vacation as those enjoined upon them in entering the judgments of the courts in term time. In the last case there is a controversy between the parties, which the court, in the exercise of its judicial power is called upon to determine, and when that determination is pronounced and the rights of the parties ascertained and defined, the clerk, as the ministerial officer of the court, enters the judgment upon the record; the judgment being but the conclusion of the law pronounced by the court upon the facts and issues ascertained and determined. But when judgment is entered by confession in vacation by the clerk, there is no matter in dispute, no question at issue between the parties, upon which the judgment of the clerk is to be exercised, upon the determination of which any opinion is to be pronounced affecting the rights of the parties, but the defendant voluntarily confesses those facts which a court of justice, in the exercise of its judicial power, must investigate and determine when they are in dispute, and the clerk in entering the judgment records no determination of his own, but the conclusion of the law upon the premises in the same manner and to the same extent as though the issues had been determined before the court in term time." The court held that a sale of land based on such a judgment was not void.<sup>2</sup>

The supreme court of Illinois said: "If the entry of a judgment order is a judicial function, none but a judge could exercise

1. Hazelett v. Ford, 10 Watts 101.

2. Pickett v. Thurston, 7 Ark. (Eng.) 397, 400.

it, and only in term time. A judge has no power, as an individual, to make orders, decrees and judgments, but that can be done only when he is acting as a court. The clerk, in all cases and in all of his official acts, whether in term time or in vacation, performs them as a ministerial officer. He so acts in entering up a judgment in term time, under the direction of the judge, who considers and decides. In entering a judgment in vacation, the clerk acts under the direction of the defendant and the statute. The law requires him, in term time, to enter judgments and orders under the direction of the judge; and the statute imposes it as a duty to enter a judgment by confession in vacation, when the requisite papers are filed, and the defendant, by plea or confession, by himself in person or by an attorney in fact, directs him to enter the judgment for the amount specified in the plea. In the one case he is required to perform the ministerial act under the law through the judge, and in the other through the direction of the defendant. Where the clerk states in the judgment order that it is considered that the plaintiff have and recover, etc., it is not his consideration or conclusion, but it is the conclusion of the law. In term time it is announced through the judge, and in vacation through the defendant, or his attorney in fact. It is no more the finding of the clerk in the one case than the other, and in either he but records the conclusion of the law."<sup>1</sup> The courts of Illinois have steadily ruled that the act of the clerk in entering such judgments is not judicial.<sup>2</sup> From this premise, the court draws a conclusion that any material error makes the judgment void. Thus, where a cognovit confessed a judgment for fifty thousand dollars on a note of twenty-six thousand dollars, a judgment for twenty-six thousand dollars (the amount really due) was held to be void for failure to follow the cognovit.<sup>3</sup> I think this case is unsound. What the parties do by their agents in such cases they do themselves, and when the judgment is spread on the record of the court, it is a judgment of the court to all intents and purposes, and not void for errors. And this is the view of the supreme court of Missouri, which said: "When the general power of a clerk to take a confession of a judgment is conceded, why should that judgment, entered on the records of the court, be regarded otherwise than those

1. *Ling v. King*, 91 Ill. 571, 573.

*ling v. Ridgely*, — Ill. — (1 N. E. R.

2. *Durham v. Brown*, 24 Ill. 93; 261, 264).

*Tucker v. Gill*, 61 Ill. 236, 239; *Conk-*

3. *Tucker v. Gill*, 61 Ill. 236, 239.



rendered by the court in term time? It is a judgment of a court of general jurisdiction, and until it is invalidated it will pass a title by a sale under it."<sup>1</sup> The courts of California<sup>2</sup> and Wisconsin<sup>3</sup> agree that the action of the clerk in such cases is not judicial; and in California,<sup>4</sup> it is held that the clerk must conform strictly to the statute or his entry will be void; while in Wisconsin,<sup>5</sup> the acts of the clerk are held to be the same as the acts of the court. But where a cognovit was given in Illinois authorizing a confession "before any court of record," it was contended that a confession entered by the clerk in vacation was void because there was then "no court;" but it was said: "We cannot concur in this view. The courts of record in this state, when considered in the abstract, are incorporeal political agencies, created by law for governmental purposes, having a continued existence, whether in or out of term time, so long as the law of their organization exists."<sup>6</sup>

**REPLEVIN BAIL.**—A statute of Indiana authorized a defendant against whom an execution was issued to replevy the same by executing a bond with surety to the satisfaction of the sheriff, to pay the amount demanded by the execution. It also provided that this bond should be recorded by the clerk and should be taken as and have the force and effect of a judgment confessed. In an action on such a record in Missouri, it was held that it was not a judgment.<sup>7</sup> It would be a surprise to any lawyer in Indiana to be told that such an entry was void. How a judgment shall be entered in Indiana so as to be valid between its own citizens, would seem to be a question for the legislature of that state rather than for the supreme court of Missouri.

**§ 804. Section 801, continued—Fence viewers.**—The supreme court of New Hampshire, in speaking of the action of fence viewers, said: "It is not necessary that a magistrate or board should act formally as a court, or that it should be usually so denominated or considered. If they are bound to notify, and hear the parties, and can only decide after weighing and considering such evidence

1. *Gilman v. Hovey*, 26 Mo. 280, 289; *accord*, that such a judgment is a conclusion of law on a contract acknowledged of record, is *Russell v. Geyer*, 4 Mo. 384, 403.

2. *Kelly v. Van Austin*, 17 Cal. 565; *approved* in *Glidden v. Packard*, 28 Cal. 649, 651.

3. *Hempstead v. Drummond*, 1 Pinney 534; *Blaikie v. Griswold*, 10 Wis. 293, 299; *Wells v. Morton*, 10 Wis. 468, 473.

4. See 2 above.

5. *Wells v. Morton*, *supra*.

6. *Keith v. Kellogg*, 97 Ill. 147, 152.

7. *Foote v. Newell*, 29 Mo. 400.

and arguments as the parties choose to lay before them, their action is judicial."<sup>1</sup> In a later case, the same court said: "The action of fence viewers in dividing fences between adjoining owners and assigning to each his share to be built and maintained; selectmen or inspectors, in correcting the check-lists and deciding upon the qualifications of voters; the action of selectmen and assessors in assessing taxes; the action of the mayor in calling out the militia in case of a riot; pilot-commissioners; supervisors in determining the necessity of a new bond—and many other cases of a similar character," are judicial.<sup>2</sup>

JUSTICES OF THE PEACE.—It is held in Missouri, that all the acts of a justice of the peace from the issuing of the summons down to and including the issuing of the execution, are judicial.<sup>3</sup>

POLICE BOARD.—The action of the board of police commissioners in New York in discharging a captain of police, because too old, after a hearing and investigation, is judicial, and they cannot be controlled by *mandamus*.<sup>4</sup>

SCHOOL TRUSTEES act judicially in determining whether or not there is a vacancy in the office of one of their number, and their decision cannot be impeached collaterally by showing that there was no vacancy.<sup>5</sup>

SELECTMEN.—The supreme court of New Hampshire, in speaking of the action of selectmen in laying out highways, said: "Whenever one or more persons are authorized or required to call parties before them, to hear their allegations and their proofs, and to pronounce a determination between them, to make a decision by which the rights of parties are to be bound, that power seems to us to be judicial, and their proceedings are judicial."<sup>6</sup>

SURVEYOR.—An Indiana statute vested the county surveyor with power to clean out ditches and to assess the cost against the lands originally assessed, and gave an appeal from his action. These duties were held to be judicial, and not void for errors.<sup>7</sup>

1. *Sanborn v. Fellows*, 22 N. H. (2 Foster) 473, 488.

2. *Salisbury v. Merrimack County*, 59 N. H. 359, 361.

3. *Wertheimer v. Howard*, 30 Mo. 420 (77 Am. D. 623); *approved*, *Chicago v. Franks*, 55 Mo. 327.

4. *People ex rel. Grace v. Police Com'rs*, 12 Abb. Pr. N. S. 181.

5. *Colton v. Beardsley*, 38 Barb. 29, 51.

6. *State v. Richmond*, 26 N. H. 132, 235.

7. *Terre Haute and Logansport R. Co. v. Soice*, 128 Ind. 105 (27 N. E. 429).

TAX ASSESSORS act judicially in levying taxes in New York, and the assessment is in the nature of a judgment which cannot be collaterally attacked for errors.<sup>1</sup> That tax boards of revision or equalization act judicially, was decided by the Supreme Court of the United States.<sup>2</sup> The action of the county court in Virginia in laying the county tax, is judicial, although it is not exercised in the usual form of judicial proceedings; and such action cannot be questioned in a collateral proceeding, except for want of jurisdiction.<sup>3</sup>

1. *Strusburgh v. Mayor of New York*, 87 N. Y. 452, 455; *Western R. R. Co. v. Nolan*, 48 N. Y. 513, 518; *Barhyte v. Shepherd*, 35 N. Y. 238.

2. *Hagar v. Reclamation District*, 111 U. S. 701 (4 S. C. R. 663); *Stanley v. Supervisors*, 121 U. S. 535, 550 (7 S. C. R. 1234).

3. *Ballard v. Thomas*, 19 Gratt. 14, 22.

# CHAPTER XVII.

## PRESUMPTIONS.

SCOPE OF, AND PRINCIPLE INVOLVED IN, CHAPTER XVII,	§ 805
PART I.—INFERIOR DOMESTIC COURTS,	806-810
PART II.—INFERIOR AND SUPERIOR COURTS, DISTINCTION BETWEEN,	811-829
PART III.—SUPERIOR DOMESTIC COURTS,	830-844
PART IV.—FOREIGN AND OTHER STATE COURTS,	845-847

§ 805. Scope of, and principle involved in, Chapter XVII.—In a collateral contest over the force and effect of judicial proceedings, where extrinsic evidence to aid or contradict the record is confined to a very few exceptions, the presumptions of law, when the record is silent on any point, are of vital importance. The general rules are, that if the court is of inferior or limited jurisdiction, silence of the record on a jurisdictional point, is fatal; but if the record shows that jurisdiction has once attached, silence in respect to subsequent jurisdictional steps, is not fatal. But if the court is one of superior or general jurisdiction, then silence on jurisdictional questions is golden, and its validity cannot be controverted. But what is an inferior or a superior court? There's the troublesome question. The old English case of *Peacock v. Bell*<sup>1</sup> is always cited on the question of presumptions. As the case arose on a writ of error for defects in the declaration, it is not authority in a collateral proceeding. The court said: "Nothing shall be intended to be out of the jurisdiction of a superior court, but that which specially appears to be so ; and, on the contrary, nothing shall be intended to be within the jurisdiction of an inferior court but that which is so expressly alleged."

### PART I.

#### INFERIOR DOMESTIC COURTS.

§ 806. Principle involved in part I— Jurisdiction shown.	§ 809. Highways.
807. Principle involved in part I— Jurisdiction not shown.	810. Interest of magistrate—Location of property—Personal judgment on publication—
808. Adjournments—Appearance not shown—Attachment bond— Emergency.	Place of holding court— Quorum of justices—Time of rendering judgment.

1. *Peacock v. Bell*, 1 *Saunders* 73, 74; *approved* (in a collateral case), *Kundolf v. Thalheimer*, 17 *Barb.* 506, and in many other cases.

§ 806. Principle involved in Part I—Jurisdiction shown.—The Supreme Court of the United States said: “It is well settled that when the jurisdiction of a court of limited and special authority appears upon the face of its proceedings, its action cannot be collaterally attacked for mere error or irregularity. The jurisdiction appearing, the same presumption of law arises that it was rightly exercised as prevails with reference to the action of a court of superior and general authority.”<sup>1</sup> It was said by the supreme court of Indiana that, “When the jurisdiction of inferior courts is once established, then all presumptions and intendments in favor of their proceedings and decisions apply to them as well as to courts of general jurisdiction. The strictness applies only to the question of jurisdiction.”<sup>2</sup> The supreme court of Arkansas said: “The rule that jurisdiction must be apparent on the face of the proceedings is limited to those jurisdictional facts which the law directs the court to set forth on its record.”<sup>3</sup> And the same case holds that “any other fact essential to jurisdiction may be established by evidence *aliunde*.” So, it was said in Illinois, that “The strictness with which the proceedings of inferior tribunals are scrutinized applies only in respect of the question of jurisdiction, and when that is established, the maxim, *omnia præsumuntur rite acta*, applies to them as well as to courts of general jurisdiction.”<sup>4</sup> The supreme court of Iowa said: “There are no rules better settled than that, when the jurisdiction of even a limited court is once established, it is entitled to the same presumptions in favor of its acts with a superior one, and that subsequent irregularities will not render its proceedings void.”<sup>5</sup> The cases all agree that, where the record shows jurisdiction to have once attached, its silence in respect to any subsequent jurisdictional step will not leave the judgment subject to collateral attack.<sup>6</sup> It is sufficient if the

1. Comstock v. Crawford, 3 Wall. 396, 403.

2. Board of Commissioners v. Markle, 46 Ind. 96, 112.

3. Levy v. Ferguson Lumber Co., 51 Ark. 317 (11 S. W. R. 284), quoting from Visart v. Bush, 46 Ark. 153.

4. Chicago, Burlington and Q. R. R. Co. v. Chamberlain, 84 Ill. 333, 343, relying upon State v. Hinchman, 27 Pa. St. 479.

5. Little v. Sinnett, 7 Iowa 324, 334.

6. Tucker v. Harris, 13 Ga. 1 (58 Am. D. 488, 491); Stoddard v. Johnson, 75 Ind. 20, 30; Argo v. Barthand, 80 Ind. 63, 66; Cauldwell v. Curry, 93 Ind. 363, 366; Cooper v. Sunderland, 3 Iowa 114; Pursley v. Hayes, 22 Iowa 11 (92 Am. D. 350); Saunders v. Tioga Mfg. Co., 27 Mich. 520; Clagne v. Hodgson, 16 Minn. 329, 331—on appeal; Bewley v. Graves, 17 Or. 274 (20 Pac. R. 322, 326); Fowler v. Jenkins, 28 Pa. St. 176; 81 Am. Dec. 427, note.

jurisdiction appears in any part of the proceedings.<sup>1</sup> The parties having been brought regularly into the court of a justice, no presumption can be indulged that he lost jurisdiction by any misstep afterwards. Because the record shows that a deed of land was given in evidence on oral pleading, it cannot be presumed that the title to land was in issue, as the deed might be used for other purposes.<sup>2</sup>

§ 807. Principle involved in Part I—Jurisdiction not shown.—The cases nearly all agree that where the record of an inferior court fails to show jurisdiction,<sup>3</sup> or fails to show service,<sup>4</sup> the proceedings are void. It is held in Maine, by virtue of a statute, that a certificate granted to a poor debtor is conclusive evidence of due service on the creditor.<sup>5</sup> In a late case in Massachusetts,<sup>6</sup> the court said: "When the cause is within the jurisdiction of the court, but the proceedings are based upon a defective writ, or are prosecuted without service of process or notice upon the party to be affected, the objection is no more fatal to the jurisdiction and power of an inferior court than it is to one of general jurisdiction." "A justice of the peace exercises his jurisdiction mainly according to the course of the common law; his court is, for many purposes, a court of record, to which a writ of error will lie. In our view, the rule which makes the judgment of a court of record binding upon the parties, until reversed by proper proceedings therefor, although jurisdiction of the person was not properly obtained, is applicable as well to a judgment of a justice of the peace as to one of a court of general jurisdiction."

§ 808. Adjournments.—The Connecticut statute provided that a suit before a justice should not abate because he was absent

1. Karnes v. Alexander, 92 Mo. 660 (4 S. W. R. 518).

2. Schlatterer v. Nickodemus, 50 Mich. 315 (15 N. W. R. 489).

3. Pendleton v. Fowler, 6 Ark. (1 Eng.) 41; Latham v. Jones, id. 371; *Ex parte Kearney*, 55 Cal. 212, *overruling dictum* to the contrary in *Ex parte Murray*, 45 Cal. 455; Nicholson v. Stephens, 47 Ind. 185; Newman v. Manning, 89 Ind. 422; Dodge v. Kellock, 13 Me. 136; Bridge v. Ford, 4 Mass. 641; Com. v. Downey, 9 Mass. 520; Wight v. Warner, 1 Doug. (Mich.) 384; Clark v. Holmes, id. 390; Chand-

ler v. Nash, 5 Mich. 409, 416; Allen v. Carpenter, 15 Mich. 25, 32; Goulding v. Clark, 34 N. H. 148, 159.

4. Case v. Hannabs, 2 Kan. 490, 496; Fahey v. Mottu, 67 Md. 250 (10 Atl. R. 68); Rossiter v. Peck, 3 Gray 538; Moore v. Haskins, 66 Miss. 496 (6 S. R. 500); Bersch v. Schneider, 27 Mo. 101; McCloon v. Beattie, 46 Mo. 391; Brown v. Cady, 19 Wend. 477.

5. Colby v. Moody, 19 Me. 111; Brown v. Watson, 19 Me. 452.

6. Hendrick v. Whittemore, 105 Mass. 23, 28.

on the return day, but that he might within twenty days thereafter proceed to try the case by giving the parties six days' notice "in writing" of the time and place of trial. In such a case, the record of the justice showed that "the parties were duly notified" to appear at a certain time and place. It was held that, as the record showed jurisdiction to begin with, all presumptions were in its favor, and the presumption was that they were duly notified in writing.<sup>1</sup> The Wisconsin statute did not permit a justice of the peace to adjourn over without the consent of the defendant or a showing under oath; but in a case where the record was silent in respect to the mode of obtaining an adjournment, it was presumed to have been done regularly.<sup>2</sup> A justice's warrant in a civil case in North Carolina was dated in June, 1843, the judgment in June, 1844, and the execution in September, 1844; and it was presumed collaterally that the justice had continued the cause from time to time so as to make the proceedings regular;<sup>3</sup> and the same ruling was made in New Hampshire in respect to the action of selectmen in laying out a highway.<sup>4</sup> But contrary to these cases, and wrong on principle, as it seems to me, is an English case, which held a conviction in the quarter-sessions void because the record showed an adjournment from Monday to Tuesday but no meeting until Thursday, when there was an adjournment until Friday, at which time the conviction was had.<sup>5</sup>

**APPEARANCE NOT SHOWN.**—A statute of Pennsylvania authorized justices to render judgment for sums exceeding one hundred dollars when the parties voluntarily appeared. A title based on a judgment for one hundred dollars and thirty-five cents, where the record failed to show the appearance of both parties, was held void.<sup>6</sup>

**ATTACHMENT BOND.**—A judgment in proceedings in attachment in South Carolina before a justice, is not void because no bond can be found, as the presumption is that one was filed.<sup>7</sup>

**EMERGENCY.**—A justice of one precinct in Alabama had no authority to set a case down for trial in another precinct, except in "cases of emergency;" and where the record failed to show

1. *Fox v. Hoyt*, 12 Conn. 491, 495 (31 Am. D. 760).

2. *Baizer v. Lasch*, 28 Wis. 268, 272.

3. *State v. Conoly*, 6 Ired. 243.

4. *State v. Weare*, 38 N. H. 314, 317.

5. *Rex v. Bowman*, 6 C. & P. 337 (25 E. C. L. 462).

6. *Camp v. Wood*, 10 Watts 118.

7. *Kincaid v. Neall*, 3 McCord 201.



that there was no competent justice in the precinct where the defendant resided, the judgment was decided to be void.<sup>1</sup>

§ 809. **Highways.**—In proceedings before the county commissioners in Illinois to establish a highway, the record showed that three viewers were appointed but that only two signed the report upon which the order of establishment was made. The presumption was held to be, collaterally, that all of the viewers acted.<sup>2</sup> In a proceeding before the board of commissioners in Ohio to establish a road, the statute required notice by advertising and posting of the intention to file the petition; and after such filing, it required personal notice to the landowners of the time and place of meeting of the viewers to assess damages. In an action of trespass against a supervisor for opening a road, the record recited that the commissioners were satisfied that the preliminary notice had been given, and showed the appointment of viewers to assess damages, and an order for them to meet on a day named; but it was silent concerning notice to the landowners of the meeting. The plaintiff offered to prove that he never had any notice, but he was not permitted to give such evidence.<sup>3</sup> I am unable to determine whether the court held that the notice was not jurisdictional or that the silence of the record was conclusive that it was given. In a later case, where the statute required the commissioners "to cause said report, survey and plat to be recorded," and declared that from thenceforth the road should be considered a public highway, it was held that, when the record showed the report, survey and plat to be duly recorded, it would be presumed that all the proceedings were regular.<sup>4</sup> The statute gave to magistrates in Ireland the power to authorize stones and earth to be quarried and carried away from lands of another to build or repair roads, when it should be proved to their satisfaction that the same could not be conveniently procured elsewhere. Such an order was duly entered, but it failed to show that proof was thus made to their satisfaction, and it was held void, in trespass.<sup>5</sup> The failure was to show a matter intermediate between the acquiring of jurisdiction and the final judgment, and the case seems to be wrong.

1. *Horton v. Elliott*, 90 Ala. 480 (8 S. R. 103).

2. *Galbraith v. Littlech*, 73 Ill. 209.

3. *Beebe v. Scheidt*, 13 O. St. 406,

4. *McClelland v. Miller*, 28 O. St. 488, 500.

5. *Fitzpatrick v. Pine*, 13 Irish C. L. 32, 47.

§ 810. **Interest of magistrate.**—A statute of Indiana made it the duty of the county surveyor to clean out and repair public ditches, which was of a judicial nature, and in cases where he was interested it was made the duty of the board of county commissioners to appoint a deputy surveyor. In such a case the record recited, "The board now appoints Isaiah Walker as deputy surveyor for Fulton county, Indiana, in compliance with" the statute, naming the section which gave the power. In a collateral assault on the assessment made by this deputy, it was held that the order appointing him was not void because the record failed to show that the surveyor was interested, as that would be presumed.<sup>1</sup>

**LOCATION OF PROPERTY.**—In an action before a justice of the peace between a landlord and tenant in Missouri, the record failed to show that it was brought "in the ward in which the property is situated, or in any adjoining ward," and for that reason the proceedings were held void.<sup>2</sup> I cannot agree that the jurisdiction depended upon the location.

**PERSONAL JUDGMENT ON PUBLICATION.**—A justice's record in Texas showed a personal judgment on service by publication, but failed to show the ground for such service. As the statute authorized such a judgment against residents who concealed or absented themselves, that was presumed to be the ground when the judgment was attacked collaterally.<sup>3</sup>

**PLACE OF HOLDING COURT.**—The city of Kansas City, in Missouri, was in Kaw township, Jackson county, and a statute provided that suits on city tax-bills might be brought before any justice "in said city" as in civil cases. Such a judgment rendered before a justice of "Kaw township, Jackson county, Missouri," failing to show that the office of the justice was within the city limits, was held to be void; and it was also held that the transcript filed in the circuit court could not be amended so as to show that the justice sat within the city.<sup>4</sup>

**QUORUM OF JUSTICES.**—The proceedings of a county court in Tennessee are void where the record fails to show a *quorum* of the justices present.<sup>5</sup>

1. Stingley v. Nichols, Shepherd & Co., — Ind. — (30 N. E. R. 34).

2. Hessey v. Heitkamp, 9 Mo. App. 36.

3. Traylor v. Lide, — Tex. — (7 S. W. R. 58, 62).

4. Corrigan v. Morris, 43 Mo. App. 456, 459.

5. Mankin v. State, 2 Swan (32 Tenn.) 206.

**TIME OF RENDERING JUDGMENT.**—A case was set for trial before a justice at 3 o'clock. The docket showed the appearance of the plaintiff at that hour, and then read: "Whereupon judgment is hereby rendered," etc. It was decided that the presumption was that the case was held open until 4 o'clock, as "every reasonable intendment should be made in support of a justice's proceedings." <sup>1</sup>

## PART II.

### INFERIOR AND SUPERIOR COURTS, DISTINCTION BETWEEN.

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| <p>§ 811. Principle involved in part II.</p> <p>812. County commissioners—County courts—Court-martial.</p> <p>813. Justices of the peace—Presumptions against.</p> <p>814. Justices of the peace—Presumptions in favor of.</p> <p>815. Probate courts in Alabama—(Appointment of administrator—Necessity for sale).</p> <p>816. Probate courts in Arkansas and California.</p> <p>817. Probate courts in Connecticut and Georgia.</p> <p>818. Probate courts in Idaho, Illinois, Indiana and Iowa.</p> <p>819. Probate courts in Kansas and Kentucky.</p> <p>820. Probate courts in Louisiana and Maine.</p> | <p>§ 821. Probate courts in Maryland, Massachusetts, Michigan and Minnesota.</p> <p>822. Probate courts in Mississippi—Lapse of time.</p> <p>823. Probate courts in Missouri—Lapse of time.</p> <p>824. Probate courts in New York, Ohio and Tennessee.</p> <p>825. Probate courts in Texas—(Appointment of administrator—Administrator removed).</p> <p>826. Probate courts in Vermont—Lapse of time—Virginia.</p> <p>827. Probate courts in Wisconsin—Administrator removed.</p> <p>828. Quarter-sessions court in Tennessee.</p> <p>829. United States courts and Vice-chancellor's court in New York.</p> |
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§ 811. Principle involved in part II.—The record of a court being silent on a jurisdictional point, it becomes of vital importance to know whether it is one of inferior or superior jurisdiction. On principle, it seems to me to be self evident that, if the court has unlimited jurisdiction over a class of cases, its jurisdiction in such matters is general; and that when its record shows such a case, all presumptions are in its favor and that silence is conclusive. According to this idea, the proceedings of probate courts, of county courts and county commissioners or supervisors in respect to county matters, boards for the assessment or revision of taxes, and justices of the peace in actions between landlord and tenant for the possession of land, being unlimited and gener-

1. Storm v. Adams, 56 Wis. 137 (14 N. W. R. 69, 71).

ally exclusive, should be classed with those of superior courts, and all intendments made in their favor. When any tribunal is given unlimited power over any matter, that is a legislative assertion that it is competent to adjudicate upon and rightfully settle all questions that may arise concerning it. No stronger declaration can be made in respect to any tribunal. When the record shows that such a matter has been adjudicated, no court has ever yet attempted to give any reason why all intendments and presumptions should not be made in its favor, and I doubt if any court ever will. I get this idea from the cases and not from my own thoughts. Thus, in an early case, the supreme court of Illinois said: "The county court, although of limited, is not strictly speaking of inferior, and certainly is not a court of special, jurisdiction. It is a court of record, and has a general jurisdiction of unlimited extent over a particular class of subjects; and when acting within that sphere, its jurisdiction is as general as that of the circuit court. When, therefore, it is adjudicating upon the administration of estates over which it has a general jurisdiction, as liberal intendments will be granted in its favor, as would be extended to the proceedings of the circuit court; and it is not necessary that all the facts and circumstances, which justify its action, should affirmatively appear upon the face of its proceedings." <sup>1</sup>

The county courts of Kentucky, in matters of probate and in granting letters of administration, have general and exclusive jurisdiction; hence, in such matters, they are to be regarded as courts of general jurisdiction, and all intendments are in their favor. "There is a marked distinction between a court having general and exclusive jurisdiction over a limited number of subjects, and a court having no jurisdiction over certain subjects, except in cases in which certain and indispensable facts shall exist. In the latter case, the rule that the facts conferring the jurisdiction must appear in the record of the proceedings, applies to all courts, circuit as well as county. The rule does not grow out of, nor depend upon the fact that the court has jurisdiction of only a limited number of subjects, but that it has not full and complete jurisdiction of the subject-matter about which it assumes to act. If the *jurisdiction over the subject-matter is com-*

1. Propst v. Meadows, 13 Ill. 157, 70 Ill. 76, 80; and in Moffitt v. Moffitt, 168; *approved* in Bostwick v. Skinner, 69 Ill. 641, 644. 80 Ill. 147, 152; and in Barnett v. Wolf

*plete ana unlimited*, the action of the court will always be taken to be within its authority and jurisdiction, unless the contrary appears."<sup>1</sup> So, because the county commissioners in Illinois had exclusive jurisdiction over the establishing of highways, they were held to be a court of general jurisdiction in reference to that matter with all intendments in their favor.<sup>2</sup> Even while their action was regarded as ministerial and not judicial at all, the same presumptions were applied as in superior courts, in respect to that matter, and their order was held to prove itself without the production of the petition or notice.<sup>3</sup> Likewise, where the county court in Kentucky had power to appoint commissioners to set off dower on the application of any person authorized by law to apply, in a case where the record failed to show at whose instance the appointment was made, it was presumed to be rightful;<sup>4</sup> and because the same court had the exclusive jurisdiction to lay a tax-levy, its judgment was held not to be void because its record failed to show a *quorum* of the justices present.<sup>5</sup> The superior court of New York said: "To constitute a court a superior court as to any class of actions, its jurisdiction of such actions must be unconditional, so that the only thing essential to enable the court to take cognizance of them is the acquisition of jurisdiction of the persons of the parties."<sup>6</sup> So, the Supreme Court of the United States, in speaking of the court of common pleas of New Jersey, said: "In treason, its jurisdiction is over all who can commit the offense; . . . with respect to treason, then, it is a court of general jurisdiction so far as respects the property of the accused."<sup>7</sup> It is also held in Alabama that, because the jurisdiction of the probate courts is original, unlimited, and general in probate matters, the validity of the appointment of an administrator *de bonis non* will be presumed, collaterally, even though the record fails to recite any jurisdictional facts.<sup>8</sup>

1. Jacobs v. Louisville and Nashville R. R. Co., 10 Bush 263, 269—opinion by Lindsay, J.

2. Henline v. People, 81 Ill. 269, 272.

3. Nealy v. Brown, 6 Ill. 10, 13; Ferris v. Ward, 9 Ill. 499, 504; Dumoss v. Francis, 15 Ill. 543, 546.

4. Williams v. Morgan, 1 Litt. 167.

5. McGuire v. Justices of Owsley County, 7 B. Mon. 340.

6. Simons v. De Bare, 17 N. Y. Super. (4 Bosworth) 547, 553.

7. Kemp's Lessee v. Kennedy, 5 Cranch 173, 185.

8. Lyon v. Odom, 31 Ala. 234; Ikellheimer v. Chapman's Adm'r, 32 Ala. 676, 681; Coltart v. Allen, 40 Ala. 155, 156; Gray's Adm'r v. Cruise, 36 Ala. 559.

The supreme court of Georgia said: "The line of demarcation between courts of general and limited jurisdiction is not so definite, however, as is generally supposed. It is usual to state what particular courts fall within the one class, and what within the other. But what author has undertaken to mark with accuracy and precision the boundary between the two? Bacon has not, nor has Blackstone, nor any other elementary writer."<sup>1</sup> The supreme court of New York, in speaking of the effect to be given to a discharge in bankruptcy by a district court of the United States, said: "The rule by which jurisdiction in fact is presumed from its exercise, does not attach by reason of the situation or character of the parties to the litigation, but by reason of the character of the court by which the decree is granted, and it is that character which gives efficacy to the decree, without proof of the preliminary proceedings to show the jurisdiction."<sup>2</sup> In a leading case on this question in New Jersey, it was said: "I apprehend the term, '*limited jurisdiction*,' to be somewhat ambiguous; and that the books sometimes use it without due precision. Our supreme court is *limited* by acts of the legislature; so likewise is the court of common pleas; and the newly constituted circuit courts; yet each of them exercises a general jurisdiction. The word *limited*, seems to be used sometimes carelessly instead of the term *special*; for I take the true distinction between courts to be, such as possess a *general* and such as have only a *special* jurisdiction, for a particular purpose; or clothed with *special powers* for the performance of specific duties, beyond which they have no manner of authority; and these special powers to be exercised in a summary way, either by a tribunal already existing for general purposes, or else by persons appointed or to be appointed in some definite form. Such tribunals, with special powers for adjudicating in particular cases, under the various names of commissioners, surveyors, appraisers, committees, directors, overseers and the like, abound in our statute books; little or in no wise relating to the general administration of justice, whose modes of proceeding are prescribed in the statutes by which they are erected; and unless their proceedings, on the face of them, show a compliance with the directions required by the statute under which they act, it never could be known whether they acted

1. *Tucker v. Harris*, 13 Ga. 1 (58 Am. D. 488, 491)—opinion by Lumpkin, J.      2. *Morse v. Cloyes*, 11 Barb. 100, 104.

within their jurisdiction, or exceeded it. And each case cited in support of the plaintiff's position was that of a tribunal empowered for a *special* purpose, and that alone; as to liberate from confinement certain prisoners; to make an inquest concerning certain water, or to inquire respecting the value of certain land; and there terminated their functions."<sup>1</sup> It is held in Oregon that the county courts are inferior courts in proceedings to lay out highways, and superior courts in making orders to sell land of a decedent to pay debts;<sup>2</sup> but in a late case the supreme court said: "The reason of this distinction is not obvious, especially when the powers in each instance are conferred by statute."<sup>3</sup> Of course the same defects which would render the judgment of an inferior court void would render that of a superior court void. The only difference between them is one of presumption.<sup>4</sup>

§ 812. **County commissioners.**—The board of county commissioners is regarded as a court of inferior jurisdiction in Indiana and Maine when engaged in laying out a highway.<sup>5</sup>

COUNTY COURTS are regarded as courts of general jurisdiction in California<sup>6</sup> and Virginia,<sup>7</sup> and as courts of inferior and limited jurisdiction in Iowa,<sup>8</sup> Kentucky<sup>9</sup> and Missouri.<sup>10</sup>

COURT-MARTIAL.—In a suit on the judgment of a court-martial, the plaintiff must establish the jurisdiction of the court.<sup>11</sup> I think the last four cases are wrong, as the courts had original, unlimited and exclusive jurisdiction over the matters involved—being highways and military offenses, respectively.

§ 813. **Justices of the peace—Presumptions against.**—Where the record of a justice of the peace failed to show that the cause of action was one over which he had jurisdiction, the judgment was held to be void by the supreme courts of Michigan<sup>12</sup> and of the United States.<sup>13</sup> So if a recognizance taken by a justice in

1. *Den ex dem. Obert v. Hammel*, 18 N. J. L. (3 Harr.) 73, 78.

2. *Tustin v. Gaunt*, 4 Or. 306, 310.

3. *Bewley v. Graves*, 17 Or. 274 (20 Pac. R. 322, 325).

4. *Keybers v. McComber*, 67 Cal. 395 (7 Pac. R. 838).

5. *Rhode v. Davis*, 2 Ind. 53; *Small v. Pennell*, 31 Me. 267.

6. *Barrett v. Carney*, 33 Cal. 530.

7. *Devaughn v. Devaughn*, 19 Gratt. 556, 563; *Harvey v. Tyler*, 2 Wall. 328, 346.

8. *State v. Berry*, 12 Iowa 58, 60.

9. *Elliott v. Treadway*, 10 B. Mon. 22, 24.

10. *Zimmerman v. Snowden*, 88 Mo. 218, 220.

11. *Crawford v. Howard*, 30 Me. 422.

12. *Spear v. Carter*, 1 Mich. 19 (43 Am. D. 688).

13. *Den v. Turner*, 9 Wheaton 541, 548.



Massachusetts does not show jurisdiction, it is void.<sup>1</sup> But his judgment is not void because his record does not show that the note sued upon was payable to the plaintiff.<sup>2</sup> The failure of a discharge granted to an insolvent in Connecticut to show notice to the creditor makes it void.<sup>3</sup>

§ 814. **Justices of the peace—Presumptions in favor of.**—The court of a justice of the peace is regarded as of an inferior and limited jurisdiction in all the states except New Jersey, North Carolina, Texas and Vermont. A late case in New Jersey says that they are courts of record of a limited statutory jurisdiction, and are not inferior courts in the technical common-law sense; that their jurisdiction need not appear on the face of their proceedings; and that, in the matter of jurisdiction depending on the fact of the presence of a sufficient affidavit in proceedings in attachment, all the courts of the state stand on the same footing.<sup>4</sup> The statute of North Carolina provided that, "Every judgment given in a court of record, or before a single magistrate, having jurisdiction of the *subject*, shall be, and continue in full force until reversed according to law." Under this statute, it was held that service before a justice of the peace would be presumed collaterally, where his record was silent.<sup>5</sup> In Texas, because the justice's court is provided for in the constitution, its proceedings are held not void for a failure to show jurisdiction over the person,<sup>6</sup> nor unless the want of jurisdiction appears on the record affirmatively;<sup>7</sup> but where the record is silent as to service, it is held that the defendant may show by parol that he was not served, and thus avoid the judgment collaterally.<sup>8</sup> No reason occurs to me why such a distinction should be made against a justice's court.

§ 815. **Probate courts in Alabama.**—The jurisdiction of the probate courts in Alabama is general, and all intendments are made in their favor,<sup>9</sup> and where the record asserts the jurisdictional facts, it is conclusive.<sup>10</sup>

1. *Bridge v. Ford*, 4 Mass. 641.

2. *Van Kleeck v. Eggleston*, 7 Mich. 511.

3. *Starr v. Scott*, 8 Conn. 480.

4. *Russell v. Works*, 35 N. J. L. (6 Vr.) 316.

5. *Hiatt v. Simpson*, 13 Ired. L. 72, 74.

6. *Williams v. Ball*, 52 Tex. 603 (36 Am. R. 730).

7. *Wakefield v. King*, 2 Tex. App. Civil Cases, § 695.

8. *Wilkerson v. Schoonmaker*, 77 Tex. 615 (14 S. W. R. 223).

9. *Acklen v. Goodman*, 77 Ala. 521; *Wyman v. Campbell*, 6 Porter 219 (31 Am. D. 677).

10. *Barclift v. Treece*, 77 Ala. 528, 531.

**APPOINTMENT OF ADMINISTRATOR.**—Where a new administrator is appointed, the appointment is not void because the record fails to show the reason.<sup>1</sup> So, although the court has no power to appoint an administrator *de bonis non* unless there is no general administrator, yet from the fact of such an appointment, it will be presumed that there was no such officer.<sup>2</sup>

**NECESSITY FOR SALE.**—A proceeding to sell land for distribution or to pay debts, seems to be an exception, and unless the jurisdictional facts are shown, it is void.<sup>3</sup> The statute authorized the administrator to sell personal property only when necessary, upon an order of the orphans' court made upon due application. Where the record showed the order to sell, but no application, the sale was held to be void.<sup>4</sup> It seems to be the idea of that court that the proceeding to sell is a special statutory power. But an order to sell land is not void because the record fails to show that the application was filed the statutory length of time before the order was made.<sup>5</sup>

§ 816. **Probate court in Arkansas.**—The probate courts in Arkansas are courts of general jurisdiction,<sup>6</sup> and where the record shows no irregularity, it is conclusive collaterally.<sup>7</sup>

**CALIFORNIA.**—In California, the probate courts were held to be of inferior jurisdiction, but in 1858 this rule was changed by statute,<sup>8</sup> and now when the appointment of an administrator *de bonis non* is attacked, the presumption is in his favor.<sup>9</sup> A record showed that an administrator filed his resignation and final account, and that four days afterwards another person filed a petition to be appointed administratrix, and that she was so appointed eleven days afterwards. Between the date of her application and appointment, some sort of an order was made in reference to the final account of the first administrator, but the evidence did not show what it was. In a collateral proceeding, it was held that the presumption was, that the court had duly accepted the resignation of the first administrator and settled his account, and that

1. Saltonstall v. Riley, 28 Ala. 164 (65 Am. D. 334).

2. Sims v. Waters, 65 Ala. 442; Burke v. Mutch, 66 Ala. 568.

3. Sermon v. Black, 79 Ala. 507, 509.

4. Wyatt v. Rambo, 29 Ala. 510 (68 Am. D. 89).

5. Cox v. Davis, 17 Ala. 714 (52 Am. D. 199).

6. George v. Norris, 23 Ark. 121, 129.

7. Currie v. Franklin, 51 Ark. 338 (11 S. W. R. 477).

8. Townsend v. Gordon, 19 Cal. 188, 205.

9. Lucas v. Todd, 28 Cal. 182.

the administratrix was duly appointed.<sup>1</sup> The old Mexican court of "first instance," prior to the adoption of the code of 1850, was a court of general jurisdiction over decedents' estates, and will be presumed to have had jurisdiction over the heirs of a decedent in a proceeding to sell land, unless the record shows to the contrary.<sup>2</sup>

§ 817. **Probate courts in Connecticut.**—The statute authorized the probate court to make an order to sell land when the debts allowed "shall exceed the personal estate." It was held that an order to sell made where the record did not show or recite that the debts exceeded the personal estate, was erroneous, but not void collaterally; <sup>3</sup> but this was afterwards overruled.<sup>4</sup>

GEORGIA.—The courts of ordinary in Georgia, by virtue of a statute of 1856, are courts of general jurisdiction in relation to decedents' estates,<sup>5</sup> and their grants of letters of administration are not void because the record fails to show the jurisdictional facts.<sup>6</sup> So, from the fact of an order to sell land, it will be presumed that all proper precedent steps were taken.<sup>7</sup>

§ 818. **Probate courts in Idaho.**—Probate courts in Idaho are of special and limited jurisdiction, and an administrator's order to sell land does not prove itself.<sup>8</sup>

ILLINOIS.—The statute required the public administrator to be appointed to take charge of an estate when the decedent had no relative or creditor within the state who would act as administrator, and the failure of the record to show that fact was held to make the appointment of the public administrator void.<sup>9</sup> This case is inconsistent with the cases cited in section 811, *supra*.

INDIANA.—In an administrator's proceedings to sell land in the old probate court of Indiana, service is presumed where the record is silent.<sup>10</sup> At present, the circuit court has jurisdiction over probate matters.

1. Jennings v. Le Breton, 80 Cal. 8 (21 Pac. R. 1127, 1130).

2. Ryder v. Cohn, 37 Cal. 69.

3. Brown v. Lanman, 1 Conn. 467, 469.

4. Wattles v. Hyde, 9 Conn. 10, 13.

5. Davie v. McDaniel, 47 Ga. 195, 200.

6. Barclay v. Kinsey, 72 Ga. 725, 734 —adopting the dissenting opinion of McCay, J., in Fisschesser v. Thomp- 45 Ga. 459.

7. Doe v. Henderson, 4 Ga. 148 (48 Am. D. 216); McDade v. Burch, 7 Ga. 559 (50 Am. D. 407).

8. Ethell v. Nichols, 1 Idaho 741.

9. Unknown Heirs of Langworthy v. Baker, 23 Ill. 484 (430, 434).

10. Doe *ex dem.* Harkrider v. Harvey, 3 Ind. 104.

IOWA.—In a collateral attack on an administrator's sale of land, the court will presume that the land was duly appraised if the record is silent, and will presume that the necessary facts were shown to authorize an order for several different tracts to be sold in a lump.<sup>1</sup>

§ 819. **Probate courts in Kansas.**—The record failing to show the appointment of a guardian, it was held that no presumption of an appointment arose from his acting and obtaining orders to sell land, and that such sales were void;<sup>2</sup> but precisely the contrary was held by the supreme court of Texas,<sup>3</sup> and, as it seems to me, with much better reason, as any step taken by a court is an adjudication that the *status* of the case warrants that step.

KENTUCKY. — A will not written by the testator needed two witnesses, but those written by him needed none. In a collateral action, a probated will had no witnesses, and the record was silent as to whether or not it was written by the testator. It was held to be a conclusive presumption that it was written by him.<sup>4</sup> So also, the validity of the appointment of an administrator will be presumed, although his petition shows the prior appointment of an executor in another state, where the testator died.<sup>5</sup>

A decree of the court of quarter sessions, appointing commissioners to convey lands of a decedent in compliance with a bond executed by him, will be presumed valid after forty-three years, unless the record shows to the contrary.<sup>6</sup>

§ 820. **Probate courts in Louisiana.**—The supreme court of Louisiana, in speaking of a case in the probate court where the judgment had been executed and the records partially lost, said: "After 20 years, the presumption is made in favor of every judicial tribunal acting within its jurisdiction, that all persons concerned had due notice of its proceedings."<sup>7</sup>

MAINE.—When the record of an administrator's sale, over twenty years old, shows that all necessary steps were taken except the approval of the bond, it will be presumed that it was approved.<sup>8</sup> So, after the lapse of more than thirty years, the authority and

1. Cowins v. Tool, 36 Iowa 82, 86.

5. Masters' Ex'r v. Bienker, 87 Ky. 1

2. Higginbotham v. Thomas, 9 Kan. 328; McKee v. Thomas, id. 343.

(7 S. W. R. 158).

3. Meniffee v. Hamilton, 32 Tex. 495, 514.

6. Shackelford v. Miller, 9 Dana

273, 276.

7. Gentile v. Foley, 3 La. Ann. 146

4. Stevenson v. Huddleson, 13 B. Mon. 299, 308.

8. Austin v. Austin, 50 Me. 74

qualification of an administrator were presumed from the existence of an inventory and a schedule of claims in the probate office, attested by his oath, and a petition preferred by him to the court of common pleas for license to sell the real estate of his intestate, with the original certificate of the judge of the probate court thereon, recognizing him as administrator—all the other records being lost.<sup>1</sup>

§ 821. **Probate courts in Maryland.**—A child had a natural guardian who, if acting, barred the power of the orphans' court to appoint another guardian; but it appointed one. In a collateral attack on this appointment, the presumption was indulged that the natural guardian had rejected or abandoned the trust.<sup>2</sup>

MASSACHUSETTS.—The probate courts in this state are courts of general jurisdiction, and all presumptions are made in their favor;<sup>3</sup> and especially is this true after the lapse of twenty years.<sup>4</sup>

MICHIGAN.—Where the record was silent as to the husband's assent to the wife's acting as guardian, it was presumed in a collateral proceeding.<sup>5</sup>

MINNESOTA.—The probate court in Minnesota is one of general jurisdiction, and when its record is silent in respect to service, it is conclusively presumed.<sup>6</sup>

§ 822. **Probate courts in Mississippi.**—The supreme court of Mississippi draws a distinction between the powers of the probate court, namely: That the power given it by the constitution to appoint administrators to take charge of the estates of decedents, and to settle them up, is a general one, and that when the court is thus acting all intendments and presumptions are in its favor; but that the power given it by statute to sell the lands of the decedent to pay his debts, is special and limited, and that such proceedings are void unless the record shows each jurisdictional fact.<sup>7</sup> It seems to me to be bad policy for the courts to

1. *Battles v. Holley*, 6 Me. 145.

2. *Fridge v. State*, 3 Gill and J. 103 (20 Am. D. 463, 466).

3. *Sever v. Russell*, 4 Cush. 513 (50 Am. D. 811).

4. *Gray v. Gardner*, 3 Mass. 399.

5. *Palmer v. Oakley*, 2 Doug. (Mich.) 433 (41 Am. D. 41, 54).

6. *Moreland v. Lawrence*, 23 Minn. 84, 86; *Davis v. Hudson*, 29 Minn. 27

(11 N. W. R. 136); *Kelly v. Morell*, 29 Fed. R. 736.

7. *Root v. McFerrin*, 37 Miss. 17 (75 Am. D. 49). The case of *Laughman v. Thompson*, 14 Miss. (6 Sm. & M.) 259, decides the latter branch of the proposition contained in the text, and many other cases are to the same point.

fill the books with distinctions where there is no substantial difference. The power given by the statute is as exclusive and unlimited as that given by the constitution, and the only difference is in its source. But that difference is nothing, as the command of both the constitution and the statute is law which the court must carry out to the letter. An early case is inconsistent with the first branch of the proposition above stated, as it held the appointment of an administrator *de bonis non* void because the record did not show the facts authorizing the court to do so.<sup>1</sup>

**LAPSE OF TIME.**—After the purchaser at an administrator's sale had been in possession for thirty-four years, and after proof that the probate records were loosely kept, and that many of them were lost, and that no notice or report of sale, or bond could be found, it was presumed, in an action by the heirs to recover the land, that all of these things were properly done.<sup>2</sup>

§ 823. **Probate courts in Missouri.**—Probate courts in Missouri are treated as superior courts of general jurisdiction,<sup>3</sup> and are entitled to the same liberal intendments; and where all the files and papers are lost, the presumption is that a sale of land was regular.<sup>4</sup> Where a guardian's sale was ordered on a petition stating two grounds, one of which was authorized by law and the other not, it will be presumed collaterally, that the court acted on the authorized ground.<sup>5</sup>

**LAPSE OF TIME.**—After the lapse of forty years, an administrator's sale made under the Spanish law, which required no records to be kept, will not be held void because the affidavits required by law cannot be found.<sup>6</sup>

§ 824. **Probate courts in New York.**—In New York, the surrogate courts are treated as courts of limited jurisdiction, except that of the city of New York, which was raised to the dignity of a court of general jurisdiction by a statute in 1870, since which, in a suit involving an order of that court, its jurisdiction need not be averred.<sup>7</sup> In an administrator's proceeding to sell land, the stat-

1. *Vick v. Mayor*, 1 Howard (Miss.) 379 (31 Am. D. 167). (14 S. W. R. 57); *Sherwood v. Baker*, 105 Mo. 472 (16 S. W. R. 938).

2. *Stevenson's Heirs v. McReady*, 20 Miss. (12 Sm. & M.) 9 (51 Am. D. 102). 4. *Rowden v. Brown*, 91 Mo. 429 (4 S. W. R. 129).

3. *Camden v. Plain*, 91 Mo. 117 (4 S. W. R. 86, 90); *Price v. Springfield*

*Real Estate Association*, 101 Mo. 107 5. *Strouse v. Drennan*, 41 Mo. 289, 298. 6. *Vasquez v. Richardson*, 19 Mo. 96, 100.

7. *Bearns v. Gould*, 77 N. Y. 455.

ute required a guardian for the infant heirs to be appointed six weeks before the time fixed for the hearing. The record showed the appointment to have been made on "the — day of September, 1826." This might or might not have been in time; but in a collateral attack, it was presumed to have been regular.<sup>1</sup>

OHIO.—All presumptions are indulged in favor of the action of probate courts in Ohio,<sup>2</sup> and where the record is silent in respect to preliminaries, the appointment of a guardian is conclusively presumed to be valid.<sup>3</sup>

TENNESSEE.—The county court in Tennessee is a court of general jurisdiction when acting in probate matters;<sup>4</sup> but inconsistently with this, it was decided that its decree divesting the title of the heirs and vesting it in a purchaser was not sufficient to establish his title without the production of any papers in the case, unless the decree recited all the facts necessary to warrant it.<sup>5</sup>

§ 825. **Probate courts in Texas.**—The jurisdiction' of the probate courts in Texas is considered to be superior and general.

ADMINISTRATOR APPOINTED. — The appointment of an administrator *de bonis non* will be presumed rightful in a collateral assault on a sale made by him, unless the record shows the contrary;<sup>6</sup> and where the record showed no petition for the appointment of an administrator, but recited in the order of appointment that the petition came on to be heard, the appointment was presumed to be regular.<sup>7</sup> An administratrix was appointed in one county, but she did nothing except to make a partial inventory. A person filed a petition in another county to be appointed administrator *de bonis non*, which recited the issuing of the first letters and alleged that the appointee intended to resign, and he was appointed and settled the estate. Thirty years afterwards, the heirs attempted to recover land sold by him, claiming that his appointment was void because another appointee was then acting. But it was held that, under all

1. *Sheldon v. Wright*, 7 Barb. 39, 43. Tenn. (16 Lea) 321, 330; *Ridgeley v. Bennett*, 14 Lea (82 Tenn.) 210, 218.

2. *Sheldon v. Newton*, 3 O. St. 494, 500. 5. *Whitmore v. Johnson's Heirs*, 29 Tenn. (10 Humph.) 609.

3. *Shroyer v. Richmond*, 16 O. St. 455. 6. *Willis v. Ferguson*, 59 Tex. 172, 175; *Mills v. Herndon*, 60 Tex. 353, 360

4. *Brien v. Hart*, 26 Tenn. (6 Humph.) —an administrator.

131; *approved*, *State v. Anderson*, 84 7. *Mills v. Herndon*, 77 Tex. 89 (13 S. W. R. 854).



the circumstances, it would be conclusively presumed in favor of the jurisdiction of the latter court that the contingency happened which authorized it to make an appointment.<sup>1</sup> It did not occur to any one that the petition to sell alleged that he was the administrator, and that the heirs then had an opportunity to controvert that question, and that the order to sell was a conclusive adjudication, collaterally, that he was the administrator.<sup>2</sup> Where a probate court recognized a person as guardian and licensed her to sell land, it was presumed that she was guardian.<sup>3</sup>

**ADMINISTRATOR REMOVED.**—Where the record showed that an administrator had been removed, and that he afterwards sold land, it was presumed that the order of removal had been set aside and that he had been reinstated.<sup>4</sup>

**SALE OF LAND.**—In a collateral assault on an administrator's sale of land, it will be presumed that a bond was given;<sup>5</sup> that a petition to sell was filed and lost;<sup>6</sup> that the administrator swore to his report of sale;<sup>7</sup> that the personal estate was exhausted;<sup>8</sup> and that the claim upon which the order to sell was made was approved by the probate judge,<sup>9</sup> when the record is silent on these points.

§ 826. **Probate courts in Vermont.**—The probate courts in Vermont are considered to be of general jurisdiction, and where a decree is shown, notice will be presumed;<sup>10</sup> and this presumption cannot be contradicted by parol;<sup>11</sup> and where a confirmation of a sale is shown, it will be presumed that the proper bond was filed and oath taken.<sup>12</sup> So, where the record shows the resignation of an administrator and the appointment of an administrator *de bonis non*, all things will be presumed to have been rightfully done.<sup>13</sup> Somewhat inconsistent, is an old case which held that when an order to sell land was shown, with nothing

1. Brockenborough v. Melton, 55 Tex. 493, 504.

2. See sections 589-591, *supra*.

3. Meniffee v. Hamilton, 32 Tex. 495, 514.

4. Townsend v. Munger, 9 Tex. 300, 310; Dancy v. Stricklinge, 15 Tex. 557 (65 Am. D. 179).

5. Moody v. Butler, 63 Tex. 210, 212.

6. Tom v. Sayers, 64 Tex. 339, 343.

7. Hurley v. Barnard, 48 Tex. 83.

8. Lynch v. Baxter, 4 Tex. 431 (51 Am. D. 735).

9. Cornett v. Williams, 20 Wall. 226, 249.

10. Judge of Probate v. Fillmore, 1 D. Chip. (Vt.) 420, 423; Doolittle v. Holton, 28 Vt. 819 (67 Am. D. 745).

11. Sparhawk v. Administrator of Buell, 9 Vt. 41, 77.

12. Doolittle v. Holton, 28 Vt. 819 (67 Am. D. 745).

13. Steen v. Bennett, 24 Vt. 303.

more, and it failed to show the necessity to sell, it was void;<sup>1</sup> and a late case holds that the probate court has a special and limited jurisdiction given by statute; and that if it appears on the face of the record that it has proceeded in a manner prohibited, or not authorized by law, its orders and decrees are absolutely void.<sup>2</sup> What distinction, if any, the court intended to draw between the probate court and the other courts of general jurisdiction, I am unable to determine.

**LAPSE OF TIME.**—After the lapse of thirty years, all things will be presumed in favor of an administrator's sale;<sup>3</sup> and in a collateral action in 1842 involving the validity of the probate of a will in 1781, it was held that all prior proceedings, including notice, would be presumed.<sup>4</sup>

**VIRGINIA.**—In a collateral attack on an administrator's sale in Virginia where a part of the record had been destroyed, it was held that the sale was not void if there was any ground upon which the court could have taken cognizance of the case, such as the payment of debts, and the like.<sup>5</sup>

§ 827. **Probate courts in Wisconsin.**—The appointment of an administrator *de bonis non* is *prima facie* evidence of authority to do so.<sup>6</sup>

**ADMINISTRATOR REMOVED.**—An administrator was a non-resident and had failed to report for ten years, when a stranger presented a petition reciting those facts and praying to be appointed administrator *de bonis non*. After due notice to the administrator, and without any formal order removing him a successor was appointed. In a collateral assault on the order of appointment, the court said: "The appointment of the administrator *de bonis non* necessarily implies a revocation of the authority of the first. And where the record shows that the court has lawful authority to make such revocation and new appointment, and the new appointment is made, we think it cannot be defeated by the absence of a formal entry of such revocation."<sup>7</sup> So, where a license to an administrator to sell land was shown, it was conclusively presumed that the personal estate was insufficient to pay the debts.<sup>8</sup>

1. Clapp v. Beardsley, 1 Aiken 168 173 (A. D. 1826).

2. Probate Court v. Winch, 57 Vt. 282, 284.

3. Hazard v. Martin, 2 Vt. 84.

4. Giddings v. Smith, 15 Vt. 344.

5. Woodhouse v. Fillbates, 77 Va. 317.

6. Oakes v. Estate of Buckley, 49 Wis. 592, 599 (6 N. W. R. 321).

7. Bailey v. Scott, 13 Wis. 618, 621.

8. Jackson v. Astor, 1 Pinney 137, 151 (39 Am. D. 281).

§ 828. **Quarter sessions court in Tennessee.**—A court of quarter sessions had jurisdiction over all common-law actions where the debt, damages or cause of action exceeded five pounds, and it was required to keep a record. It was held to be a court of superior jurisdiction with all presumptions in its favor.<sup>1</sup>

§ 829. **United States courts.**—The jurisdiction of the circuit courts of the United States in civil causes is limited, with a few exceptions, to controversies between citizens of different states, or citizens and aliens, and it is ground for reversal when the record fails to show the proper citizenship. Nevertheless, when their records are assailed collaterally, all presumptions are indulged in their favor.<sup>2</sup> So, where a judgment was rendered by default against an administrator, it was presumed that the facts warranted the judgment;<sup>3</sup> and where the record was silent as to the amount in controversy, the presumption was held to be in favor of the jurisdiction.<sup>4</sup> A couple of old cases hold that no action will lie on a judgment of a United States circuit court unless the record shows service,<sup>5</sup> but these are obviously wrong.

**VICE-CHANCELLOR'S COURT IN NEW YORK.**—The statute gave the vice-chancellor jurisdiction only where the cause arose within his circuit, or the subject-matter was there situate, or the defendant there resided; and because the record failed to show the existence of either of these things, his decree was decided to be void collaterally.<sup>6</sup> This seems to me to be clearly wrong. The character of the court, like that of the United States circuit, made it one of superior jurisdiction, and all presumptions ought to have been made in its favor.

### PART III.

#### SUPERIOR DOMESTIC COURT.

§ 830. **General proceedings**—Presumption as to service when record is silent—(Ambiguous—Amendment—Appearance—Non-resident—Partition—Setting aside judgment—Unknown heirs).

§ 831. **Service presumed conclusively when record is silent**—(Infants—Insanity inquest—United States courts).

832. **Service appearing to be insufficient**—Presumption as to further.

1. Pope v. Harrison, 84 Tenn. (16 Lea) 82, 89.

2. Cuddy, Petitioner, 131 U. S. 280, 285 (9 S. C. R. 703).

3. Cutright v. Stanford, 81 Ill. 240, 243.

4. Pierro v. St. Paul, etc. R. Co., 37 Minn. 314 (34 N. W. R. 38).

5. Buford v. Hickman, Hempstead 232; Allen v. Blunt, 1 Blatchford 480 (A. D. 1849).

6. Burckle v. Eckhart, 3 Denio 279.

§ 833. Subject-matter, silence of record concerning—Order to sell.

834. Special proceedings—Presumptions concerning—Principle involved.

835. Section 834, continued—(Constructive service, affidavit of non-residence not appearing in record—Date of Filing—Proof of publication, defective, presumptions as to other proof—Too short).

836. Section 834, continued—Constructive service, bond omitted—Mailing notice.

§ 837. Administrator's proceeding in equity to sell land—Admiralty proceedings.

838. Attachment and garnishment proceedings.

839. Bankruptcy proceedings—Condemnation proceedings—Confession—Confiscation—County warrants.

840. Divorce proceedings.

841. Guardianship proceedings—Highway proceedings—Infants—Insanity inquest.

842. Judge in chambers.

843. Receivership—Summary proceedings—Supplementary proceedings.

844. Tax foreclosure proceedings.

**§ 830. General proceedings—Presumption as to service when record is silent.**—When the record of a superior domestic court, or a domestic court of general jurisdiction, showing an adjudication in a common or general proceeding, comes in question collaterally, service will be presumed when the record is silent.<sup>1</sup> This means, at least, that the party introducing the record need not produce the process nor the return, as the presumption is that they are regular and rightful.

**AMBIGUOUS.**—Where the record in a foreclosure suit is indefinite and uncertain as to service upon and appearance by a defendant, the presumption collaterally is that the court obtained jurisdiction over him.<sup>2</sup>

**AMENDMENT.**—A petition in Indiana for partition omitted the name of a joint-owner; but the record contained his name with a recital of service by publication. It was held that the presumption was, that he was made a party after the filing of

<sup>1</sup> 1. *Weaver v. Brown*, 87 Ala. 533 (6 S. R. 354); *Reddick v. President, etc.*, 27 Ill. 145, 147; *Abdil v. Abdil*, 33 Ind. 460; *Ayers v. Harshman*, 66 Ind. 291, 295; *Dwiggins v. Cook*, 71 Ind. 579; *Anderson v. Spence*, 72 Ind. 315, 322; *Iles v. Watson*, 76 Ind. 359, 361; *Crane v. Kimmer*, 77 Ind. 215, 219; *Bloomfield R. R. Co. v. Burress*, 82 Ind. 83, 86; *Jones v. Edwards*, 78 Ky. 6, 9; *Win-*

*gate v. Haywood*, 40 N. H. 437, 441; *Stokes v. Middleton*, 28 N. J. L. 32; *Ray v. Rowley*, 8 N. Y. Supr. (1 Hun) 614; *Lessee of Morgan v. Burnet*, 18 O. 535, 546; *Hopper v. Fisher*, 2 Head (39 Tenn.) 253; *Guilford v. Love*, 49 Tex. 715; *Ferguson's Adm'r v. Teel*, 82 Va. 690, 696.

<sup>2</sup> *Tallman v. Ely*, 6 Wis. 244, 259.

the petition by amendment, and that the omission to insert his name in the petition did not make the decree void as to him.<sup>1</sup>

**APPEARANCE, INDEFINITE.**—When a part only of the defendants have been served, an appearance for the “defendants” will be construed to be for those served only.<sup>2</sup> Where a Wisconsin record in a foreclosure suit showed service by publication on a resident of the state, which was not sufficient, and also showed an appearance by an attorney for some of the defendants, but not showing for whom, the presumption was held to be that he appeared for the defendant not served; that this would be done in aid of the record of a court of general jurisdiction collaterally.<sup>3</sup> A brought suit in Iowa against B and C. B filed a cross-petition against C and got service by publication. The record showed that the same counsel who appeared for B also appeared for C. A personal judgment was taken by B against C. This was held void. It was presumed that B’s counsel only appeared for C in answer to A and not in answer to B, as that would place him on both sides.<sup>4</sup>

**NON-RESIDENT.**—The burden does not shift when the defendant in the original cause shows that he was a non-resident. The presumption still remains that there was service.<sup>5</sup>

**PARTITION.**—A record in partition did not show in what year it was made. If made in one year, the parties were all before the court; if made in another, they were not. The presumption was held to be in favor of the jurisdiction.<sup>6</sup>

**SETTING ASIDE JUDGMENT.**—Land was sold by virtue of a judgment in Kansas, and afterwards, on motion, the judgment was set aside and adjudged to be “null and void.” In an action by the heirs of the original defendant to recover the land, the record failed to show upon what ground the judgment had been held void; but the court, while presuming that it was for want of service, relied on the words of the judgment that some good cause existed, and they were enabled to recover.<sup>7</sup>

1. *Doe ex dem. Hain v. Smith*, 1 Ind. 451, 458.

2. *McBride v. Bryan*, 67 Ga. 584, 587; *Valentine v. Cooley*, Meigs 613 (33 Am. D. 166); *Hubbard v. Dubois*, 37 Vt. 94 (86 Am. D. 690).

3. *Ely v. Tallman*, 14 Wis. 28, 33.

4. *Scovil v. Fisher*, 77 Iowa 97 (41 N. W. R. 583).

5. *Loving v. Pairo*, 10 Iowa 282 (77 Am. D. 108).

6. *Mayer v. Hover*, 81 Ga. 308 (7 S. E. R. 562, 564).

7. *North v. Moore*, 8 Kan. 143, 150.

UNKNOWN HEIRS.—Where the court finds that notice to unknown heirs had been given for a specified time, and then acts upon it, the presumption is that this notice was according to a previous order of the court.<sup>1</sup> A recent case in Tennessee says that “a record collaterally attacked should show that the court rendering it had jurisdiction of the person and subject-matter, otherwise it is void.”<sup>2</sup> This is opposed to nearly all the authorities.

§ 831. **Service presumed conclusively when record is silent.**—When the record of a domestic court of general jurisdiction is silent as to service, it is conclusively presumed collaterally, and extrinsic evidence is inadmissible to show there was none.<sup>3</sup>

INFANTS.—Where the record is silent as to service on infants, but shows the appointment of a guardian *ad litem* for them, the presumption of service is conclusive collaterally.<sup>4</sup> So, where the record recited an appearance by certain defendants and an adjudication that they were infants, and showed the appointment of a guardian *ad litem* for them, and that he appeared and answered, they were held to be concluded from showing a want of personal service.<sup>5</sup> The county court of Tennessee, a court of general jurisdiction to bind out minors, made this entry: “On motion, the court bound Isaac Norris to John H. Stephens, with him to live and work as an apprentice, and the said John H. Stephens came into open court and executed a bond with Vincent Boring as security, which bond is on file in the clerk’s office.” It was held that the minor, in a collateral suit for wages, might show that neither he nor his mother had notice, and thus show the order to be void.<sup>6</sup> This case seems to me to be wrong.

INSANITY INQUEST. — Where the record, in proceedings to appoint a conservator for an alleged insane person, is silent concerning service, it will be conclusively presumed, collaterally.<sup>7</sup>

1. Rhodes v. Gunn, 35 O. St. 387.

2. *Dictum* in Walker v. Cottrell, 6 Baxter (65 Tenn.) 257, 274. This case denies Cooper v. Reynolds, 10 Wall. 308.

3. Swarengen v. Gulick, 67 Ill. 208, 211; Goar v. Maranda, 57 Ind. 339; Sims v. Gay, 109 Ind. 501 (9 N. E. R. 120); Davis v. Hudson, 29 Minn. 27, 37 (11 N. W. R. 136); McClanahan v. West, 100 Mo. 309 (13 S. W. R. 674); Pope v. Harrison, 84 Tenn. (16 Lea) 82, 93; Mitchell v. Menley, 32 Tex.

460, 464; Fitch v. Boyer, 51 Tex. 336, 344; Murchison v. White, 54 Tex. 78, 82; Tennell v. Breedlove, 54 Tex. 540, 543; Hill v. Woodward, 78 Va. 765.

4. Boyd v. Roane, 49 Ark. 397 (5 S. W. R. 704, 708); Beddinger v. Smith, — Ark. — (13 S. W. R. 734).

5. McAnear v. Epperson, 54 Tex. 220 (38 Am. R. 625).

6. Norris v. Stephens, 68 Tenn. (9 Baxter) 433.

7. Searle v. Galbraith, 73 Ill. 269.

UNITED STATES COURTS.—The United States court sitting in Minnesota is a domestic court within that state, and when its record is silent as to service, it is conclusively presumed.<sup>1</sup>

§ 832. **Service appearing to be insufficient—Presumption as to further.**—Where the service appearing in the record of a superior court is insufficient to give it jurisdiction, it will not be presumed, collaterally, that any other service was made.<sup>2</sup> But where a decree in Illinois recited that due service of process was made, and the process found in the record was issued three terms before and showed a defective service, it was presumed that another process had been issued and served, as there was time to do so.<sup>3</sup> So, in a later case in the same court, where the summons found among the papers was returnable at the July term, upon which the service was too short, it was held that that would not control a recital of service made at the August term, as the presumption was that a new writ had been issued and duly served.<sup>4</sup>

§ 833. **Subject-matter, silence of record, concerning.**—A judgment of a court of general jurisdiction is presumed to be correct, although the record fails to disclose the nature of the litigation, or whether it was on issues joined or by default.<sup>5</sup> The presumption collaterally is, that land upon which a mortgage is foreclosed is in the county where the court sat, when the record is silent on that point.<sup>6</sup> When a judgment of naturalization is offered in evidence which recites the filing of the petition and declaration of intention, and the taking of the oath of allegiance, all these matters will be presumed without producing the papers.<sup>7</sup> The law of Illinois authorized two modes of making partition: namely, by bill in chancery and by petition under a statute. Upon the bill in chancery, it was necessary to have personal service on minor defendants, while upon the petition under the statute, service on their guardians was sufficient. The same court had jurisdiction over both proceedings, and, under the local practice, it was difficult to decide from the proceedings which kind they were. It was held in such a case that the proceeding would be

1. Turrell v. Warren, 25 Minn. 9, 14.

2. Clark v. Thompson, 47 Ill. 25 (95 Am. D. 457, 461 and note); Mickel v. Hicks, 19 Kan. 578 (27 Am. R. 161); Barber v. Morris, 37 Minn. 194 (33 N. W. R. 559).

3. Mulvey v. Gibbons, 87 Ill. 367, 380.

4. Matthews v. Hoff, 113 Ill. 90, 95.

5. Treat v. Maxwell, 82 Me. 76 (19 Atl. R. 98).

6. Markel v. Evans, 47 Ind. 326, 330.

7. The Acorn, 2 Abb. (U. S.) 434, 443.



presumed, collaterally, to be that over which the court had jurisdiction; and as the service was made on the guardians, it would be presumed that the court acted under the statute.<sup>1</sup>

ORDER TO SELL. — An Ohio record showed a petition to sell land, the appointment of appraisers, and an account of the sale, but no order to sell, nor confirmation. It was held that it could not be presumed that an order to sell had been made, and that the sale was void.<sup>2</sup> It seems to me that the order to sell ought to have been presumed from the accounting for the proceeds of the sale.

When a drainage assessment made by the circuit court in Indiana is attacked collaterally, it will be presumed that the petition properly described the lands, and that due notice was given.<sup>3</sup>

§ 834. **Special proceedings, presumptions concerning—Principle involved.**—There is no more inherent difficulty in a special than in a general proceeding. An affidavit in attachment is no more complicated than an indictment for perjury or a bill in equity. There is nothing peculiar about service by publication that the ordinary judge or court cannot readily understand. A statute is no more mysterious than the common law. Why it should be presumed that the judge did his duty in a general proceeding and failed to do it in a special one, or that the action was rightful in the one and wrongful in the other, no court has ever yet made very clear. Just how or when such a doctrine crept into the law, I am unable to determine, and it seems to me to be wrong both upon principle and authority. Thus, in a late case, the supreme court of Texas said: "It seems to us illogical to hold, when the averments of the pleadings show that personal service might have been made within the jurisdiction, that this will be presumed to have been done if the record be silent, or do not show to the contrary, when the court has exercised, or assumed to exercise, the power to make a final judgment, but to hold that the same presumption will not be indulged as to proper citation by publication, or as to the seizure of property, when the pleadings show that these things were necessary to be done, and could have been done, before the court assumed

1. *Nichols v. Mitchell*, 70 Ill. 258, 261, *relying upon* *Goudy v. Hall*, 36 Ill. 313.

2. *Lessee of Goforth v. Longworth*, 4 O. 129.

3. *Indianapolis, etc., G. R. Co. v. State*, *ex rel. Flack*, 105 Ind. 37, 39 (4 N. E. R. 316).

the power to render a final judgment. In either case the presumption that the court did not render a final judgment until it was authorized to do so, arises from the fact that to have done otherwise, would have been a breach of duty, which is never presumed from the doing of an act that may have been legal."<sup>1</sup> A statute of New Jersey gave authority to the court of common pleas to appoint surveyors of highways "on due proof being made that the advertisements have been put up according to law." In such a case, the record recited that "the court being satisfied that due and legal notice of this application has been given," made the appointment. The contention was, that the court was exercising a special statutory power and that its order was void because it did not follow the statute. It was held that the jurisdiction so exercised was not special and limited within the rule, but general.<sup>2</sup> The opinion quotes from Lord Mansfield in *Rex v. Croke*, that "This is a special authority, delegated by act of parliament to *particular persons*, therefore it must be strictly presumed, and must appear to be so upon the *face* of the order."<sup>3</sup> The supreme court of North Carolina, in an opinion by Chief Justice Ruffin, speaking of a title based on an attachment and garnishment against an absconding debtor, said: "The general rule has not been questioned by defendant's counsel, that the judgment of a court having jurisdiction of the subject-matter, and proceeding according to the course of the common law, by declaration, plea, issue, trial by jury and judgment of record, cannot be collaterally impeached, but until it be set aside by the same court, or reversed in a superior tribunal, is conclusive. Such is, unquestionably, the general rule of law. The reason is, that the judgment itself is evidence of the right determined in it, or debt recovered; and is evidence so high, that the denial of the right can only be made in the form of a plea denying the existence of the record alleged. The principle applies to all courts to which a writ of error runs from a higher court, or from which an appeal lies to a higher court, which itself proceeds according to the common law; because these are adequate remedies for any error. . . . But we are not aware of any instance in which the subject-matter is within the jurisdiction, and a cause is once constituted in a court of record, that the

1. *Stewart v. Anderson*, 70 Tex. 588 (8 S. W. R. 295, 297).

2. *State v. Lewis*, 22 N. J. L. (3 Zab.) 564, 566.

3. *Rex v. Croke*, Cowper 29.

judgment is not conclusive between the parties, or any other plea is admissible, except *nul tiel record*; and that *without regard to the process by which the action was commenced.*"<sup>1</sup> It will be seen that these three courts do not carry the distinction between general and special proceedings very far; and if the quotation given from Lord Mansfield is its foundation, it has been much misapplied.

§ 835. Section 834, continued — Constructive service, affidavit of non-residence not appearing in record.—A supplemental bill in a California court alleged that an infant defendant was a non-resident and prayed for publication. In such cases, the statute required the court to be satisfied by affidavit of the non-residence, and also that a cause of action existed. The record showed an order for publication, and that publication was made, but was silent as to how the court became satisfied of the non-residence, or of the existence of a cause of action. For these defects, the Supreme Court of the United States held the judgment void collaterally.<sup>2</sup> This is the leading American case on this point; and the ground upon which it is placed is, that the court was exercising a special statutory power, and therefore nothing could be presumed in its favor on a jurisdictional question. It is self-evident, that any nation so far advanced in civilization as to organize courts of justice would have some mode provided for making service upon non-residents concerning their property within the realm; and such service would necessarily be by oral warning, by posting notices, or by some sort of advertisement. There must have been some way to satisfy the court that the defendant was a non-resident, and proof of service was made in some manner. The statute under consideration conferred no new power on the court, but simply provided a new mode of exercising an old and inherent power. If that is a "special statutory power" then the issuing of the ordinary summons would seem to be "special," because the common-law form has been changed in all the states. But the main trouble with this and all kindred cases, as it seems to me, is a want of generalization. The court represents the majesty of the state. Its officers are sworn to act according to law and are competent to do so. Their duty and their competency being the same in all kinds and classes of proceedings, the same presumptions should

<sup>1</sup> Skinner v. Moore, 2 Dev. & Bat. L. 138, 144 (30 Am. D. 155).

<sup>2</sup> Galpin v. Page, 18 Wall. 350, 353, 364, 372.

be applied to all. The doctrine of the case last cited is approved in Iowa<sup>1</sup> and Montana,<sup>2</sup> and disapproved in Missouri<sup>3</sup> and Kentucky.<sup>4</sup> But in a later case in the Supreme Court of the United States, where there was a collateral attack on a judgment rendered on service by publication in a court of general jurisdiction, and where the record showed that the court ordered publication to be made, and the statute did not expressly require the proof of service to be placed on the record, due service was presumed although the record was silent.<sup>5</sup> This case distinguishes *Galpin v. Page*, by saying that there the record showed no order of the court for publication, thus showing affirmatively that the publication made was the unauthorized act of the party. But if it was, the court necessarily ratified and adopted it before rendering judgment. It was a defect that could not possibly harm the defendant. It was held by the supreme court of Connecticut that when the record of a court of general jurisdiction was silent as to service on a non-resident, it would be conclusively presumed;<sup>6</sup> but in partition proceedings in New York against unknown owners, where the record failed to show the filing of the affidavit required by statute that the petitioner was ignorant of their names, and also failed to show any publication of notice, the decree was held to be void.<sup>7</sup> The court said that if a record were produced in which the plaintiff sued on a promissory note, and it failed to show service, "would not such a record be an absolute nullity?"

**DATE OF FILING.**—Where a foreclosure record in Kansas is silent in respect to the date of the filing of the affidavit of non-residence of the defendant, the presumption is that the date was such as to make the judgment regular.<sup>8</sup>

**PROOF OF PUBLICATION DEFECTIVE, PRESUMPTION AS TO OTHER PROOF.**—When the proof of publication on file in Illinois is defective, the court will presume, collaterally, in order to uphold the judgment, that other proof was made.<sup>9</sup> So, where the

1. *Bradley v. Jamison*, 46 Iowa 68, 73.

2. *Palmer v. McMaster*, 8 Mont. 186 (19 Pac. R. 585, 587).

3. *Adams v. Cowles*, 95 Mo. 501 (8 S. W. R. 711).

4. *Newcomb v. Newcomb*, 13 Bush 544 (26 Am. R. 222), especially denying *Galpin v. Page*, *supra*.

5. *Applegate v. Lexington and Carter County Mining Co.*, 117 U. S. 255, 270 (6 S. C. R. 742).

6. *Coit v. Haven*, 30 Conn. 190 (79 Am. D. 244).

7. *Denning v. Corwin*, 11 Wend. 647.

8. *Carey v. Reeves*, 32 Kan. 718, 722 (5 Pac. R. 22).

9. *Pile v. McBratney*, 15 Ill. 314, 318.

proof of publication of notice on file in an administrator's proceeding to sell land misdescribed it, but the record recited that legal and proper notice to sell the land described in the petition had been given, it was held that the recital was not overcome, and that the sale was not void.<sup>1</sup> The court said that when the return of the sheriff shows a want of service, the judgment is void, even though the record recite due service, because the only proof of such service is the return; but that in case of publication, the statute simply says that the certificate of the printer "shall be sufficient evidence" of service, not excluding other modes of proof, and hence, that when the record recites that legal service was made, the presumption is that the court heard other evidence. The case also held that the heirs could not prove by evidence *dehors* the record, namely, by the files of the paper, that the notice actually published misdescribed the land. So, where the Missouri statute provided that the affidavit of the printer or publisher "shall be sufficient evidence of the publication," and the certificate of the publisher was not verified, it was held by three judges against two that the statute did not make the affidavit the exclusive evidence, and that, as the record recited that due proof of notice was made, the presumption was, collaterally, that other evidence was heard, and that the judgment was not void.<sup>2</sup> On the other hand, where the record of a district court of Texas contained no proof of service by publication, a federal court held it void.<sup>3</sup>

TOO SHORT.—So, when the record failed to show that service by publication was *not* too short, the judgment was held void in Montana.<sup>4</sup> The last two cases seem to me to be wrong.

§ 836. Section 834 continued—Constructive service, bond omitted.—The Alabama statute required the plaintiff, before taking possession of land sold on a decree rendered against a non-resident upon constructive service, to give a bond to secure the rents in case the sale should be set aside. In a collateral action to recover land so sold, the record being silent in respect to the bond, it was presumed to have been given.<sup>5</sup>

MAILING NOTICE.—In a case of foreign attachment in New York, the judgment roll showed that an order had been made to mail a

1. Barnett v. Wolf, 70 Ill. 76, 79.

2. Raley v. Guinn, 76 Mo. 263, 271.

3. Preston v. Walsh, 10 Fed. R. 315,

324.

4. Palmer v. McMaster, 8 Mont. 186 (19 Pac. R. 585, 588).

5. Seelye v. Smith, 85 Ala. 25 (4 S. R. 664).

copy of the summons and complaint to the defendant, but it failed to show a compliance with the order; and for this defect it was held to be void.<sup>1</sup> This case seems to me to be unsound.

§ 837. **Administrator's proceeding in equity to sell land.**—Courts of equity have jurisdiction in certain cases to order the sale of the land of a decedent to pay debts, but the jurisdiction is exceptional; and in such a case in Tennessee, although the petition was proper, showing the exhaustion of the personal estate and the amount of unpaid debts, yet the decree was held to be void because it failed to show on its face the amount of the debts and to whom due, and the amount of the assets.<sup>2</sup> I know of no principle that will support this case. There was no defect apparent in respect to the service, and the allegations of the petition were proper, and conferred jurisdiction over the subject-matter. The only trouble was, if I understand the case, that there was no special finding of facts in the decree showing the truth of the matters alleged in the petition. But that is a matter of form which does not touch the jurisdiction.<sup>3</sup> It was also held in Illinois that an order of the circuit court to sell land of a decedent was void unless the jurisdiction was shown in the record.<sup>4</sup>

**ADMIRALTY PROCEEDINGS.**—The supreme court of Michigan, in speaking of a proceeding in admiralty in the federal court, said: "There can be no presumption in favor of jurisdiction when the facts necessary to show it do not appear in the record."<sup>5</sup> In this case it was held that the failure of the record to show that the boat was "over five tons burden," or a failure to advertise notice for the time required by the rules, made the sentence void. Why a court of original, exclusive and unlimited jurisdiction over a subject so old as admiralty jurisprudence should be thus degraded to the level of a police magistrate, was not made very plain. The supreme court of Kentucky also held that no presumptions would be indulged in favor of a decree of a federal admiralty court;<sup>6</sup> and in England it is held that, where the record of a foreign admiralty court fails to show jurisdiction over the person of the defendant, no action can be maintained upon it.<sup>7</sup>

1. Mosier v. Waful, 56 Barb. 80, 83.

5. Gould v. Jacobson, 58 Mich. 288

2. Starkey v. Hammer, 1 Baxter (60 Tenn.) 438, 443.

(25 N. W. R. 194).

3. See section 702, *supra*.

6. Case v. Woolley, 6 Dana 17, 20.

4. Donlin v. Hettinger, 57 Ill. 348, 351.

7. Obicini v. Bligh, 8 Bing. 335 (21 E. C. L. 566).

§ 838. **Attachment and garnishment proceedings.**—Where the record in attachment proceedings fails to show an affidavit,<sup>1</sup> or bond,<sup>2</sup> it will be presumed, collaterally, that they were filed. It was said by the supreme court of Texas that “the generally accepted doctrine now seems to be that the jurisdiction over attachment proceedings is part of the general jurisdiction conferred upon the courts in which they are cognizable; and the same presumption in favor of that jurisdiction must be indulged as in other cases, and the same intendments in favor of the officer executing process.”<sup>3</sup> The supreme court of New Jersey said: “The statute has only prescribed a new writ, or mode of bringing a party defendant, into court. If he appears, the suit proceeds according to the course of the common law. If he does not appear, the court acts upon his property, the proceeding is *in rem*,” and it was held that such proceedings were not special and that errors did not vitiate them.<sup>4</sup> The rule established by the Supreme Court of the United States, as I deduce from two cases, is, that when a superior court renders a judgment or decree foreclosing a lien or for the sale of the property of a non-resident on service by publication without attachment, the judgment or decree is void unless the record shows the jurisdictional facts; but that if the proceeding is by *attachment* or *in rem*, it is not void unless the record affirmatively shows a want of jurisdiction.<sup>5</sup>

The same court had decided in an earlier case, that a judgment ordering the sale of lands attached, was not void because all the necessary steps did not appear in the record.<sup>6</sup> A record, filed in Indiana with the defendant’s answer that he had been compelled to pay the debt by proceedings in garnishment, failed to show personal service on the defendant in that cause, or that his property had been attached in the county where the action was brought, or that the garnishee was summoned in that county; and for these defects, it was held to be void.<sup>7</sup> It is held in Illinois that the circuit court, when proceeding by foreign attachment, is

1. Doe v. Rue, 4 Blackf. 263; Sloan v. Mitchell, 84 Mo. 546; Bigg’s Heirs v. Blue, 5 McLean 148.

2. Doe v. Rue, 4 Blackf. 263, 264.

3. Willis v. Mooring, 63 Tex. 340, 342.

4. Thompson v. Eastburn, 16 N. J. L. (1 Harr.) 100; Diehl v. Page, 3 N. J. Eq. (2 H. W. Green) 143, 147.

5. Cooper v. Reynolds, 10 Wall. 308, and Thompson v. Whitman, 18 Wall. 457.

6. Voorhees v. Bank of United States, 10 Peters 449.

7. Johnson v. Johnson, 26 Ind. 441.



exercising a special statutory power, and that, unless its jurisdiction appears, its judgment is void,<sup>1</sup> while the contrary is held in Missouri.<sup>2</sup>

§ 839. **Bankruptcy proceedings.**—When the record of a bankruptcy proceeding is silent, jurisdiction is presumed.<sup>3</sup>

**CONDEMNATION PROCEEDINGS.** — In a collateral attack on railway condemnation proceedings of a circuit court in Indiana, it was conclusively presumed that a copy of the instrument of appropriation was delivered to the landowner as required by the statute, and that the appraisers had the necessary statutory qualifications and were duly sworn and qualified—the record being silent.<sup>4</sup>

**CONFESSION.** — All presumptions are indulged in favor of a judgment by confession in New Jersey<sup>5</sup> and Oregon;<sup>6</sup> and in the last case cited the court said: “So far as this matter is concerned, under our code, all proceedings are to a great extent regulated by statute, and we think great uncertainty would result from attempting to establish different rules in determining the effect of different classes of judgments rendered in the same court.”

**CONFISCATION.**—In confiscation proceedings in a district court of the United States, the record failed to show any order of seizure or any actual seizure of the land, for which reasons it was held void.<sup>7</sup> This decision was put upon the ground that the court was of limited jurisdiction, and that it was necessary for its jurisdiction to appear upon the record. No authority was cited, and I think the case wrong.

**COUNTY WARRANTS.**—A county court made an order calling in certain outstanding county warrants to be canceled or reissued, and fixing the time for their presentation. The holders of certain warrants did not present them, and an order was made forbidding their use in payment of taxes. By virtue of this order, the collector refused to receive them for taxes, and the holders brought *mandamus* to compel him to do so. The record failed to show

1. Haywood v. Collins, 60 Ill. 328, 333.

2. *Dictum* in Huxley v. Harrold, 62 Mo. 516, 523.

3. Hayes v. Ford, 55 Ind. 52 (15 N. B. Reg. 569); Mount v. Manhattan Co., 41 N. J. Eq. 211, 213.

4. Indiana Oolitic Limestone Co. v. Louisville N. A. and C. Ry. Co., 107 Ind. 301, 306 (7 N. E. R. 244).

5. Dean v. Thatcher, 32 N. J. L. (3 Vroom) 470, 473.

6. Allen v. Norton, 6 Or. 344, 350.

7. Mason v. Tuttle, 75 Va. 105.

that notice was either published or posted as the statute required. The court was one of general jurisdiction, but as the proceeding was a special statutory one, its judgment was held void.<sup>1</sup>

§ 840. **Divorce proceedings.**—The supreme court of Massachusetts, in speaking of a divorce granted in California, said: "Jurisdiction over the subject of divorce is a special authority not recognized by the common law, and its proceedings in relation to it stand on the same footing with those of courts of limited and inferior jurisdiction; so that its powers in the case must be shown and appear to have been strictly pursued;"<sup>2</sup> and the same rulings were made in New York<sup>3</sup> and Oregon.<sup>4</sup> The Vermont statute required proof to be made in divorce cases that the plaintiff was a permanent resident of the state. It was held that, from the fact of the rendition of the decree, it would be presumed that due proof was made, even though the record were silent on the point.<sup>5</sup> So, a decree in Pennsylvania annulling a divorce for fraud, is not void because the record fails to show that any proof was made on that subject.<sup>6</sup>

§ 841. **Guardianship proceedings.**—A surety of a deceased guardian made a final report for the guardian, and obtained a discharge from the bond. It was presumed collaterally, that the wards had notice of his proceeding.<sup>7</sup> Notice to persons interested not appearing in a probate record in Minnesota, does not make the appointment of a guardian void, as the presumption is that it was given.<sup>8</sup> So, it was presumed collaterally in New York, that a surrogate assigned a day for hearing, as the statute required, before appointing a guardian for an infant.<sup>9</sup>

**HIGHWAY PROCEEDINGS.**—An order of the common pleas court in New Jersey confirming the action of surveyors in laying out a highway, is not void because the record fails to show that notice was posted of the surveyors' meeting.<sup>10</sup>

1. *Gibney v. Crawford*, 51 Ark. 34 (9 S. W. R. 309).

2. *Com. v. Blood*, 97 Mass. 538, 540.

3. *Lawrence's Case*, 18 Abb. Pr. 347.

4. *Northcutt v. Lemery*, 8 Or. 316, 323.

5. *Town of Huntington v. Charlotte*, 15 Vt. 46, 50.

6. *Allen v. McClellan*, 12 Pa. St. 328 (51 Am. D. 608, 610).

7. *Castetter v. State, ex rel. Bradburn*, 112 Ind. 445, 448 (14 N. E. R. 388).

8. *Kelley v. Morrell*, 29 Fed. R. 736.

9. *People v. Wilcox*, 22 Barb. 178, 186.

10. *Humphreys v. Mayor, etc.*, 48 N. J. L. 588 (7 Atl. R. 301, 304).

**INFANTS.**—Where the record is silent as to service on infants, but shows a guardian *ad litem* appointed for them, it will be presumed.<sup>1</sup>

**INSANITY INQUEST.**—Where a record showed an adjudication of insanity and the appointment of a guardian, all necessary prior steps were presumed.<sup>2</sup> So, where the record in such a case was silent as to service, it was presumed.<sup>3</sup> The Indiana statute in relation to inquests of insanity provided that the alleged insane person should be produced in court unless it should be satisfied that his health would not permit. In a collateral case, the record was silent as to whether or not the defendant had been produced in court or his presence dispensed with. It was held that the presumption was that he was produced or that the court dispensed with his production.<sup>4</sup>

§ 842. **Judge in chambers.**—Where the allegations of the petition, in a proceeding in Illinois to condemn land, were sufficient to cause the judge to act, he was set at work, and the presumptions were held to be the same in his favor as in favor of the circuit court.<sup>5</sup> It was at first held in Indiana, that vacation orders made by a judge were void unless the record showed jurisdiction;<sup>6</sup> but that ruling was afterwards overturned.<sup>7</sup> In New York it was said: "A judge of the supreme court, like any other officer when acting out of court, is an officer of limited jurisdiction. He may do just what the legislature has authorized him to do, and whatever he does more than this, is done without jurisdiction."<sup>8</sup>

§ 843. **Receiverships.**—The pendency of an action gives power to appoint a receiver, and the recital of such pendency in the order of appointment, is sufficient proof of that fact in a collateral proceeding.<sup>9</sup>

**SUMMARY PROCEEDING.**—Although the court of a justice of the peace in Texas is entitled to the same presumptions as a

1. Horner v. State Bank, 1 Ind. 130 (48 Am. D. 355); Brackenridge v. Dawson, 7 Ind. 383, 385.

2. Ockendon v. Barnes, 43 Iowa 615.

3. Willis v. Willis, 12 Pa. St. 159.

4. Hutts v. Hutts, 62 Ind. 214, 220.

5. Galena and Chicago Union R. R. Co. v. Pound, 22 Ill. 399, 414.

6. Pressley v. Harrison, 102 Ind. 14, 23 (1 N. E. R. 188).

7. Pressley v. Lamb, 105 Ind. 172, 185 (4 N. E. R. 682); First National Bank v. United States Encaustic Tile Co., 105 Ind. 227, 236 (4 N. E. R. 846).

8. Bangs v. Selden, 13 How. Pr. 374, 376.

9. Potter v. Merchants' Bank, 28 N. Y. 641, 652.

superior court, yet where its record failed to show service in a summary proceeding, its judgment was held void.<sup>1</sup>

**SUPPLEMENTARY PROCEEDINGS.**—Proceedings supplementary to execution are a continuation of the original cause and “not a special statutory proceeding before a court or officer of limited jurisdiction in the sense that the facts conferring jurisdiction of the matter must be affirmatively proved whenever questioned in a collateral proceeding.”<sup>2</sup> Where a decree in California was signed by the attorneys of the parties and entered of record, with an entry at the foot, “Decree rendered on the 15th October, 1856,” this was presumed, collaterally, to be the decree of the court.<sup>3</sup>

**§ 844. Tax-foreclosure proceedings.**—It is held in Iowa that a court in foreclosing the rights of the owner under a tax sale acts within its common-law powers, and that its proceedings are not special, and that all intendments are in favor of the record;<sup>4</sup> and the failure of such a record in Minnesota, on a judgment by default, to recite as required by statute that no answer had been filed, and that more than twenty days had elapsed since the date of the last publication of the list and notice, does not make it void.<sup>5</sup> So, the supreme court of Missouri holds that the same presumptions will be indulged in favor of such records as in favor of any other,<sup>6</sup> but strangely inconsistent with this, is a later case. The statute required the tax collector to advertise for the July term of court that he would then apply for judgment upon delinquent taxes; but it also provided that if for “any good cause” he was not able to take judgment at that term, he might do so at the August term. In such a case, a judgment of foreclosure and order of sale made in August, were held void because the deed did not show any good cause why judgment was not taken in July.<sup>7</sup>

1. *Mitchell v. Runkle*, 25 Tex. Supp. 132.

2. *Wright v. Nostrand*, 94 N. Y. 31, 46.

3. *Drake v. Duvenick*, 45 Cal. 455, 462.

4. *Hunger v. Barlow*, 39 Iowa 539, 541; *accord*, *Brown v. Walker*, 11 Mo. App. 226, 230.

5. *Kipp v. Collins*, 33 Minn. 394 (23 N. W. R. 554); *Gilfillan v. Hobart*, 34 Minn. 67 (24 N. W. R. 342).

6. *Allen v. McCabe*, 93 Mo. 138 (6 S. W. R. 62).

7. *Kinney v. Forsythe*, 96 Mo. 414 (9 S. W. R. 918).

## CHAPTER XVIII.

### FOREIGN JUDGMENTS.

§ 848. Principle involved in Chapter XVIII.

849. Errors of law or fact in foreign judgments—The old cases.

§ 850. Errors of law or fact in foreign judgments—The new doctrine.

851. Foreign Divorces.

§ 848. Principle involved in Chapter XVIII.—The diffusion of information in respect to foreign nations by means of steam, electricity and the printing press, has gradually dispelled our ignorance, egotism and bigotry until we have learned that the laws of all civilized nations are inherently just, and that the tongue in which the judge speaks has nothing to do with the clearness of his conceptions or the rectitude of his decisions. And having become thus informed, and the law being a growing science, it is but natural that our courts should change it so as to make it accord with their convictions of right and justice. And, in my opinion, it has been so modified by recent decisions, that the true rule now in regard to foreign judgments is the same as that applied between the states of the American Union: namely, that the question of jurisdiction alone is open to controversy. The recent action of China in returning to the United States the surplus of indemnity money, after paying all just claims of her subjects for injuries received at the hands of American citizens, demonstrates the fact that justice is dealt out by her courts and judges as impartially as in Europe or America, and that her judgments ought to receive the same consideration as those of the most enlightened nation. Certainly, no American court would overhaul one of her judgments on the merits.

§ 849. Errors of law or fact in foreign judgments—The old cases.—An English case decided that the decree of a foreign prize court condemning a ship and goods was not binding in England if it did not proceed on just grounds of condemnation by the law of nations.<sup>1</sup> In another case, it was said that a foreign judgment "Is impeachable for error apparent on the face of it, sufficient to show that such judgment ought not to have been pronounced; . . .

1. *Hobbs v. Henning*, 17 C. B. N. S. (112 E. C. L.) 791.

such error upon the face of the judgment itself, as, without any extrinsic evidence, shows that the judges have come to an erroneous conclusion, either of law or fact." <sup>1</sup> So, a decision of a French court in a maritime case was held not binding in England because it mistook the French law.<sup>2</sup> In each of these cases the English court assumed that it was superior in knowledge to the foreign court. This may have been true, but it was not courteous.

A ship being subject to a valid mortgage in England, went to Louisiana and was there attached by a creditor of the mortgagor. The mortgagee intervened and proved his rights, which were superior by the law of England, but they were disregarded, and the ship was sold and the proceeds paid to the attaching creditor. The purchaser having brought the ship to England, it was decided that the mortgagee might seize and sell her, and that the Louisiana decree was not binding because founded on a perverse disregard of English law in a case properly subject to that law by the comity of nations.<sup>3</sup> Some of the American cases hold that a foreign judgment is merely *prima facie* evidence.<sup>4</sup> But as long ago as the reports of Henry Blackstone, it was decided that when a person defended himself by virtue of a foreign judgment, the courts could not inquire into it to see if it were right or wrong; that they could only do that when a suit was brought upon it to enforce it.<sup>5</sup> From this decision, I am inclined to think that the rule which authorized a foreign judgment to be examined on the merits arose from a confusion of the doctrines of collateral attack and setting aside in equity. When a suit is brought upon any judgment, either domestic or foreign, a court of equity will allow a defense to be made in certain cases well settled in equity jurisprudence, but its jurisdiction never extended to enjoining a person from defending himself under a judgment. In accord with the last case, is one from Maryland where it was decided that a Haytien judgment compelling a garnishee to pay over funds was conclusive in his favor, but only *prima facie* evidence when suit

1. *Reimers v. Druce*, 23 Beavan 145, 154.

2. *Meyer v. Ralli*, Law Rep., 1 C. P. Div. 358, 371 (45 L. J. C. P. Div. 741; 24 W. R. 963).

3. *Simpson v. Fogo*, 1 Hemming and Miller 195 (A. D. 1862).

4. *Jordan v. Robinson*, 15 Me. 167; *Rankin v. Goddard*, 54 Me. 28 (89 Am. D. 718); *Buttrick v. Allen*, 8 Mass. 273 (5 Am. D. 105). See 82 Am. D. 404, 411, *note*.

5. *Phillips v. Hunter*, 2 H. Bl. 402, 411.

was brought upon it against the principal defendant.<sup>1</sup> It was held in an early case in New York that foreign proceedings *in rem* in relation to real estate, after due constructive notice, could not be overhauled in this country for error.<sup>2</sup> It was ruled in an early case on the federal circuit, that a foreign decree confiscating a vessel without any libel from which it could be determined what the charges were, was not conclusive.<sup>3</sup>

§ 850. **Errors of law or fact in foreign judgments—The new doctrine.**—As long ago as 1815, it was decided in England that, when a foreign judgment was introduced to prove a fact, it could not be shown to be erroneous because an account was incorrectly taken;<sup>4</sup> and in 1845, the House of Lords held that a French judgment could not be overhauled because it was alleged to be “unjust;”<sup>5</sup> and still later, it was ruled that the judgment of a Greek consular court could not be examined on the merits to see if it was erroneous in fact;<sup>6</sup> nor a foreign judgment because it mistook the law of England, as that was a mistake of fact;<sup>7</sup> nor a New York judgment because it mistook the New York law, which was a mistake of law.<sup>8</sup> So, where a suit was brought on a French judgment which was rendered against English subjects after an appearance by them, it was held to be no defense that the merits were decided wrongly, or that it was decided upon incompetent evidence, such as letters to which the defendants were not privy;<sup>9</sup> nor is it any defense to a suit on a foreign judgment that the alleged promises upon which the original action was brought were not made by the defendant.<sup>10</sup> Likewise, it has been held by the supreme courts of Illinois and New York,<sup>11</sup> and upon the federal circuit,<sup>12</sup> that a foreign judgment, when jurisdiction existed, was conclusive on the merits. The court of appeals

1. Taylor v. Phelps, 1 Har. and G. 492, 503.

2. Monroe v. Douglas, 4 Sandf. Ch. 126.

3. Bradstreet v. Neptune Ins. Co., 3 Sumner 600, 610.

4. Tarleton v. Tarleton, 4 M. and S. 20; *accord*, Martin v. Nicolls, 3 Sim. 458.

5. Ricardo v. Garcias, 12 Cl. and Fin. 368, 397.

6. Messina v. Petrococcino, L. R. 4 P. C. 144.

7. Godard v. Gray, L. R., 6 Q. B. 139.

8. Scott v. Pilkington, 2 B. and S. (110 E. C. L.) 11 (8 Jur. N. S. 557; 31

L. J. Q. B. 81; 6 L. T. N. S. 21).

9. De Cosse Brissac v. Rathbone, 6 H. & N. 301.

10. Bank of Australasia v. Nias, 16 Ad. & El. N. S. (Q. B.) (71 E. C. L.) 717, 734.

11. Baker v. Palmer, 83 Ill. 568, 571; Dunstan v. Higgins, 17 N. Y. Supp. 887.

12. McMullen v. Richie, 41 Fed. R. 502; Hilton v. Guyott, 42 id. 249.



of New York decided that when a creditor submitted to the jurisdiction of a foreign bankrupt court and took a dividend, the discharge was binding on him;<sup>1</sup> and it was held in Maryland that a foreign judgment was not void for irregularities;<sup>2</sup> and in Ireland that one was binding there, although the declaration was bad on demurrer;<sup>3</sup> and by the Supreme Court of the United States that the record of a foreign prize court could not be contradicted by showing that the vessel did not, in fact, attempt a breach of blockade.<sup>4</sup>

§ 851. **Foreign divorces.**—A foreign divorce stands upon grounds somewhat different from those of a judgment concerning other rights, as was attempted to be shown in sections 648–651, *supra*. A Scotch divorce of an English marriage upon grounds not recognized in England, is void there, and no defense to an indictment for bigamy.<sup>5</sup> So, a divorce granted in Turkey to a Turk, annulling a marriage settlement, when the wife was an English subject, is void in England.<sup>6</sup> A Dane married an English woman in England and then removed with her to Denmark and there obtained a divorce valid according to its laws; but it was held to be void in England, and not to affect his rights in her property.<sup>7</sup> By collusion between English subjects, the husband went to Scotland and procured a divorce. The wife then went to Scotland and married and had children during the life of her first husband. This was decided to be void in England, and the children illegitimate.<sup>8</sup> A man being a native and subject of Würtemburgh, and a woman being a native and subject of France, but both residing in Illinois, they there contracted marriage, and the next year they returned to Europe, and finally became domiciled in Würtemburgh. Afterwards, he commenced proceedings in the proper court there to have the Illinois marriage annulled as being contrary to its laws; and after a contest it was annulled. Subsequently, he died leaving real estate in Illinois, and she came on and filed a bill for partition, claiming that the Würtemburgh decree was of no force in Illinois and that she was his widow; but her claim was denied.<sup>9</sup>

1. Phelps v. Borland, 103 N. Y. 406 (9 N. E. R. 307).

2. Barney v. Patterson, 6 Har. & J. 821, 203.

3. Jack v. Tease, 12 Irish Ch. 279.

4. Croudson v Leonard, 4 Cranch 434.

5. Rex v. Lolley, Russ & Ry. 237.

6. Colliss v. Hector, L. R., 19 Eq. 334, 340.

7. M'Carthy v. Decaix, 2 Russ. & M. 614, 617.

8. *In re* Wilson's Trusts, L. R., 1 Eq. 247; Shaw v. Gould, L. R., 3 H. L. Cas. 55 (37 L. J., Ch. 433; 18 L. T. N. S. 833).

9. Roth v. Roth, 104 Ill. 35, 43—two judges *dissenting*.

## CHAPTER XIX.

### JUDICIAL OFFICERS, LIABILITY OF.

<p>§ 852. Principle involved in Chapter XIX — Judges of superior courts.</p> <p>853. Judges of inferior courts—Liability of—(Construction of</p>	<p>statute—Criminal responsibility—Practice erroneous—Service by private person—Unconstitutional law).</p> <p>§ 854. Justice <i>de facto</i>—Liability of.</p>
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§ 852. Principle involved in Chapter XIX—Judges of superior courts —The supreme court of Michigan, in an opinion by Mr. Justice Cooley, said: <sup>1</sup> “A judicial officer has certain powers confided to him to be exercised according to his judgment or discretion; and the law would be oppressive which should compel him in every case to decide correctly at his peril. It is accordingly a rule of very great antiquity, that no action will lie against a judicial officer for any act done by him in the exercise of his judicial functions, provided the act, though done mistakenly, were within the scope of his jurisdiction. This principle of protection is not confined to courts of record, but it applies as well to inferior jurisdictions; the only difference being that authority in a court of general jurisdiction is to be presumed, while the jurisdiction of inferior tribunals must affirmatively appear on the face of their proceedings. Nor does the rule depend upon whether the tribunal is a court or not; it is the nature of the duties to be performed that determines its application. Thus in *Harrington v. Commissioners*,<sup>2</sup> a decision by road commissioners that one was not exempt from a road assessment was held a protection notwithstanding the party was exempt in fact. In *Freeman v. Cornwall*,<sup>3</sup> an overseer of highways who had adjudged one in default for not working, and obtained a warrant of distress from a magistrate, was held not liable, although in fact there was no default. In *Easton v. Calendar*,<sup>4</sup> the trustees of a school district included in

1. *Wall v. Trumbull*, 16 Mich. 228,

235.

2. *Harrington v. Commissioners*, 2 McCord 400.

3. *Freeman v. Cornwall*, 10 Johns.

470.

4. *Easton v. Calendar*, 11 Wend. 92

their apportionment of taxes the collector's percentage, though otherwise directed by statute, but were held not liable. In *Weaver v. Devendorf*,<sup>1</sup> it was held that the duty of assessors in determining the value of taxable property was in its nature judicial, and that, however erroneous their decision, they were not liable to a suit on behalf of the party aggrieved."

In the case cited from 3 Denio, it was said that judges, from the highest to the lowest, acting within their jurisdiction, are not responsible, civilly, for their acts, however erroneous their decisions or malicious their motives. A standard text book says that power to fine and imprison, or the power to examine, hear and punish, is judicial power, and they in whom it is reposed act as judges, and persons who are made judges are not liable to have their judgments examined in actions against them.<sup>2</sup> In a note to the same work,<sup>3</sup> it is said that "Any person, who, by law, is vested with certain powers, and is also vested with a discretion as to when and how they shall be exercised, is a judicial officer, and exempt so far as he keeps within his powers." But the difficulty arises in determining when the judge "keeps within his powers," as no case has ever yet held a judge of a superior court responsible. It is not sufficient that his judgment is void and no protection to any party or person attempting to enforce it. Thus, in the early English case,<sup>4</sup> where the judge was sued for having committed the jury for bringing in a perverse verdict, it was held by the court of common pleas that the action was a greater outrage than the imprisonment of the jury, although that was void, as had been previously decided by the king's bench,<sup>5</sup> a court superior to the common pleas. So, where a federal statute authorized a fine *or* imprisonment, a person was fined *and* imprisoned. He paid the fine, and then applied to the same court to be released, whereupon it set aside the sentence and entered a new one of imprisonment, and he was accordingly imprisoned. This last sentence was held to be void by the Supreme Court of the United States, and he was released.<sup>6</sup> He then sued the federal judge in a New York state court for false imprisonment; but the court of last resort decided that the judge acted

1. *Weaver v. Devendorf*, 3 Denio 117, 120.

2. 2 Add. Torts, § 890, citing *Groenvelt v. Burwell*, 1 Ld. Raym. 467.

3. Note to 2 Add. Torts, § 890.

4. *Hammond v. Howell*, 1 Mod. 184, and 2 id. 218.

5. *Bushell's Case*, Vaughn 135 (T. Jones 13).

6. *Ex parte Lange*, 18 Wall. 163.

judicially in imposing the second sentence; that when he was brought into court and the wrongful sentence set aside, it was a judicial question as to what should be done, upon which the judge committed an error, but for which he could not be held responsible.<sup>1</sup> It seems to me that the reasoning of this case shows that the decision of the Supreme Court of the United States releasing him on *habeas corpus*, was wrong. When the court had set aside the erroneous judgment, of course it was a judicial question as to what should be done. It was a question which *that* court had to decide on its own opinion of very doubtful law. It had the prisoner before it, and something had to be done with him. What that should be, was a debatable question, the wrongful decision of which, in my opinion, was not void. So, in an earlier case in New York, where the chancellor, in violation of a statute, committed a person a second time for contempt after he had been released on *habeas corpus*, it was decided that he was not liable.<sup>2</sup>

A judge of a superior court was held not liable in damages in South Carolina for any opinion delivered by him, as such;<sup>3</sup> and the same was ruled in England, where slanderous words were spoken by the judge falsely and maliciously and without relevancy to the case before him;<sup>4</sup> and also in Colorado, where a judge reinstated a dismissed case to the damage of the plaintiff, without the notice which the statute required.<sup>5</sup> The supreme court of California reversed a case and ordered the court below to render a judgment on the "findings." By a misinterpretation of the order, an improper judgment was rendered, but it was decided that the judge was not guilty of a contempt of the supreme court.<sup>6</sup> So, where the judge of a federal district court erroneously held that an affidavit charged a person with an offense against the franchise laws, and caused him to be arrested and imprisoned, it was ruled that he was not liable for false imprisonment.<sup>7</sup> As early as A. D. 1354, it was held that an indictment would not lie against a judge of a criminal court because he entered upon the record that certain persons were

1. *Lange v. Benedict*, 73 N. Y. 12 App. Cas. 125—slanderous words addressed to counsel during a trial. (29 Am. R. 80).

2. *Yates v. Lansing*, 5 Johns. 282, and 9 Johns. 395 (6 Am. D. 290).

3. *Brodie v. Rutledge*, 2 Bay 69.

4. *Scott v. Stanfield*, L. R., 3 Exch. 220; *accord*, *Miller v. Hagaart*, 2 Shaw

5. *Hughes v. M'Coy*, 11 Colo. 591 (19 Pac. R. 674).

6. *In re Mahon*, 71 Cal. 586 (12 Pac. R. 868).

7. *Busteed v. Parsons*, 54 Ala. 393

indicted for a felony when the indictment returned was for a trespass, thus falsifying the record;<sup>1</sup> and in A. D. 1608, it was decided that, for anything done by a judge, he should not be questioned before another judge.<sup>2</sup> So, the judges of superior courts have been held exempt from civil actions for damages for ordering the arrest of a person without any charge having been made;<sup>3</sup> or for refusing to certify an appeal;<sup>4</sup> or for neglecting to take security from a guardian;<sup>5</sup> or for a willful disregard of duty in refusing to make a rule for costs;<sup>6</sup> or for maliciously committing a person for contempt without having jurisdiction over his person,<sup>7</sup> or for wrongfully striking the name of an attorney from the rolls.<sup>8</sup>

§ 853. **Judges of inferior courts—Liability of.**—Where the judge of an inferior court has jurisdiction, all the cases agree that he is not liable for mere errors of judgment,<sup>9</sup> and they nearly all agree that he is not liable for corruption;<sup>10</sup> but the reader of this work will have noticed that hundreds of cases hold him responsible whenever his judgment is void for any cause,<sup>11</sup> while a few decide that he is entitled to the same immunity as a judge of a superior court. These latter cases will now be specially noticed. A justice of the peace was held not liable for an excess of jurisdiction in committing a person for contempt.<sup>12</sup> A witness was summoned

1. Book of Assize, 27 Edw. 3 pl. 18.  
2. Floyd and Barker's Case, 12 Report 23.

3. Taafe v. Downes, 3 Moore P. C. 41 n. (A. D. 1812).

4. Ward v. Freeman, 2 Ir. C. L. 460.

5. Phelps v. Sill, 1 Day 315.

6. Fray v. Blackburn, 3 B. and S. 576.

7. Pickett v. Wallace, 57 Cal. 555.

8. Randall v. Brigham, 7 Wall. 523; Bradley v. Fisher, 13 Wall. 335.

9. Bailey v. Wiggins, 5 Harr. (Del.) 462 (60 Am. D. 650); Brunner v. Downs, 17 N. Y. Supp. 633, 636; Reid v. Hood, 2 Nott & M. 168 (10 Am. D. 582); Peake v. Cantey, 3 McCord 107.

10. Irion v. Lewis, 56 Ala. 190—tampering with the jury; Kress v. State, *ex rel.* Wagoner, 65 Ind. 106; Pratt v. Gardner, 2 Cush. 63 (48 Am. D. 652);

Raymond v. Bolles, 11 Cush. 315; Wells v. Stevens, 2 Gray 119; Sullivan v. Jones, 2 Gray 570; Kelley v. Dresser, 11 Allen 31; Sage v. Laurain, 19 Mich. 137; Stone v. Graves, 8 Mo. 148 (40 Am. D. 131, 135 *note*); Lenox v. Grant, 8 Mo. 254; Mangold v. Thorpe, 33 N. J. L. (4 Vroom) 134; Wilson v. Mayor, 1 Denio 595 (43 Am. D. 719); Weaver v. Devendorf, 3 Denio 117, 120; Rains v. Simpson, 50 Tex. 495 (32 Am. R. 609); *contra*, holding him liable are *dicta* in three cases, to wit: State v. Flinn, 3 Blackf. 72 (23 Am. D. 380); Gregory v. Brown, 4 Bibb. 28 (7 Am. D. 731); Bevard v. Hoffman, 18 Md. 479 (81 Am. D. 618).

11. Brown v. Carroll, — R. I. — (18 Atl. R. 283, 285).

12. Cooke v. Bangs, 31 Fed. R. 640—*A. Brewer, J.*

to appear before a justice of another county, but the writ was irregular because no order for such service was indorsed upon it by the justice, and he refused to obey it, for which he was fined for contempt. He sued the justice, but was defeated because the justice acted judicially in determining that the service was sufficient.<sup>1</sup> So, in a late case in Indiana, the mayor of a city, acting as a justice, wrongfully refused to grant a change of venue, and tried and convicted a person. The court decided that he was not liable for damages, although all his acts subsequently to the refusal to grant the change of venue were void.<sup>2</sup> The court said that he exceeded his jurisdiction, but not in the sense in which that word is used in the cases or justified in principle, and that he was liable only where he exercised a jurisdiction with which the law had not clothed him. The principle to be deduced from this case, if I understand it, is, that a justice does not become responsible to an injured party unless he exercises jurisdiction over some matter, or renders a judgment, which is beyond his possible power in any case of that general class; and that for an erroneous exercise of power actually possessed, he is not responsible. A late case in Michigan seems to accord with this view, as it held that a justice was not responsible in damages for convicting a person under an ordinance which was void because unreasonable, and unconstitutional because of discrimination against non-residents. It also decided that he was entitled to the same immunities as a judge of a superior court.<sup>3</sup> This seems to me to be the correct doctrine. The duties of all judges are the same. All are bound to know the law and to administer it so as to do justice in each particular case. The duties being the same, the responsibilities ought to be the same.

It is said in Bacon's Abridgment: "If justices of the peace arraign a person of treason in their sessions, who is convicted and executed, this is felony as well in the justices as sheriff or officer who executed their sentence; but if he had been indicted of a trespass, found guilty and hanged, though this had been felony in the justices, yet it would not be so in the sheriff, because a matter in which the justices had jurisdiction, and in which they only were to blame in exceeding their authority."<sup>4</sup> I do not pre-

1. *Allec v. Reece*, 39 Fed. R. 341, *disapproving* Cooley on Torts 420.

2. *State v. Wolever*, 127 Ind. 306 (26 N. E. R. 762).

3. *Brooks v. Mangan*, 86 Mich. 576 (49 N. W. R. 633).

4. 8 Bac. Abr. 691, 692, *citing* Dalt. Sh. 107.

tend to understand this quotation, and give it for what it is worth. When the officers of Cambridge University arrested a woman in the company of students, as a person of evil conduct, and brought her before the vice-chancellor, who simply examined her, but not under oath, and heard no witnesses, and imprisoned her for fourteen days, it was held that he was acting as a judge, and that, as no practice was prescribed by the statute, he could adopt his own practice, and was not liable because he erred in fact.<sup>1</sup> The supreme court of New York recently said: "The general rule is that where a judge, who has jurisdiction of the subject-matter, errs in his judgment as to whether the facts presented do or do not confer jurisdiction, he is not liable to an action of false imprisonment by a person arrested through an error of judgment."<sup>2</sup> So, where the issuing of an execution is regarded as judicial, he is not responsible for damages occasioned by making it returnable in sixty instead of ninety days.<sup>3</sup> Where one joint debtor confessed for both, and the justice rendered judgment against both, apparently supposing that the law so authorized, he was not liable for damages to the one not confessing.<sup>4</sup>

CONSTRUCTION OF STATUTE.—A statute authorized a town, by vote, to exempt a certain factory from taxation for ten years, which was done. The statute, being somewhat doubtful, it was again exempted for another ten years. This the court held to be illegal; but, in the meantime the selectmen, in laying the tax, had exempted it in obedience to the vote. It was held that they acted judicially, and were not liable in damages.<sup>5</sup> A mayor of a town, as *ex officio* justice, had jurisdiction to try misdemeanors committed within the corporate limits of the town, and jurisdiction to examine and bind over for misdemeanors committed anywhere within the county. He convicted and imprisoned a person for a misdemeanor committed outside of the town and within the county, and was sued for damages, but the action was defeated.<sup>6</sup>

CRIMINAL RESPONSIBILITY.—A magistrate is not liable to be punished criminally for a commitment for contempt when he did not act corruptly.<sup>7</sup>

1. Kemp v. Neville, 10 C. B. N. S. 523 (100 E. C. L. 523).

2. Nowak v. Waller, 63 N. Y. Supr. (56 Hun) 647 (10 N. Y. Supp. 199).

3. Wertheimer v. Howard, 30 Mo. 420 (77 Am. D. 623).

4. Little v. Moore, 4 N. J. L. (1 South.) 74 (7 Am. D. 574).

5. Boody v. Watson, 64 N. H. 162 (9 Atl. R. 794, 797).

6. Bell v. McKinney, 63 Miss. 187, 192.

7. State v. Johnson, 2 Bay 385.



**PRACTICE ERRONEOUS.**—A justice rendered a judgment in favor of the plaintiff, but in entering it on his docket he reversed the names of the parties so as to make it in favor of the defendant, and against the plaintiff, who was compelled to pay it. The supreme court of New York permitted him to recover it back from the justice,<sup>1</sup> but upon what principle, I am at a loss to know. The judgment was not void, and appeared to be regular, and ought to have protected him. A justice committed a person for want of bail. It was his duty to organize a court of special sessions to try the accused at the expiration of twenty-four hours. This he failed to do. The defendant was discharged on *habeas corpus*, and sued the justice for false imprisonment; but it was held that the action could not be maintained; that the failure of the justice to do his duty did not avoid the proceeding so far as regular.<sup>2</sup>

**SERVICE BY PRIVATE PERSON.**—Where a justice rendered judgment upon service made by a private person, this was an erroneous conclusion of law, which did not make him liable.<sup>3</sup>

**UNCONSTITUTIONAL LAW.**—Where a justice in Kansas tried a person for a crime with a jury of six instead of twelve, by virtue of an unconstitutional law, he was held not responsible in damages.<sup>4</sup>

§ 854. **Justice de facto—Liability of.**—The cases all hold that, although the acts of a justice *de facto* are valid and binding between the parties, they are void in respect to himself and make him responsible in damages.<sup>5</sup> They all place the justice on the same footing as a ministerial officer; but as the justice acts judicially in such cases—if he did not, his acts would be void—I am unable to see why the rule in respect to a ministerial officer should be applied to him. Each and every judge *must* decide upon his own competency to act at each step he takes, and why a mistake of law or fact in respect to that question should make him personally responsible, I am unable to point out.

**PARTY OR PERSON AIDING, LIABILITY OF.**—Parties and persons who set judicial proceedings in motion, or aid in their enforce-

1. Christopher v. Van Liew, 57 Barb. 17, 29.

2. Kenner v. Morrison, 19 N. Y. Supr. (12 Hun) 204.

3. McCall v. Cohen, 16 S. C. 445 (42 Am. R. 641).

4. Clark v. Spicer, 6 Kan. 440.

5. Grace v. Teague, 81 Me. 559 (18 Atl. R. 289)—office expired; Newman v. Tiernan, 37 Barb. 159, 165; Courser v. Powers, 34 Vt. 517—office expired one day before.

ment, are not responsible for damages on account of errors or defects which do not make them void.<sup>1</sup> A few cases are contrary and wrong, as it seems to me. Thus, a creditor in New York divided his claim into several parts so as to bring each part within the jurisdiction of an inferior court, and caused a writ of attachment to be issued on each part, as a separate cause of action, upon which the goods of the debtor were seized. On account of this error, the writs were quashed, and the debtor then brought an action for damages, and it was held that the writs having been set aside, were no protection.<sup>2</sup>

1. *Blanchard v. Goss*, 2 N. H. 491, and cases cited; *Hall v. Munger*, 5 N. Y. Supr. (5 Lans.) 100, 105. The reader will have noticed numerous cases in *accord* all through the preceding chapters.

2. *Wehle v. Butler*, 43 How. Pr. 5, 11. This case relies on *Kerr v. Mount*, 28 N. Y. 659, but in that case the court had no jurisdiction, and the writs were void.

## CHAPTER XX.

### PLEADING, PRACTICE AND EVIDENCE.

PART I.—PLEADING, . . . . .	§ 855
PART II.—PRACTICE AND EVIDENCE, . . . . .	856-859

#### PART I.

##### P L E A D I N G.

§ 855. Pleading in collateral actions—Answer—Foreign and other state judgments—Special judge.

§ 855. **Pleading in collateral actions.**—When an action is brought on the judgment of an inferior court, as there is no presumption of jurisdiction, facts showing service or an appearance, and that the subject-matter was one over which the court had jurisdiction, must be alleged, unless dispensed with by statute.<sup>1</sup> But it was held by the supreme court of Indiana that, in a suit to enjoin a judgment of a justice of the peace because rendered in the wrong township, the complaint must show that it was not so done by the defendant's consent.<sup>2</sup> When the action is on the judgment of a superior domestic court, no such allegations are necessary, as jurisdiction is presumed to exist.<sup>3</sup>

**ANSWER.**—An answer to an action on a domestic judgment, where special pleading is required or attempted, must not only deny service and appearance, but must allege what the record shows or fails to show on those points. If the record shows service or an appearance, it cannot be contradicted; and the same is true in respect to the record of a court of general jurisdiction when the record is silent. Hence, an answer to an action on the record of any court must allege that it does not show any service or appearance, and if the record is that of a superior court, it must allege that it affirmatively shows a want of service.<sup>4</sup>

1. *Reeves v. Townsend*, 22 N. J. L. R. Co. v. North, 103 Ind. 486, 492 (3 N. E. R. 144); *Cassady v. Miller*, 106 Ind. 69 (5 N. E. R. 713); *Phillips v. Lewis*, 109 Ind. 62 (9 N. E. R. 395);
2. *Gage v. Clark*, 22 Ind. 163.
3. *Spaulding v. Baldwin*, 31 Ind. 376.
4. *Krug v. Davis*, 85 Ind. 309, 311; *Indianapolis and St. Louis Ry. Co. v. Exchange Bank v. Ault*, 102 Ind. 322 (1 N. E. R. 562); *Baltimore, etc., R. Harmless*, 124 Ind. 25 (24 N. E. R. 369).

A highway was established in Indiana by order of the board of county commissioners. A landowner sought to enjoin its opening on the ground of the want of notice, and she alleged that neither she nor her agent nor guardian were named in the petition or notified of its pendency. As the statute authorized service to be made upon the owner, agent or occupant, the failure of the complaint to allege that there was no occupant, or that he was not named and served, made it bad on demurrer.<sup>1</sup> In another case precisely like the last, the plaintiff alleged that the board had appointed appraisers to assess the damages that would result to him, and that they made a report that he would sustain none. As the board could not lawfully appoint appraisers unless the plaintiff had filed a remonstrance, and as the complaint did not deny that he had filed one, it was held bad on demurrer.<sup>2</sup> But in a late case in the appellate court of Indiana, where the complaint was founded on a judgment forfeiting a deposit of money made by a prisoner to secure his release from custody, there was an answer that the judgment had been set aside, to which there was a reply that the state was not represented when the judgment was set aside and had no notice of the application; that the prosecuting attorney, though nominally present and appearing for the state, was in collusion with, and really employed by, and acting for the defendant, and thereby deceived the court. This reply was held good.<sup>3</sup> As the reply admitted that the record was regular on its face, it seems to have been bad according to the decisions of the supreme court just cited.

FOREIGN AND OTHER STATE JUDGMENTS.—In an action on a foreign judgment,<sup>4</sup> or the judgment of another state rendered by a superior court,<sup>5</sup> neither jurisdiction over the subject-matter nor the person need be alleged, as it will be presumed. So, in suing upon a judgment of another state rendered by a

1. *Ryder v. Norstring*, — Ind. — (29 N. E. R. 567).

2. *Rassier v. Grimmer*, — Ind. — (28 N. E. R. 866).

3. *State ex rel. Michener v. Scanlon*, 2 Ind. App. 320 (28 N. E. R. 426, 430).

4. *Gunn v. Peakes*, 36 Minn. 177 (30 N. W. R. 466), *overruling* *Karns v.*

*Kunkle*, 2 Minn. 313, and *Smith v. Mulliken*, id. 319.

5. *Bruckman v. Taussig*, 7 Colo. 561 (5 Pac. R. 152); *Specklemeyer v. Dailey*, 23 Neb. 101 (36 N. W. R. 356); *Phelps v. Duffy*, 11 Nev. 80; *Mink v. Shaffer*, 124 Pa. St. 280 (16 Atl. R. 105), *relying on* *Wetherill v. Stillman*, 65 Pa. St. 105, 115; *Jarvis v. Robinson*, 21 Wis. 530 (523) (94 Am. D. 560).

special judge, it is not necessary to allege that the law of the state authorized the appointment of special judges, or that he was duly appointed.<sup>1</sup> The object of this section is merely to show the principle involved. For particulars, I would refer to the excellent works of Mr. Black<sup>2</sup> and Mr. Freeman,<sup>3</sup> and the various works on pleadings.

## PART II.

### PRACTICE AND EVIDENCE.

§ 856. Proof of judgments of inferior courts—Competency of extrinsic evidence—Restraining.

857. Proof of judgments of superior courts—Pennsylvania confessions.

§ 858. Amendments and *nunc pro tunc* entries.

859. Equitable aid and extrinsic evidence, competency of—Service—Service overturned by parol.

§ 856. Proof of judgments of inferior courts—Competency of extrinsic evidence.—The pleadings as well as the judgment is necessary in order to prove a judgment of an inferior court of another state;<sup>4</sup> but it was held in New York that, when the record of an inferior court was silent on the question of jurisdiction over the person, it might be shown by extrinsic evidence.<sup>5</sup> A person was proceeded against before a justice of the peace in Arkansas by constructive service and the appointment of an attorney *ad litem* to appear for him. The attorney appeared and answered, and a judgment was taken against him and land sold, but the plaintiff failed to file the bond required by the statute before the sale in cases of constructive service, so that the sale would be void. In ejectment for the land, the purchaser was allowed to show that the attorney appeared for the defendant at his request, and thus to show that no bond was required.<sup>6</sup> A poor debtor was discharged in Massachusetts, although the return showed that service was not made in time, by which the discharge was apparently void; but in a suit on the bond it was held competent to show by parol that the creditor had waived the time.<sup>7</sup> The statute of Michigan did not require the record of a justice to show the time

1. Henry v. Allen, 82 Tex. 35 (17 S. W. R. 515).

2. 2 Black on Judgments, §§ 873-875; 881-893; 897, 898, 902; 964-967, 970-979.

3. 2 Freeman on Judgments, §§ 450-461.

4. Brown v. Eaton, 98 Ind. 591, 595.

5. Van Deusen v. Sweet, 51 N. Y. 378, 385.

6. Visart v. Bush, 46 Ark. 153.

7. Lord v. Skinner, 9 Allen 376.

of service, and when the files were lost, it was held admissible to show the time by parol.<sup>1</sup> But, in Indiana, where the record of a justice of the peace was silent in respect to service, it was decided to be incompetent to show that service by publication was made in order to sustain the judgment.<sup>2</sup>

RESTRAINING.—Where a party sues to enjoin the enforcement of the proceedings of an inferior judicial tribunal, such as the action of the trustees of a village in laying out a street, the burden is on him to show and prove their invalidity; and the burden is not shifted because the petition is defective in not showing that it was signed by the proper persons.<sup>3</sup>

§ 857. **Proof of judgments of superior courts.**—Where the object is to show that a question is *res judicata*, the pleadings as well as the final judgment must be shown, and frequently this must be supplemented by parol evidence to show what was actually litigated, but that is never the case in an attack on the validity of some right or title derived through the judgment. When the final judgment is shown, its validity is presumed, and it is *prima facie* proof that all necessary prior steps were duly taken, without producing the other parts of the record.<sup>4</sup> In order to prove a judgment in Kansas, the entry alone was introduced which recited due service by publication, and it was then proved that the files were burned; but it was held that it ought to have been proved that the files contained proof of service. The court said: "Neither is the difficulty avoided by the presumption which exists in favor of the proceedings in courts of general jurisdiction. That presumption arises only when the record is silent; it does not supersede the record. A party may not introduce part of a record, and, relying on presumptions, withhold the remainder."<sup>5</sup> The supreme court of Arkansas held that a transcript of the final judgment of the supreme court of Tennessee, with no copy of any prior proceedings or pleadings, would not sustain an action,<sup>6</sup> and the same ruling was made in Indiana concerning a copy of a judgment from a district court of Iowa.<sup>7</sup> So, where goods were replevied from a sheriff in Michi-

1. Van Kleeck v. Eggleston, 7 Mich. 511.

2. Newman v. Manning, 89 Ind. 422.

3. Tingue v. Village of Port Chester, 101 N. Y. 294, 299.

4. Naylor v. Mettler, — N. J. Eq. — (11 Atl. R. 859); Rollins v. Henry,

78 N. C. 342, 244; Pensoneau v. Heinrich, 54 Ill. 271, 273—a decree foreclosing a lien.

5. Hargis v. Morse, 7 Kan. 415, 418.

6. Hallum v. Dickinson, 47 Ark. 120

(14 S. W. R. 477).

7. Ashley v. Laird, 14 Ind. 222. —

gan, it was held that he could not justify by introducing his writ and the final judgment without the pleadings and process.<sup>1</sup> The last four cases seem to me to be clearly wrong. It was said by the supreme court of Indiana that "A judgment is always evidence of the fact that such a judgment has been given, and of the legal consequences which result from that fact;"<sup>2</sup> and one of the legal consequences is that the defendant is indebted to the plaintiff, and that he has a right to an execution to collect it. In an action by a receiver in New York, it was held that the order appointing him was not sufficient evidence of his appointment without showing that it was done in an action, because the statute prescribed the causes for appointment and declared that "any order appointing a receiver otherwise shall be void."<sup>3</sup>

**CHAIN OF TITLE.**—A judgment is admissible as a link in the chain of title in a suit between a privy and a stranger to it, the same as a deed or other evidence of title.<sup>4</sup>

**PENNSYLVANIA CONFESSION.**—A copy of a confession entered by the clerk in Pennsylvania is not admissible in evidence in another state without proof of the statute authorizing it.<sup>5</sup>

§ 858. **Amendments and nunc pro tunc entries.**—After an action was brought in Missouri to recover land sold on execution because of defective service of original process, the sheriff was permitted to amend his return in order to defeat it.<sup>6</sup> So, where the return on a writ of attachment is not signed, it can be amended to prevent the judgment from being held void.<sup>7</sup> It is the duty of the court to correct its records at any time on the motion of any person in interest, or on its own motion as soon as it discovers the defects.<sup>8</sup> Thus, where the report of commissioners in partition in North Carolina was made and confirmed in 1811, the report was ordered to be spread of record *nunc pro tunc* in 1852, in order to defeat an action of ejectment.<sup>9</sup> In a foreclosure suit in a state court, the return of service was insufficient to give jurisdic-

1. *Kenyon v. Baker*, 16 Mich. 373.

2. *Maple v. Beach*, 43 Ind. 51, 58, *relying* on 1 Starkie Ev. 317, and 1 Gr. Ev., § 538.

3. *Springs v. Bowery Nat. Bank*, 18 N. Y. Supp. 574.

4. *Barr v. Gratz's Heirs*, 4 Wheaton 213.

5. *Thomas v. Pendleton*, — S. D. (46 N. W. R. 180).

6. *Dunham v. Wilfong*, 69 Mo. 355, 358.

7. *Wilkins v. Tourtelott*, 28 Kan. 825, 833.

8. *Strickland v. Strickland*, 95 N. C. 471, 473.

9. *Marshall v. Fisher*, 1 Jones L. 114, 116.



tion, but a decree was rendered and the premises were sold. Ten years afterward, the defendants in the foreclosure suit brought ejectment in the federal court against the purchasers, who, without notice to their adversaries, had the sheriff amend his return in the foreclosure suit, by order of the state court, so as to show good service. The federal court held that a transcript of this amended record would defeat the ejectment, and that it could not be impeached in that court.<sup>1</sup> So, in California, where the record of a justice failed to show service, it was permitted to be amended as against all except *bona fide* purchasers.<sup>2</sup> But it was decided in Georgia that an amendment of an administrator's proceedings to sell land, by the entry of an order of sale *nunc pro tunc*, after ejectment brought by the heirs, without notice to them, was void;<sup>3</sup> and the same was ruled in Arkansas concerning an amendment of a justice's record, without notice to the adverse party, so as to cause it to show service.<sup>4</sup> The last two cases seem to me to be wrong. The record, taken as a whole, shows all the facts necessary to constitute a perfect judgment. But, through the negligence of the clerk, they are not spread out upon the order books, dockets, or judgment rolls, in proper form. This oversight it is the duty of the clerk to correct at any time his attention is called to it, without any order other than the original one with which he has never complied. So, it is the duty of the court, as soon as its attention is called to his dereliction, to order him to complete the entries in accordance with the original order. From the nature of the second order, no notice to the parties is necessary. It is a mere completion of the original order of which they had due notice.

**859. Equitable aid and extrinsic evidence—Competency of.**—In a collateral action, inconsistencies in the dates of an administrator's deed may be aided by the papers in the estate.<sup>5</sup> Where heirs brought ejectment in Illinois because the administrator's deed failed to recite the order of sale, and because it was executed by only one of the two administrators, a court of equity corrected the deed and compelled the other administrator to execute it so as to perfect the title.<sup>6</sup> So, in Missouri, where the pur-

1. Rickards v. Ladd, 6 Sawyer, 40—  
Deady, J.

2. Allison v. Thomas, 72 Cal. 562 (14  
Pac. R. 309).

3. Wimberly v. Mansfield, 70 Ga.  
783.

4. Levy v. Ferguson Lumber Co., 51  
Ark. 317 (11 S. W. R. 284).

5. Moore v. Wingate, 53 Mo. 398,  
405.

6. Thorp v. McCullum, 6 Ill. (1 Gil-  
man) 614, 624.

chaser at an administrator's sale received no deed, but where the records showed the sale and its approval and the payment of the money, this was held sufficient to defeat an action of ejectment by the heirs, and the court made a decree vesting the title in the defendants; and as the report of sale did not properly describe the premises, the correct description was taken from the administrator's final report.<sup>1</sup> In a later case in the same state, where the heirs brought ejectment because the description in the administrator's deed was too indefinite to convey title, the action was defeated because the court was enabled to gather from the report of sale the exact amount of land appraised and sold, which was supplemented by parol evidence that that embraced the entire land of the decedent.<sup>2</sup> So where an administrator's deed had no seal, it passed an equitable title which was sufficient to defeat an action of ejectment by the heirs.<sup>3</sup> Without drawing any comparisons, I must say that, on the whole, I am very favorably impressed with the decisions of the supreme court of Missouri. Narrow, technical decisions which permit a man to rob his neighbor in the courts under the guise of getting his "legal rights" occupy but a small niche in its archives. An administrator's sale was held to be void in Illinois because no part of the record showed that there were any debts, and parol evidence to sustain the title by showing that there were debts, was decided to be inadmissible.<sup>4</sup> If the court had held that the administrator's proceeding to sell was simply a part of the administration proceeding, and that the whole proceeding could be examined in order to show that there were debts, no one could have pointed out where it was wrong on principle. Where the jurat to an affidavit in attachment in Iowa was not signed by the officer, it was held that, in a collateral suit to quiet title, it could be shown by parol that the oath was administered.<sup>5</sup> So, where an infant's lands had been sold in Kentucky by a petitioner not shown to be his *guardian*,<sup>6</sup> or by virtue of a petition which failed

1. Long v. Joplin Mining, etc., Co., 68 Mo. 422, 427.

2. Gilbert v. Cooksey, 69 Mo. 42; accord, Sherwood v. Baker, 105 Mo. 472 (16 S. W. R. 938)—that equity will compel the execution of a deed.

3. Snider v. Coleman, 72 Mo. 568.

4. Davenport v. Young, 16 Ill. 548 (63 Am. D. 320).

5. Cook v. Jenkins, 30 Iowa 452; accord, Sheldon v. Wright, 5 N. Y. 497, 499—an affidavit to a petition to appoint an administrator.

6. Lampton v. Usher's Heirs, 7 R. Mon. 57, 63.

to show that they came to him by *descent*,<sup>1</sup> it was held that those facts might be shown by extrinsic evidence in order to defeat actions of ejectment. The court of common pleas in Connecticut had jurisdiction of causes where the demand exceeded one hundred dollars. In a collateral attack on one of its judgments, where the declaration demanded one hundred and fifty dollars, and the recovery was eighty-five dollars and sixty-five cents, the party was permitted to prove by the testimony of the common pleas judge that the principal of the actual demand was sixty-five dollars and eighty-five cents, and that the interest claimed but not allowed raised the demand to more than one hundred dollars, by reason of which it was held that the court had jurisdiction.<sup>2</sup>

SERVICE.—In order to sustain proceedings in attachment in Ohio where the record is silent, evidence *aliunde* is admissible to show service by publication.<sup>3</sup> So also, it has been decided in Illinois that, although parol evidence is not admissible to aid a return of service, it is admissible to prove publication;<sup>4</sup> and where the affidavit making proof of publication did not show that it was made by the proper person, that fact was allowed to be proved by parol in order to show the judgment to be valid collaterally.<sup>5</sup> Where the proof of publication in Minnesota did not show a sufficient service, so that the judgment appeared to be void, on a motion to set it aside, the plaintiff was permitted to file a new proof so as to show the service sufficient.<sup>6</sup> The process in a summary proceeding in Connecticut bore date one day before the cause of action accrued. The plaintiff recovered a judgment, issued a writ and seized goods of the defendant, who brought suit for trespass, and in this suit the plaintiff in the original suit was permitted to prove that the process was not issued, in fact, until the day after its date.<sup>7</sup>

SERVICE OVERTURNED BY PAROL.—The supreme court of Maine said: "It has often been decided in this state, that the certificate of the justices respecting the notice is conclusive, unless its effect be destroyed by an agreed statement of facts, or

1. Singleton v. Cogar, 7 Dana 479.

2. Stone v. Hawkins, 56 Conn. 111 78.  
(14 Atl. R. 297).

3. Lessee of Parker v. Miller, 9 O.  
108, 114.

4. Botsford v. O'Connor, 57 Ill. 72,

5. Dukes v. Rowley, 24 Ill. 210, 222.

6. Burr v. Seymour, 43 Minn. 401  
(45 N. W. R. 715).

7. Taylor v. Judd, 41 Conn. 483, 485.

affidavit of merits, this judgment was held valid when assailed collaterally.<sup>1</sup>

§ 862. **Attachment.**—The plaintiff who procures an attachment void because the wrong kind of process was issued, and gives bond, is estopped to plead the want of jurisdiction when sued on the bond.<sup>2</sup>

**ATTORNEY.**—The attorney who procures a judgment, cannot show it to be void for want of service, in a collateral contest between himself and his client over property levied upon.<sup>3</sup>

**COSTS.**—A court upon dismissing an action for want of jurisdiction over the subject-matter may render a judgment for costs.<sup>4</sup> The plaintiff asks the court to hear and decide his case, and in order to do so, even to the extent of determining that there is no jurisdiction, necessarily makes costs, which he is estopped to controvert. But where a defendant appealed a criminal case from a justice of the peace in Indiana to the court of common pleas, which had no criminal jurisdiction, for which reason it dismissed the case and rendered a judgment against him for costs, upon which his land was sold, this sale was held void.<sup>5</sup> I think this case is unsound.

**ESTOPPEL AGAINST ESTOPPEL.**—It was recently held by the court of appeals of New York that, where there was a judgment in favor of the defendant and a later one in favor of the plaintiff, there was an estoppel against an estoppel, which “setteth the matter at large.”<sup>6</sup> This is the only case of the kind I have been able to find. Neither Lord Coke nor the editors of Smith’s Leading Cases, with all their learning, lay down any such doctrine, and I cannot conceive it to be correct. The last judgment is always conclusive that no cause existed why it should not be rendered.

§ 863. **Garnishee.**—A garnishee defendant appeared before a justice in Michigan, and made and subscribed a statement on the

1. *Montgomery v. Heilman*, 96 Pa. (3 Bosw.) 644, 647; *King v. Poole*, 30 Barb. 242.

2. *Bowne v. Mellor*, 6 Hill 496.

3. *Kennedy v. Redwine*, 59 Ga. 327.

4. *Blair v. Cummings*, 39 Cal. 667, 669. See section 740, *supra*; *Parker v. Betcher*, 87 Ga. 110 (13 S. E. R. 314; *Cumberland Coal and Iron Co. v. Hoffman Steam Coal Co.*, 39 Barb. 16 (15 Abb. Pr. 78, 81); *McMahon v. Mutual Life Ins. Co.*, 16 N. Y. Super.

5. *Ferrier v. Deutchman*, 111 Ind. 330 (12 N. E. R. 497); *accord*, that no judgment for costs can be rendered unless authorized by statute, is *Bunnell v. Ranney*, 2 Demarest 327, 330. 6. *Shaw v. Broadbent*, 129 N. Y. 114 (29 N. E. R. 238, 241), *citing* 2 Smith Ldg. Cas. 620–800.

docket of his indebtedness, and authorized the justice to enter judgment against him, which was done. It was held that he thereby waived a declaration, and second process and proofs, and estopped himself from claiming the judgment to be void for those defects.<sup>1</sup>

**GUARDIAN.**—A guardian who qualifies and obtains possession of the estate, is estopped to deny the validity of his appointment because he filed no petition.<sup>2</sup>

**INJUNCTION.**—So a person who procures an injunction, when sued on the bond, is estopped to say that it is void.<sup>3</sup>

**JUDGE.**—A judge who renders a void judgment is estopped, as a creditor of the defendant, to raise the question of its nullity.<sup>4</sup> This case seems to me to rest on sound public policy. It being the duty of the judge *not* to render a void judgment, to permit him personally to take advantage of it, would make his judicial acts subject to suspicion and animadversion.

§ 864. **Ratification.**—It was decided in Iowa that the successful use of a void judgment as a defense to an action on the original claim, estopped the party from subsequently claiming that it was void.<sup>5</sup> But precisely the contrary was held in New Hampshire. A judgment was rendered in Louisiana against both members of a firm after service on one only. The member not served was sued on the original cause of action in that state, and successfully used the judgment as a defense. He afterwards died, and an administrator was appointed for his estate in New Hampshire, who was sued upon this judgment, but it was held void.<sup>6</sup> That the Iowa case is sound and the New Hampshire case unsound, seems to me to be free from doubt. A divorce granted in Illinois to citizens of Massachusetts, through their collusion, is not void in New York at the suit of one who subsequently married the divorced wife.<sup>7</sup>

§ 865. **Replevin.**—One who causes a writ of replevin to issue from a court having no jurisdiction, and obtains property by giving a bond, is estopped to deny the validity of the proceeding when sued on the bond.<sup>8</sup> In the Pennsylvania case last cited,

1. *Bigalow v. Barre*, 30 Mich. 1, 3.

2. *Fox v. Minor*, 32 Cal. 111, 119.

3. *Robertson v. Smith*, 129 Ind. 422 (28 N. E. R. 857); *Stevenson v. Miller*, 2 Lit. 306, 310.

4. *Osborn v. Segras*, 29 La. Ann. 291, 294.

5. *District Township v. Independent District*, 69 Iowa 88 (28 N. W. R. 449).

6. *Wilbur v. Abbot*, 60 N. H. 40, 49.

7. *Kinnier v. Kinnier*, 53 Barb. 454.

8. *McDermott v. Isbell*, 4 Cal. 113; *Bates v. Williams*, 43 Ill. 494; *Fahnestock v. Gilham*, 77 Ill. 637; *Harbaugh*

the jurisdiction of the court was limited to cases where the sum in controversy did not exceed one hundred dollars. The plaintiff replevied a horse alleged to be worth sixty dollars. On the trial there was a verdict and judgment for defendant for a return, and two hundred dollars damages. This was held not even erroneous, on the ground that the plaintiff was estopped.

§ 866. **Set-off.**—Where a party erroneously induces a justice of the peace to allow a set-off in an action of tort, this will estop him from afterwards suing upon it.<sup>1</sup>

**STAY OF EXECUTION.**—The statute of Kentucky, in case of the death of the plaintiff pending the suit, authorized it to be revived in the name of the administrator, on motion, and provided that the order should be “served in the same manner as a summons” upon the defendant. In such a case, a revivor was had and judgment taken by default without any service of the order of revivor on defendant. The defendant “replevied” or stayed execution on the judgment, and after the stay expired and execution was issued, he procured the execution to be quashed on the ground that the judgment was void.<sup>2</sup> This case would seem to encourage sharp practice, and I do not think it sound.

§ 867. **Trustee.**—Where one is appointed trustee of a marriage settlement in a suit where all the parties interested have not been notified, and qualifies and gives bond, both he and his sureties are estopped to raise the question of the want of notice.<sup>3</sup>

**UNCONSTITUTIONAL LAW.**—Where the state prosecutes and convicts a person before a justice of the peace, this estops it from carrying on a new prosecution on the ground that the statute giving the justice jurisdiction was unconstitutional.<sup>4</sup>

**USURY.**—A person being sued by a national bank pleaded usury and had a reduction under the state law. The state usury law did not apply to such a case. He then sued the bank to recover the penalty provided by the act of congress, claiming that the judgment in his favor on the usury was void; but he was held to be estopped.<sup>5</sup>

v. Albertson, 102 Ind. 69 (1 N. E. R. 298); Fenton v. Harred, 17 Pa. St. 158.

1. M'Lean v. Hugarin, 13 Johns. 184.

2. Amyx v. Smith's Adm'r, 1 Met. (Ky.) 529.

3. Bassett v. Crafts, 129 Mass. 513; accord, People v. Norton, 9 N. Y. 176.

4. McGinnis v. State, 9 Humph. (28 Tenn.) 43 (49 Am. D. 697, 704).

5. Bolling v. Schuyler National Bank, 26 Neb. 281 (41 N. W. R. 990).

# INDEX.

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**Abandoned by Indians, adjudicated, is conclusive, § 534.**

**Abbreviations in entries, § 767.**

**Abettor of erroneous judicial proceeding, is not liable, § 854.**

**"Absconds from county" instead of from state, alleged, § 258.**

**"Abscond," "leave" used instead of, in capias affidavit, § 270.**

**Absence of defendant from state, false return of, § 477, pp. 481, 482.**

**in criminal case, record shows, § 494, p. 506.**

**when criminal case called, false recital of, § 473.**

**Absent heir, attorney for, not appointed, § 667.**

**Acceptance of service. See SERVICE, sub-titles, PERSON SERVED OR ACCEPTING SERVICE—PLACE OF SERVICE OR ACCEPTANCE OF SERVICE—UNAUTHORIZED PROCEEDINGS.**

**"Action," jurisdiction taken upon a misconstruction of this word, § 179.**

**Action on judgments. See PLEADING IN COLLATERAL ACTIONS.**

***Adjournments in inferior courts, loss of jurisdiction by, §§ 672-675.***

**Consent, by, § 672.**

**Indefinite, § 673.**

**Omitted, unlawfully, § 675.**

**Too long, § 674.**

**Unauthorized by law, § 675.**

**ADMINISTRATOR. See also GUARDIAN.**

**Annual settlements of, made at wrong time, § 172, p. 177.**

**Application of, to sell. See ADMINISTRATOR'S PETITION TO SELL, *infra*.**

**Appointment of. See ADMINISTRATOR, APPOINTMENT OF, *infra*.**

**Attachment proceedings, subjected to, by misconstruction of statute, § 130.**

**Bond of. See BOND IN SPECIAL PROCEEDINGS.**

**Capacity of, dual, or both plaintiff and defendant, § 598.**

**Court in which sued, wrong, § 592, p. 625.**

**Designated as "executor" in his letters, § 592, p. 624.**

**Equity, proceedings in, to sell land, § 837.**

**Final settlement of, errors and irregularities in, § 721, p. 775.**

**fraud in, § 551, p. 579.**

**Funds on hand, wrongfully ordered to pay into court, § 721, p. 777.**

**General letters instead of letters *d. b. n.* issued to successor, § 592, p. 624.**

**License of, to sell. See ADMINISTRATOR'S ORDER TO SELL LAND, *infra*.**

**Loan of money by, ordered upon a misconstruction of statute, § 159.**

**Mortgage by. See ADMINISTRATOR'S ORDER TO MORTGAGE LAND, *infra*.**

**Notices concerning, wanting. See SERVICE, sub-title, IN REM OR QUASI IN REM, *Notice wanting*.**



**ADMINISTRATOR—Continued.**

Oath of, informal. § 243, p. 229.

officer before whom taken, wrong, § 254.

omitted, § 251.

statutes concerning, affect how, §§ 796, 797.

Order to sell land. See **ADMINISTRATOR'S ORDER TO SELL LAND**, *infra*.

Other state court, proceeds with pending suit of decedent in, § 432, p. 439.

Petition to sell land. See **ADMINISTRATOR'S PETITION TO SELL**, *infra*.

Purchaser at his own sale, § 553.

Removal of. See **ADMINISTRATOR, REMOVAL OF**, *infra*.

Resignation of, accepted—acts of, afterwards, § 157, p. 165.

allowed by misconstruction of law, § 157.

Sale of land by. See **ADMINISTRATOR'S SALE OF LAND**, *infra*.

Settlements made at wrong time by misconstruction of law, § 172, p. 177.

Specific performance by compelled, when he had an option, § 169.

under mistake of law, § 160, p. 168.

Sued in wrong court, void, § 592, p. 625.

Testamentary trustee, treated as, by misconstruing statute, § 172, p. 177.

Unlawful, heirs cannot question collaterally, § 593, pp. 628, 629.

Widow's interest sold by her consent, under mistake of law, § 175.

**ADMINISTRATOR, APPOINTMENT OF.** See **GUARDIAN**.

Acceptance by administrator of letters *d. b. n.* with stranger, waives right to notice and removal, § 591, p. 622.

*Ad colligendum*, § 527, p. 543.

Assets, none, § 527.

in county, 573.

in state, § 573.

Clerk's vacation appointment, recognition of such appointee as administrator, is an implied confirmation, § 791.

Confirmation of clerk's appointment is made by recognizing his appointee as administrator, § 791.

Constitution violated by, § 76.

Debts, all barred, § 563.

Debts, none, § 527.

*De facto* officer, does an unlawful appointment or recognition of a person, make? § 588, p. 616, § 591.

Evidence of what, is, § 17, p. 24.

Examination upon which made, irregular, § 240.

Foreign, not reappointed in domestic court, § 589, p. 618.

Fraud in, § 551.

General illegality in, § 527, p. 540.

General, instead of administrator *d. b. n.*, § 721.

Husband and wife, jointly for, § 721.

Indian, exempt from jurisdiction, for, § 613.

Infant widow wrongly appointed, § 590, p. 620.

Joint, for husband and wife, § 721.

Letters of administration are evidence of what, § 17, p. 24.

Living person, for, §§ 608–610.

Necessity for, none, § 527, p. 541.

Next of kin, request from, wanting, § 589.

**ADMINISTRATOR, APPOINTMENT OF—Continued.**

- Non-resident decedent, made for, by misconstruction of statute, § 164.
- Notice of proceeding to appoint, wanting. See SERVICE, sub-title, IN REM OR QUASI IN REM.
- Object of, unlawful, § 156.
- Person improper, for soldier of the Republic of Texas, § 590, p. 619.
- Person, improper, such as alien, non-resident, stranger, etc., not void, § 590, pp. 618, 619, 620. *Contra* in Michigan, p. 620.
- Petition for appointment of administrator.*
  - Defective, § 278, p. 264.
  - Heirs, names and residence of, omits, § 589.
  - "Information and belief," made on, § 247.
  - Jurat, omitted from, § 253.
  - Names of heirs, omits, § 589.
  - Person making, improper, § 589.
  - Residence of heirs, omits, § 589.
- Predecessor not removed, is it void? § 593.
- "Principal creditors," not shown to be one of the, § 590, p. 620.
- Principle involved in this matter, § 588.
- Prior appointment existing, § 527, p. 541.
- Purpose of, unlawful, § 156.
- Questioned in another proceeding, is a collateral attack, § 3.
- Residence of decedent. See RESIDENCE, sub-title, DECEDENT OR WARD.
- Res judicata*, is, of what, § 17, p. 24.
- Retrospective statute, errors as to, in making an appointment, § 112.
- Settled estate, for, § 527, p. 542.
- Soldier of the republic of Texas, person improper, § 590, p. 619.
- Statutes as to sales made by, bar attacks upon appointment, § 793.
  - misconstrued, made by virtue of, § 156.
- Statute of limitations bars right to, § 563.
- Subject-matter is the rights of persons interested in the estate, § 588.
- Temporary, of, § 527, p. 542.
- Too soon, § 563, p. 593.
- Vermont, is conclusive collaterally, in, § 589.
- Wanting, is granting an order to sell conclusive of appointment? § 589.
- Widow, unlawful, selects person for, § 590, p. 619.
- Will existing, when, § 527, p. 543.

**ADMINISTRATOR'S ORDER TO MORTGAGE LAND.**

- Amount of money to be raised, not specified in, § 766.
- Petition to sell, mortgage ordered upon, § 721, p. 776.
- Sale only authorized by statute, mortgage ordered, § 170, p. 175.

**ADMINISTRATOR'S ORDER TO SELL LAND.**

- All, instead of sufficient to satisfy debts, § 721, p. 775.
- Amount, too great, § 721, p. 775.
- Conditional, as at public or private sale, or for cash or on credit, § 773.
- Costs, in order to pay, § 163.
- County where to be made, wrong, § 721, p. 776.
- Court making, implied power of, §§ 92, 166.
  - power of, impliedly transferred to another court, §§ 160, 509.
  - wrong one, § 162, p. 170, § 164.

**ADMINISTRATOR'S ORDER TO SELL LAND—Continued.**

- "Debt of decedent," claim to be paid not a, § 163.
- Debts, all barred when made, § 528.
  - none when made, § 528, p. 546.
- Departures from, confirmation cures, §§ 787-789.
- Description as "all the real estate of the decedent," or as the land
  - "bought of J. A. Davis," etc., § 775.
  - location of, wrong, § 528, p. 547.
  - omitted from petition, but included in order, § 752.
  - wrong in report of sale and deed, § 776, p. 834.
- Discretion granted administrator as to what land to sell, § 777.
- "Equitable division among the heirs," procured for, when there was but one legal heir, § 165.
- Escheated land sold by misconstruction of statute, § 160.
- "Estate lies," "Estate shall be," misconstruction of these words, § 164.
- Fraud in, § 552.
- Gross instead of separate sale ordered, § 721, p. 775.
- Heir, unborn child treated as, § 165.
- Homestead, sale made subject to, by misconstruction of statute, § 172.
- Implied power of court, §§ 92, 166.
- Implied transfer of power to another court, order afterward, §§ 160, 509.
- Inherent power of the court, §§ 92, 166.
- Interest, undivided, ordered to be sold, § 171.
- Irregularities in, do not avoid, § 660, p. 709, § 721, p. 775.
- Joint administrator not acting, §§ 167, 785, § 592, p. 624.
- Land to be sold, described by reference, § 775.
  - described wrong in report of sale, § 776, p. 834.
  - left to discretion of administrator, § 777.
  - mistake as to location of, § 528, p. 547.
  - omitted from petition, but included in order, § 752.
- Legacy, in order to pay, § 163.
- Married woman's land, wrongful, § 168.
- Mortgage ordered when statute authorized order to sell, § 170, p. 175.
- Necessity for sale not existing, § 529.
- New order made without new notice or petition, § 789.
- One administrator not acting, §§ 167, 592, p. 624, § 785.
- Part sold without prejudice, failure to determine, § 721, p. 775.
  - undivided, ordered to be sold, § 171.
- Power impliedly transferred to another court, §§ 160, 509.
- Prematurely made, not void, § 710.
- Principle involved in, § 275.
- Quantity, too much, ordered to be sold, § 721, p. 775.
- Reasons given for, outside of petition and unlawful, § 755.
- Second order made without new notice or petition, § 789.
- Statute authorizing, repealed by implication, § 160.
- Time of making order, confused, § 721, p. 776.
  - too late, § 172.
- Time sale to be made, omitted, § 721, p. 776.
  - wrong, §§ 172, 721, p. 776.
- Title, settled in, §§ 173, 530.

**ADMINISTRATOR'S ORDER TO SELL LAND—Continued.**

Too much ordered to be sold, § 721, p. 775.

Unborn child treated as an heir, § 165.

Undivided interest ordered to be sold, § 171.

Usurper, procured by, heirs cannot question, § 593, pp. 628, 629.

Widow, claim of, mistake of fact as to, in order, § 530.

consent of, to order, § 175.

quantity of her interest fixed in, § 176.

value of her interest given in land instead of money, § 177.

Will, sale ordered by misconstruction of, § 178.

**ADMINISTRATOR'S PETITION TO SELL LAND, §§ 275-288.**

Absence of, cured by statute, when, § 798.

Amendable, not void, § 256.

Amounts and values, gross and not itemized, in, § 276.

reference to inventory for, § 277, p. 263.

omitted from, § 277.

Attorney signs administrator's name to, § 252.

Attorney in fact, verifies, § 252.

Cause for sale, none shown in, § 275, p. 261.

unlawful, shown in, § 287.

Circumstances and condition of estate, not shown in, § 278.

Co-administrators not all joining in, §§ 167, 592, p. 624, § 785.

Creditors alone have the right to file petition, § 592, p. 624.

"Debts," inferentially shown to exist, § 278.

none shown to exist, § 278.

Defects, merely, do not affect, § 278, p. 264.

Descendible estate to heirs, not shown in, § 281.

Description of land, defective in, § 279.

reference to other papers for, in, § 280.

wanting in, but given in report, § 784.

Donation instead of sale shown in, § 280, p. 266.

Equity, filed in, erroneously, § 837.

Evidence instead of facts, set forth in, § 282.

Exhaustion of personalty, not shown in, § 282.

Exhibits and schedules, omitted from, § 283.

Heirs alone have the right to file the petition, § 592, p. 624.

Heirs, property of, not inherited, included in petition, § 612, pp. 648-651.

Informal or inaccurate, but amendable, § 256.

Joint administrators do not all unite in, §§ 167, 592, p. 624, § 785.

Law repealed, pending, § 109.

Limitations, claims barred by, § 284.

Material allegation, omitted from, § 285.

Mortgage ordered upon, § 721, p. 776.

and then changed to order to sell, § 721, p. 776.

Name of administrator signed to, by his attorney, § 252.

Necessity for sale not shown in, § 286.

Non-joinder in, of co-administrator, §§ 167, 592, p. 624, § 785.

Object in selling, shown to be unlawful, in, § 287.

Orphan, failure of petition to show owner to be an, § 285, p. 270.

Premature sale prayed for, § 288.

**ADMINISTRATOR'S PETITION TO SELL LAND—Continued.**

- Principle involved in this matter, §§ 275, 283.
- Purpose in selling, shown to be unlawful, in, § 287.
- Reference for description to other papers, in, § 280.
- Repeal of law authorizing, pending, § 109.
- Residence of heirs, not stated in, § 288, p. 274.
- Same or similar import as statute, allegations in, have, § 288, p. 274.
- Seisin of decedent, not shown in, § 281.
- Signature of administrator to petition written by his attorney, § 252.
- Statute authorizing, repealed, pending, § 109.
- Statute, cures absence of, § 798.
- Surplusage in, § 288, p. 274.
- Two petitions for, in record, construed together, § 285, p. 270.
- Verification of, attorney in fact, by, § 252.
  - officer before whom taken, wrong, § 254, p. 239.
  - wanting, § 251.
- Wanting, confirmation of sale does not cure, § 784.
  - statutes cure, § 798.
- Widow's consent to, defective, § 175.

**ADMINISTRATOR, REMOVAL OF.**

- Cause for, insufficient in law, § 593, p. 628.
- Funds ordered to be paid to *ad. d. b. n.* instead of creditors, § 611.
- Implied by appointment of successor, § 593.
- Presumption of reappointment, § 825, p. 886.
- Public administrator in New York removed without notice, § 592.
- Reappointment will be presumed, when, § 825, p. 886.
- Successor appointed without removal of incumbent, § 593.
- Surety insufficient, irregularity in removal for, § 593, p. 627.

**ADMINISTRATOR'S SALE OF LAND.**

- Appraisement omitted, § 664.
- Cash sale reported and confirmed, bars contradiction, § 788, p. 847.
- Confirmation of, what shows a, § 791.
- Court instead of administrator appoints appraisers, § 668, p. 719.
- Deed, informal, confirmation cures, § 785.
- Fraud in, § 553, p. 581.
- Lapse of time, presumptions after, § 822, p. 884. § 826, p. 887.
- Notice of, defective or wanting, § 706.
  - confirmation cures, §§ 783, 787.
- Omitted from petition but included in order, §§ 752, 784.
- Order to sell procured as guardian, and sale as administrator, § 160.
- Price too small, § 788, p. 847.
- Public ordered, reported and confirmed, but actually private, § 788, p. 847.
- Purchaser's name changed after sale and before report, § 788, p. 847.

**ADMINISTRATOR DE BONIS NON.**

- Appointment of,
  - administrator unlawfully removed, § 157.
  - court which did not appoint predecessor, by, § 592, p. 624.
  - petition for, not verified, § 251.
- Funds in hands of administrator wrongfully ordered paid to, § 611.
- Sales made by, validity of, when administrator unlawfully removed, § 157.

- Administrator with will annexed*, signs deed as "executor," § 660, p. 709.
- Admiralty court**, can it settle fact that goods were captured on water ? § 576.  
     proceedings, presumptions concerning, § 837.  
     property in custody of another court, seized in, § 399, p. 394.
- Adoption of child**, fraud in, § 558, p. 587.  
     notice to parents of, wanting, § 408.
- Adultery**, second conviction for same offense, § 83.
- Advisory officers to aid court**, action of, improper, § 662, p. 714.  
     failure to appoint, § 661.  
     improper persons, § 662.  
     number, wrong, § 663.
- Affidavit in attachment**, bankruptcy, *capias*, etc. See PETITION.  
     confession. See PETITION IN GENERAL CIVIL PROCEEDINGS.  
     criminal case. See CRIMINAL PLEADINGS.  
     instead of information, used, § 87.  
     jurat wanting to, § 253.  
     refused, contempt, adjudged to be, by misconstruction of statute, § 186.
- Affray**. See CRIMINAL PLEADINGS.
- Age of criminal**, sentence to wrong prison by mistake as to, § 594.  
     heir, inferentially shown, proceedings not void, § 596, p. 631.  
     judge, too young, § 48.  
     soldier, person too old for, is his conviction for desertion void ? § 595.  
     ward, final settlement before ward is of age, § 596.  
         guardian appointed for, under mistake as to, § 596.
- Agent**, colludes with adverse party, § 533.  
     foreign corporation, of, false return of service on, § 453.  
     instead of president, served, § 452.  
     return fails to show him to be a proper one, § 452, and p. 453.  
     return so showing, false in fact, § 452.
- Aider and abettor of erroneous judicial proceedings**, is not liable, § 854.
- Alabama supreme court**, inconsistent positions of, § 285.
- Alien enemy**, denied right to appear, § 386.  
     or friend detained by enemy, mistake of fact as to, § 597.
- Alien**, judgment naturalizing is conclusive as to facts, § 567.  
     juror acting, judgment not void, § 705.
- Alimony**. See DIVORCE PROCEEDINGS.
- Allegations**. See JURISDICTION—Material allegations.
- Allowance**, by boards, errors do not make void, § 722.  
     payment ordered, when power is to "allow," only, § 194.
- Alteration of record as to costs by justice**, and erasing alteration, § 660, p. 709.  
     unlawful, § 549.
- Alternative**, attachment affidavit in the, § 258.  
     judgments, § 723.  
         omitted in criminal case, § 760.  
         omitted in replevin, § 759.  
     prayer which court has no power to grant, § 248.
- Amendable petition**, gives jurisdiction, § 256.
- Amendment in criminal case**, after sentence and after term, § 699.  
     of process, § 375.  
     of record, after term has passed, § 698, pp. 751, 752.





**Attempt to provoke.** See **CRIMINAL PLEADINGS.**

**ATTORNEY AT LAW.**

Absent heirs, failure to appoint, for, § 667.

Appearance by, unauthorized, § 430. See also, **SERVICE**, sub-title, **UNAUTHORIZED PROCEEDINGS.**

wrongfully refused in contempt proceedings, § 187.

Colludes with adverse party, § 533.

Contemptuous language used by, in brief in supreme court, towards judge of trial court, conviction for, in trial court, § 192.

Disbarred upon a misconstruction of law. Judge not liable, § 192.

Estopped to contest with client, void judgment procured by him, § 862.

Forges entry in record, it protects him as long as it stands, § 549, p. 572.

Imprisoned defendant, failure to appoint, for, § 667.

Judge and attorney in same case, § 46.

Non-resident creditor, failure to appoint, for, § 667.

Unknown heir, failure to appoint, for, § 667.

Attorney in fact, service made upon, § 454.

*Audita querela*, writ of, is a direct attack, § 2.

Auditing public accounts by county court is not judicial action, § 800.

Averments. See **JURISDICTION**—Material allegations.

Award, errors do not avoid, § 724.

outside of issues, § 747.

Bail in criminal cases, is action concerning, judicial? § 800, p. 860.

for stay of execution, sued before issuing execution, § 238, p. 226.

Bail bond, statute dispenses with notice, judgment without, § 499, p. 510.

"Balance due," jurisdiction taken upon misconstruction of, § 91.

**BANKRUPTCY PROCEEDINGS.**

Composition decree, errors do not avoid, § 724.

fraud in, § 554.

notice of meeting for, insufficient, § 410, p. 408.

signature of bankrupt to, wanting, § 670, p. 721.

Corporation, unauthorized on behalf of, § 421, p. 422.

Discharge decree, cause of action destroyed by, subsequent judgment upon, is not void, § 580, p. 605.

errors in, do not avoid, § 724.

fraud in, does not avoid, § 554.

unlawful preferences, do not avoid, § 584.

*Jurisdiction taken in, by misconstruction of law*, §§ 134-141.

Amount of debts, as to, § 134.

"Change of circumstances," as to, § 135.

Copartners, § 136.

Estate of deceased partner, as to, § 137.

"Inability to endure," as to, § 138.

"Proper authority," as to, § 139.

Second application for discharge, as to, § 140.

Tort, as to, § 141.

*Jurisdiction taken in, by mistake of fact*, § 532.

Assets not disclosed in, § 532.

Creditor adjudged to be a debtor in, § 532.

Facts did not warrant adjudication in, § 532.

**BANKRUPTCY PROCEEDINGS—Continued.***Jurisdiction taken in, by mistake of fact—Continued.*

Petition in, false in fact, § 532.

Name of creditor fraudulently omitted from, § 410.

Notice wanting in, § 410.

Presumptions concerning, § 839.

Residence of petitioner in, § 635.

Unauthorized on behalf of corporation, § 421, p. 422.

Victualler adjudged bankrupt when statute applied to traders, § 597

**Bastard**, awarded a share of his father's land, § 612, p. 651.**BASTARDY PROCEEDINGS.**

Commitment ordered in absence of defendant, § 714.

Findings in, defective, § 702.

Fraud, consent of relatrix to judgment in, obtained by, § 423.

Official plaintiff in, wrong, § 627.

Order to imprison in, erroneous, § 732, p. 786.

Personal judgment in, on constructive service, § 389, p. 376.

**Benefits** assessed to land, notice of, wanting, § 706.**Bill in equity.** See PETITION IN GENERAL CIVIL PROCEEDINGS.**Bill of credit** issued in violation of constitution, judgment upon, § 70.**Billiard-table keeper.** See CRIMINAL PLEADINGS.**Blanks in criminal record**, effect of, § 660, p. 709.

entry, generally, § 771.

process, filled by improper person, § 349.

unfilled, § 373.

**Board of commissioners**, when action of, is judicial, § 801.

equalization of taxes, acts on its own information, § 697, p. 750.

**Bond**, foreclosure of, defective, confirmation cures, § 788, p. 847.

forfeiture of, in criminal case, adjudged to be a contempt, § 193.

replevin, in, refusal of defendant to give, conviction for, § 188.

sheriff's, decree approving under a misconstruction of statute, § 107.

void, judgment upon, § 236, p. 223.

**BOND IN SPECIAL PROCEEDINGS, §§ 292-297.***Administrator's bond to execute the trust.*

New bond given upon request without an order from court, § 670.

New bond taken under a mistake of fact, § 527, p. 544.

Surety, dead, § 527, p. 544.

insolvent, § 527, p. 544.

Time of execution, two days before appointment, § 249.

Wanting, § 292, p. 278.

*Administrator's sale bond.*

Debts, bond given to pay, sale made afterwards, § 160, p. 168.

Statutes concerning the absence of the bond, effect of, § 794.

Wanting, § 292.

**Approval**, officer making the, wrong, § 293.

wanting, § 293.

**Attachment bond**, conditions illegal, § 294.

defective, § 294.

dispensed with, by misconstruction of statute, § 131.

waived, may be, § 292.

**BOND IN SPECIAL PROCEEDINGS—Continued.**

Conditions, attachment bond, in, unlawful, § 294.

improper, § 294.

one, wanting, § 294.

person bound, wrong, § 294.

Constructive service, refunding bond, not given, § 292, p. 278.

Costs, bond for, omitted in special proceedings, § 239.

Guardian's bond, jurisdiction wrongfully taken of suit upon, § 109.

surety wanting, § 292, p. 278.

wanting, § 292, p. 278.

Guardian's sale of land, bond omitted, § 292.

bond omitted by misconstruction of law, § 161.

Injunction bond, omission of, § 292.

Obligee in, improper, § 295.

Partition, omission to take, from one getting larger share, § 758, p. 814.

Partition sale, bond in, omitted, § 292, p. 278.

Penalty of, insufficient, § 295, p. 280.

Principle involved in, § 292.

Sureties in, improper, § 296.

Unsealed, § 296.

Wanting, §§ 292, 297.

Book, record not entered in, § 688.

Bound over to a justice instead of to court, § 739, p. 795.

Breach of the peace. See CRIMINAL PLEADINGS.

"Breach of the peace," riot erroneously adjudged to be included in, § 201.

Built, adjudication that railway is not, is conclusive, § 534, p. 554.

Bumboat case, § 539.

"Bundles of cornstalks," conviction for taking as "a stack of corn," § 205.

Burglary. See CRIMINAL PLEADINGS.

Burglary, official liability for money lost by, canceled by mistake of law, § 107.

Canvassing election returns, city council enjoined from doing, § 515.

Capacity of party dual, administrator of adverse estates, same person is, § 598.

administrator of heir and ancestor, same person is, § 598.

Capacity of party misdescribed or not described, § 599.

**CAPIAS PROCEEDINGS.**

Malicious prosecution, issued in, by overlooking the statute, § 220.

Petition in. See PETITION IN CAPIAS PROCEEDINGS.

Process in, served by wrong person, § 447, p. 456.

Process wanting in, § 383.

Refusal of justice in, to hear evidence as to defendant's discharge, § 697.

Residence of defendant in, § 635.

"Care for and preserve," sale ordered upon misconstruction of, § 162.

Cause, re-instated without notice, § 498, p. 509.

Cause of action, dividing to sue before justice, effect of, § 581.

new one added to complaint after publication, § 355.

other state judgment, fraud in, § 558, p. 586.

process misdescribes, § 355.

*Certiorari*, writ of, is a direct attack, § 2.

Chain of title, judgment is admissible as proof of a link in, § 857, p. 922.

"Change of circumstances," discharge of poor debtor upon a, § 135.

- Change of venue, wrongfully made or refused. See **Venue, change of**.
- Character of person, jurisdiction taken under mistake, as to, §§ 597-699.
- Charge. See **JURISDICTION—Material allegations**.
- Cheat and defraud. See **CRIMINAL PLEADINGS**.
- Children, divorce on constructive service, how affects, § 391.
- Church rate, validity of, adjudicated by justices without authority, § 512, p. 51.
- City, garnished by mistaking public policy, § 215.  
overlooking the statute, § 215.
- City council, action of, is judicial, when, § 801, p. 862.
- City officer, injunction against removal of, § 515.  
mandamus issued against, by overlooking the statute, § 220.
- Civil case, imprisonment in, constitution violated, § 80.
- Civil cases, arrest in. See **CAPIAS PROCEEDINGS**.
- Civil instead of criminal procedure, §§ 95, 323.
- Civil proceedings, general, pleadings defective, in, §§ 226-236.  
statute misconstrued in, §§ 90-129.  
special, bond in. See **BOND IN SPECIAL PROCEEDINGS**.  
pleadings in. See **PETITION IN ATTACHMENT, ETC**.  
preliminaries in. See **PRELIMINARIES IN SPECIAL PROCEEDINGS**.
- Civil trial, refusal or neglect to hear evidence in, § 697, p. 748.
- Clerk in insolvency proceedings, prematurely appointed, § 239.  
instead of judge, acts, § 668.  
issues order for publication, § 344.  
or court, which one acting? § 767.  
*pro tempore*, appointed without authority in law, § 189.  
removal of, by unlawful order, § 189.
- Clerk's contumacious acts, held to be a contempt by mistake of law, § 189.  
entries for want of an answer, are judicial, § 802.  
judge absent, § 54.  
judicial acts in violation of the constitution, §§ 71, 77.  
unauthorized entries, § 549, p. 572.  
pleading in collateral action admits, § 549, p. 574.  
vacation entries, are they judicial? § 803.
- Codicil, probate of, is conclusive that it was a, § 585, p. 610.
- Cognovit. See **CONFESSION OF JUDGMENT**, sub-head, **Warrant**.
- Collateral attack, defined, § 3.  
illustrated, § 3.  
interlocutory order, bars a, § 17, p. 23.  
motion, ruling on, bars a, § 17, p. 26.  
*res judicata* distinguished from, § 17.  
rule in, § 17, p. 29.
- COLLUSION**. See **FRAUD**.
- Agent of corporation colludes with plaintiff, § 533.  
wife colludes with adversary, § 533.
- Attorney for defendant colludes with plaintiff, § 533.
- Divorce proceedings, in, §§ 434, 533.
- Garnishee colludes with plaintiff, § 533.
- Guardian colludes with adversary, § 533.
- Insolvency, assignor and assignee collude in, § 533.

**COLLUSION—Continued.**

- Public office, contestants for, collude, § 533.
- Service made on ex-mayor of city, by, § 434, p. 441
- Colorable allegations in capias proceedings, § 268.
  - special proceedings, § 256.
- Colorable authority for action, sufficient, § 1, p. 3.
- Colorable authority wanting, §§ 514-525.
  - charge in criminal case, § 304.
  - question, jurisdiction wrongfully exercised upon a, not void, § 1, p. 3.
- Colored person convicted in violation of the constitution, § 78.
- Commissioner instead of administrator, sells, § 709, p. 764.
- Commissioner acts judicially, in what cases, §§ 800, 801, p. 860.
- Commissioner, agent of, instead of himself makes sale, not void, § 662, p. 714.
  - assess damages, to, interested person, not void, § 662.
  - decendent's estate, of, allowance by, outside of state, § 662, p. 714.
  - ditches, of, five instead of three, not void, § 663, p. 716.
  - exercising judicial powers, conclusiveness of record, § 526, p. 538.
  - one alone acting, not void, § 663, p. 716.
  - time of report of, improper, not void, § 662, p. 715.
- Commissioners to investigate application to sell infant's land in Kentucky,
  - failure of report of, to cover statutory grounds, sale is void, § 662, p. 714.
- Commissioners to make guardian's sale, act without a commission, § 662, p. 714.
  - roads, time of report of, improper, § 662, p. 715.
- Common law, jurisdiction exercised in violation of, § 67.
  - jurisdiction taken upon a misconstruction of, §§ 89-212.
- Common proceedings. See Civil Proceedings, General.
- Common recovery, partial relief given in, § 757, p. 813.
- Community property, adjudication that land is, § 585, pp. 610, 611, § 612, p. 651.
- Complaint. See PETITION.
- Complaint on judgment. See PLEADING IN COLLATERAL ACTIONS.
- Completed, adjudication that ditch is, is conclusive, § 534, p. 554.
- Composition in bankruptcy. See BANKRUPTCY PROCEEDINGS.
- "Concealed" debtor, absent person sued as a, §§ 469, 470.
- Conclusive evidence disregarded, §§ 693, 694.
- CONDEMNATION PROCEEDINGS, §§ 142, 143; 272-274.**
  - Errors in, do not avoid, § 724.
  - Highway.*
    - Assessment for a, when *locus* not in fact a, § 559.
    - Conditions in order establishing, illegal, § 723, p. 778.
    - Consent to laying out, can court so adjudicate? § 63, p. 89.
    - Description of route of, defective, § 272.
      - by reference, § 273.
    - High-water mark, wrongfully laid out below, § 740.
    - Householders, signers of petition for, not shown to be, § 272, p. 259.
    - Location of, record conclusive that place is proper, § 575.
    - Material allegations omitted from petition for, § 272, p. 259, § 274.
    - Name of road corporation, omitted from petition, § 272, p. 259.
    - Outside of petition, order establishing, is, § 751.
    - Partition proceedings, highway laid across land in, § 733, p. 787.
    - Prematurely established, § 712.

**CONDEMNATION PROCEEDINGS—Continued.***Highway—Continued.*

Presumptions as to proceedings for, before inferior courts, § 809.

Public cannot reach it, § 726.

Railway, laid upon, by misconstruction of statute, § 142.

Reference to other papers for description, § 273.

Unreasonable refusal of town to allow, judgment upon, § 58.

Vacated without notice, § 497.

Wider than petitioned for, § 740.

Width of, entry does not give, § 778, p. 837.

established by overlooking the statute, § 217.

Notice wanting, § 411.

Presumptions concerning, § 839.

Prize condemned by overlooking the statute, § 221.

*Railroad.*

Description of route of, by reference, § 273.

Land condemned for, by mistake of law, § 142.

Map alleged to be filed in, § 565.

Place where located, is record conclusive as to, § 577.

"Refused to relinquish right of way," omitted from petition, § 273.

Statute, wrong one applied, § 221.

Street removed by railroad, § 143.

**CONDITION OF PROPERTY, MISTAKE OF FACT AS TO.**

Abandoned by Indians, as to, § 534.

Building a railroad, as to, § 534, p. 554.

Deserted premises, as to, § 534, p. 554.

Ditch completed, as to, § 534, p. 554.

Foreign or domestic vessel, as to, § 534, p. 554.

Occupied premises, as to, § 534, p. 554.

Platted land, as to, § 535.

Possession of premises, as to, § 535.

Public benefit, as to, § 535.

Public or private property, as to, § 535.

Conditional judgments, § 723.

**CONFESSION OF JUDGMENT.**

Amount of penalty instead of amount of bond, for, § 694.

Consent of creditor, wanting to, § 425, p. 429.

Corporation officer gives, without authority in law, § 428.

Due, claim not yet, § 228, p. 216.

Exceeds highest limit allowed by law, is void, § 739.

False recital of, in justice's record, § 471.

Informal entries of, by justices, § 762.

Pending suit, offers to make in, irregular, § 669.

Place where made, other than court room, § 27.

Prematurely entered, § 228, p. 216.

Statute under which done, impliedly repealed, § 502, p. 514.

Superior court, presumptions concerning, § 839.

Unauthorized by creditor, § 422, p. 424.

Vacation in, claim not due, § 566.

Warrant for, attorney of defendant signs, § 252, p. 238.

**CONFESSION OF JUDGMENT—Continued.**

- Warrant for bond not referred to in, § 226, p. 214.
  - joint debtor signs names of others, § 252.
  - jurat to, defective, § 253.
  - name of defendant signed by alleged attorney, § 252, p. 238.
  - other state, in, fraudulently obtained, § 558, p. 588.
  - proof of execution of, not made before clerk, § 697, p. 749.
  - proof that it was explained to maker, omitted, § 697, p. 749.
  - see SERVICE, sub-title, UNAUTHORIZED PROCEEDINGS.
- Witnessed, informally, § 762, p. 818.

**CONFIRMATION DECREE, §§ 782–791.**

- Errors made after final judgment, effect of, upon, §§ 785–789.
- Errors made in or before final judgment, effect of, upon, §§ 782–784.
- General irregularities are cured by, § 782.
- How shown, § 791.
- Necessity of, § 790.
- Prematurely made, § 710.
- What makes, § 791.

**CONFISCATION PROCEEDINGS. See also FORFEITURE.**

- Corporate property, § 144.
- "Forfeit his vessel," § 145.
- Married women, defective against, § 274.
- Presumptions concerning, § 839.
- Sentence, conclusive of consent to illegal use, § 600, p. 635.
- Statute repealed by constitution, judgment under, § 74.
- Statute repealed by treaty of peace, judgment afterwards, § 503.

**Conflict of jurisdiction, contempts concerning, § 193.****CONSENT DECREES AND JUDGMENTS.**

- Conclusive as to cause of action, collaterally, § 600, p. 635.
- Duress, cannot be shown that consent was obtained by, § 544.
- Irregularities in, do not make void, § 670.
- Jurisdiction taken in, upon a misconstruction of consent, § 91.
- Mortgagees enter, when demurrer of mortgagor pending, § 670, p. 721.
- Outside of issues, § 746.
- Partition decree in, in form unknown to law, § 670, 721.

**CONSENT OF PERSONS. See SERVICE, sub-title, UNAUTHORIZED PROCEEDINGS, AS TO DEFENDANT.**

- Father to enlistment of son, forged, conviction of son as soldier, § 600.
- Husband for wife to make a will, probate of, is conclusive, § 600.
- Plaintiff to begin suit, wanting. See SERVICE, sub-title, UNAUTHORIZED PROCEEDINGS, AS TO PLAINTIFF.

**CONSENT TO PROCEDURE.**

- Adjournments in inferior courts, by, § 672.
- Justice's judgment delayed by, § 676, p. 727.
- Misinterpreted by justice, § 670, p. 721.
- "Consideration of claim," insolvency petition fails to state, § 265, p. 251.
- Consideration of claim, wanting, judgment upon it, § 536.
- Constable. See SERVICE, sub-title, PERSON MAKING SERVICE.
- Constable appointed because of refusal of one elected to serve, § 536.



- Contradiction of domestic record as to service.** See **SERVICE**, sub-title, **PROOF OF SERVICE**.
- Contradiction of domestic record as to subject-matter,** §§ 526-586.
- Contradiction of foreign record, as to subject-matter,** § 389, p. 376.
- Contributor to corporation, statute dispenses with notice to,** § 499, p. 510.
- Contumacy, clerk dismissed for, when not guilty,** § 538, p. 558.  
constable wrongly adjudged to be in contempt for, § 189.
- Copartners, discharged in insolvency, by misconstruction of law,** § 136.
- Copy of charges not served on defendant in court-martial,** § 660, p. 709.  
complaint or process. See **SERVICE**, sub-title, **MODE OF SERVICE**.  
process served, false, but return shows that true one was given, § 472.
- Corporation, bankruptcy suit begun for, without authority,** § 421, p. 422.  
confiscation of property of, by misconstruction of statute, § 144  
contributor, statute dispenses with notice to, § 499, p. 518  
defunct before suit brought, § 604.  
libel of, held to be a crime by misconstruction of law, § 208.  
name of, process gives, wrong, § 357.  
officer, injunction issued against, by mistake of law, § 149.  
plaintiff in the writ, § 461.  
served outside of state, 467.  
wrong one, §§ 452, 455.  
organized, impliedly adjudicated, is it conclusive? § 601.
- "Corporators," jurisdiction taken by misconstruction of this word,** § 136.
- Cost bond, omitted in special proceedings,** § 239.  
statute dispenses with notice to signers of, § 499, p. 510.
- COSTS, TAXATION OF.**  
Errors in, not void, § 724.  
Estoppel exists against plaintiff who makes costs, to contest, § 862.  
Exceed possible limit allowed, not void, § 740.  
Informal entry of, §§ 763, 768.  
Judicial action, is, § 800, p. 860.  
Justice fails to enter itemized bill of, § 687.  
Person in favor of, wrong, § 730.
- "Costs and expenses," judgment upon misconstruction of these words,** § 194.
- "Counsel fees," adjudged to be "cost and expenses,"** § 194.
- County.** See **RESIDENCE**.
- County, justice's record fails to show service in,** § 463.  
trial in wrong, constitution violated, § 79.  
warrants, proceedings to cancel, presumptions concerning, § 839.
- COURT, OR JUDICIAL TRIBUNAL.**  
Abolished by implication, acts afterwards, § 504.  
Constitutional infirmities in its organization, collateral effect of, §§ 18-25.  
*De facto*, organized contrary to constitution, is it a? § 20-21.  
Duty of, same without regard to grade, § 1, p. 2.  
to discourage collateral attacks, § 1, p. 3.  
to use its power, § 1, p. 2.  
Implied transfer of jurisdiction of, to another court, § 502, p. 514, § 509.  
Officers present, adjudicated to be rightful in each case, § 1, p. 2.  
Organization of, adjudicated in each case, § 1, p. 2.  
Other state, of. See **OTHER STATE**.

**COURT, OR JUDICIAL TRIBUNAL—Continued.**

- Payment ordered when the only power is to "allow," § 194
- Place where held, unlawful*, §§ 27, 28.
  - Adjudicated to be rightful in each proceeding, § 1, p. 2.
  - Confession taken by justice outside of office, §§ 27, 28.
  - Contradicted, record cannot be, as to, § 574.
  - County seat, unlawful, § 27.
  - Justice sitting outside of his township, §§ 27, 28.
  - Prize court held in neutral territory, void, § 27.
- Power of, same in all, collaterally, § 1, p. 2, § 16.
- Statute authorizing its existence not yet in force, void, § 29.
- Statute authorizing its existence, repealed, acts void, § 29.
- Statutory and common-law infirmities in its organization, §§ 26, 57.
- Time when held, unlawful*, §§ 30–33.
  - Adjourned too long, § 32.
  - Adjudicated to be rightful in each proceeding, § 1, p. 2.
  - Commencement of term, irregular, § 32.
  - Holiday, on, void, § 33.
  - Irregular term, § 32.
  - Notice for special term, too short, § 31.
  - Presumptions as to, § 30.
  - Principle involved, § 30.
  - Sunday, on, void, § 33.
  - Vacation, consent of parties, § 32.
  - Vacation, conviction in, void, § 32.
- Which one has jurisdiction, §§ 93, 162, p. 170.
- Wrong one acts.*
  - By reason of a misconstruction of the statute, § 93.
  - Exemption proceedings taken in, § 222.
  - Motion made in, § 222.
  - Sheriff, motion against, in, § 222.
  - Warrant returnable in, § 220, p. 211.
- "Court having jurisdiction" in statute, how construed, § 795.
- "Court of competent jurisdiction" in statute, how construed, § 795.
- Court-martial, mode of organization of, conclusiveness of its record, § 564, p. 594.
  - time of issuing order constituting, unlawful, § 31.
- Creditor's bill to enforce judgment, usury in original cause, § 584, p. 609.
- Creditors, frauds concerning, § 554.
  - of poor debtor, service not made on all, § 456.

**CRIMINAL MATTERS.**

- Affidavit in. See CRIMINAL PLEADINGS, *infra*.
- Constitution violated by statute creating the offense, § 78.
- Errors in, do not avoid, § 725.
- Ex post facto* law, conviction under, § 74.
- Indictment. See CRIMINAL PLEADINGS, *infra*.
- Information. See CRIMINAL PLEADINGS, *infra*.
- Jurisdiction taken in, by misconstruction of law*, §§ 93, 200–212, 519.
  - Breach of the peace, riot erroneously held to be a, § 201.
  - "Bundles of cornstalks" held to be a "stack of corn," § 205.
  - Construction of statutes, a question for trial court, § 200, p. 199.

**CRIMINAL MATTERS—Continued.***Jurisdiction taken in, by misconstruction of law—Continued.*

Corporation, libel of, held to be a crime, § 208.

Digging and carrying away potatoes, held to be larceny, § 206.

Diluting milk, justice tries charge of, by mistake of law, § 200, p. 199.

"Document," construction of this word, § 202.

Forgery of "document," latter word construed, § 202.

engrossed bill, statute misapplied as to, § 203.

Grand larceny held to be petit, § 207.

Implied repeal of law creating, conviction afterwards, § 506.

transfer of jurisdiction over, to another court, § 505.

Larceny, grand held to be petit, § 207.

Libeling corporation, held to be a crime, § 208.

Limitations, statute of, held to be in abeyance, § 209.

Malicious mischief, act erroneously held to be, § 210.

Perjury, conviction of, for making affidavit not provided for by law, § 210.

Pleadings in. See **CRIMINAL PLEADINGS**, *infra*.

Potatoes in the ground held to be objects of larceny, § 206.

Principle involved in this matter, § 200.

Procedure in. See **CRIMINAL PROCEDURE**, *infra*.

Prospective statute misapplied to present transaction, § 203.

Unauthorized by state, § 423.

Vagrant, statute misapplied to a person as a, § 211.

**CRIMINAL PLEADINGS. See §§ 301-321.**

Affidavit, error in construing, § 722.

Affray, failure to charge that both parties fought, § 305.

Assault and battery, general charge of, § 305.

material allegation omitted from, § 305, p. 289.

Attempt to provoke, presence of person to be insulted, not shown, § 306.

Billiard-table keeper, charge of, inferential, § 305, p. 289.

Breach of the peace, attempt to provoke, charge of, defective, § 306.

Burglary, "in the night time," omitted from charge of, § 307.

Cheat and defraud, charge of, defective, § 307, p. 290.

Civil cause of action, charge only states facts sufficient to show, § 304.

Disorderly person, charge of, general, § 308.

Disturbing public meeting, charge of, defective, § 308.

Duplicity in indictment, § 301.

"Facts and circumstances" constituting offense, not given, § 309.

False pretenses, what they were, not alleged, § 310.

"Feloniously," omitted from charge of felony, § 311.

Fornication, omission to state that woman was unmarried, § 310.

"Has a legal tendency to prove each requirement of the statute," § 304.

Inferential allegations, sufficient in, § 305, p. 289.

"Information and belief," charge made upon, § 301.

"Intimates the facts necessary to constitute the offense, and a purpose to declare thereon," charge does, § 304.

Intoxication, charge of, defective, § 310.

Larceny, estoppel against state, charge of, when sufficient to create, § 311.

felonious taking not shown, § 311.

loan shown by charge, § 312.

**CRIMINAL PLEADINGS—Continued.**

- Larceny, possession of defendant, not shown, § 313.
  - property, thing taken not shown to be, § 313.
  - taking not shown by charge, § 312.
- Limitations, charge shows crime barred by, § 314.
- "Makes, some approach toward charging a criminal offense," § 304.
- Malicious mischief, charge of, defective, § 315.
- Name of defendant, fictitious in, § 301, p. 285.
- Name of owner or person injured, omitted from, § 316.
- Non-repair of highway, charge of, defective, § 316.
- "No offense against the law shown," in, § 304.
- Obstructing highway, charge of, defective, § 316.
- Place or venue, defectively stated in, or omitted from, § 317.
- Principle involved in criminal pleading, § 304.
- Profane swearing, charge of, defective, § 318.
- Runaway slave, charge of aiding, defective, § 318.
- "Sufficient to call upon the court to act," is good, § 304.
- "Sufficient to set the judicial mind in motion," is good, § 304.
- Sunday labor, charge of, insufficient, § 319.
- "Tends to show a criminal offense," is good, § 304.
- Time, defectively stated in, or omitted from, § 320.
- Time, future and impossible, charged, § 320, p. 296.
- Transcript on change of venue, seal omitted from, § 302.
  - wanting, § 302.
- Trespass, defective charge of, § 321.
- Uncertainty as to kind of offense, § 305.
- "Unlawfully," omitted from charge of misdemeanor, § 321.
- Value, omitted from charge, § 321, p. 297.
- Verification, defective in, § 303.
- Verification, person making, improper, § 303.
- Verification, wanting in, § 303.

**CRIMINAL PROCEDURE.**

- Affidavit construed erroneously as to charge made, § 722.
- Age of criminal, sentence to wrong prison by mistake as to, § 594.
- Amendment of indictment by court, § 87, p. 119.
- Civil procedure instead of criminal, § 95.
- Constitution violated by the exercise of criminal jurisdiction, § 79.
- Entry informal, §§ 763, 768.
- Evidence of defendant, justice refuses to hear, § 697, p. 748.
- Examination, preliminary, binding over to wrong court, § 739, 795.
  - witnesses neglect to sign, § 298.
- Fictitious indictment, § 299.
- Fraudulent acquittal of defendant, § 555.
- Fraudulently conducted on behalf of state, § 423.
- Grand jury, illegally impaneled, § 299.
  - impaneled by wrong judge, § 299.
  - number of, wrong, § 299.
  - power to impanel wanting, § 204.
  - talesmen selected irregularly, § 300.
- Information used instead of indictment, § 87, p. 119.

**CRIMINAL PROCEDURE—Continued.**

- Injunction issued against, by overlooking the law, § 218.
- Jury incomplete or illegal, or waived unlawfully, § 705.
- Limitations, bar interposed by statute of, disregarded, § 209.
- Mistakes of fact, or conviction when not guilty*, § 539.
  - Bumboat case, § 539.
  - Charge, false in fact, § 539.
  - Felony adjudged to be a misdemeanor, § 539, p. 561.
  - Identity of crimes, § 539, p. 560.
  - Larceny, conviction for, when not guilty, § 539, p. 561.
  - Simony, conviction for, when not guilty, § 539, p. 561.
- Place where crime committed, does jurisdiction depend upon? § 572.
  - outside of state, § 523.
- Premature conviction in, § 711.
- Process wanting in, § 383.
- Punishment, alternative, omitted, § 760.
  - innocent person, of, § 539.
  - limitation bars prosecution, § 209.
  - prison in which carried out, wrong, § 594.
  - too light, § 761.
  - writ issued to enforce, wrong, § 738, p. 791.
- Residence of defendant, § 636.
- Reversal, sentence on original verdict, § 718, p. 773.
- Second indictment for same offense, § 83, p. 112.
- Sentence, alternative, omitted, § 760.
- Sentence too light, § 761.
- Verdict defective, § 718, p. 772.
  - directed, § 718, p. 772.
- Writ, wrong one issued to carry sentence into effect, § 738, p. 791.
- Writing, complaint before justice not in, § 212.
- Cross-bill in equity to case at law in same court, service wanting, § 495, p. 507.
- Cross-complaint, service upon, wanting, § 495.
- Cumulative sentences, are they void? § 742, p. 798.
- Curator. See also ADMINISTRATOR—GUARDIAN.
  - oath of office, omitted by, not void, § 592, p. 624.
  - report of sale, by, time of, improper, § 662, p. 715.
- Custom of London, notice not necessary under, § 400, p. 397.
- Damages, assessed by justice upon wrong principle, § 724.
- Date of process, irregular, § 350.
- DATES AND TIME, CONTRADICTING RECORD, AS TO, §§ 540-542.**
  - Day wrong*, § 540.
    - Alteration of record as to date, § 540.
    - Confession, record wrong as to day, § 540.
    - Conviction, dated back, § 540.
    - Justice's record, dated back, § 540.
    - Probate order, dated forward, § 540.
    - Stay bond, dated back, § 540.
  - Hour wrong*, § 541.
    - Default set aside, § 543.
    - Justice's record, dated back, § 541.

**DATES AND TIME, ETC.—Continued.***Hour wrong—Continued.*

Justice's record, dated forward, § 541.

Poor debtors' proceedings, contradicting record as to hour, § 541.

*Term or vacation, § 542.*

Clerk nor judge cannot contradict record, as to, § 542.

Parol evidence inadmissible to contradict record, as to, § 542.

**Dative tutor.** See TUTOR.**Day, wrong in record.** See DATES AND TIME.**Dead person proceeded against as living, principle involved, § 602.****DEATH OF.**

Defendant before service by publication is complete, § 604.

Defendant pending suit for damages, § 606.

land, heirs not made parties, § 605.

Lunatic after committee appointed but before petition to sell, § 605.

Mortgagor after sale but before confirmation, not void, § 605.

Party before suit brought, not void, § 603.

void, § 604.

Plaintiff pending suit, § 607.

Wrongfully assumed, or administrator for living person, § 608-610.

**Debatable question, jurisdiction wrongfully exercised upon a, not void, § 1, p. 3.****Debt or fraud, jurisdiction taken by mistaking a debt for fraud, § 147.****DEBTS.**

Administrator appointed, when no, § 527.

sale by, when no, § 528.

Amount of, protection granted insolvent, by mistake as to, § 134.

Contempt, conviction for, by misconstruction of word "debts," § 194, p. 194.

Inability to pay, poor debtor's petition fails to show, § 278, p. 264.

Inferentially shown in administrator's petition to sell, § 278.

Jurisdiction taken upon misconstruction of word "debt," § 94.

Probate mortgage ordered upon misconstruction of word "debts," § 163.

sale ordered upon misconstruction of word "debts," §§ 163, 168.

**Deceased partner, bankruptcy suit against estate of, § 137.****Declaration.** See PETITION.**Declaration on judgment.** See PLEADING IN COLLATERAL ACTIONS.**Decoyed into state, service made upon, § 435, p. 443.****Decree, final.** See RELIEF.

interlocutory. See INTERLOCUTORY DECREE.

**Deed, probated as a will, § 236, p. 224.****DE FACTO.**County seat, place of holding court, makes a *de facto*, § 27.

Court, can there be a? §§ 20, 21, 41.

place where held, unlawful, is, § 27.

time when held, unlawful, §§ 30, 31.

Officer, service made by, § 447.

Possession of another state, § 522.

**DE FACTO PROCEEDINGS.***Judge or justice de facto*, acts of, are valid, § 37.

personally responsible for errors, § 854.

**DE FACTO PROCEEDINGS—Continued.***What constitutes a de facto judge or justice.*

Appointed by wrong body or person, §§ 22, 23, 35.  
     in unconstitutional manner, is, §§ 22, 23.  
     under unconstitutional statute, is, §§ 22, 23.

Color of title not necessary, §§ 37, 38.

Constitutional disqualifications do not prevent, §§ 22, 23, 24.

Disqualified by another office, § 38.

Elected by wrong electors, § 38.

Holding over, by judge of another district, is, § 40.  
     simply, makes, § 40.

Name the same, qualifying and acting, is, § 40.

Old and new, both acting, § 40.

Place where sitting wrong—justices outside his township, § 27.

Principle involved, §§ 37, 39.

Residence, wrong under constitution, § 25.  
     statute, § 38.

Special, consent to his acting, does not make, § 41.  
     holding over, § 38.  
     unlawfully holding special term, is not, § 41.

Statute authorizing appointment, void, § 38.

Vacancy, appointed to fill, when none exists, §§ 38, 41.

Default, omitted or wrongfully taken, judgment not void, § 671.  
     set aside before justice, contradicting as to time of, § 543.  
     for want of appearance, cannot contradict record, as to, § 543.

Defendant and plaintiff, same person is, § 598.

Defendant, death of, before suit brought, § 604.  
     pending suit, §§ 605, 606.

Defendant, process misnames. See PROCESS, sub-head, Name of defendant.

Defendants, matters between, outside of issues, adjudicated, § 749.

Defense made, record cannot be contradicted as to fact of, § 543.

*De hors* record, evidence which is, used to contradict, is collateral, § 3.

Delay. See DISCONTINUANCE.

Delivery bond, statute dispenses with notice, judgment without, § 499, p. 511.

Demurrer to evidence, non-joinder in, § 660, p. 710.

Deputation of officer to serve process, left blank, § 349, p. 333.

Deputy, appointment of, irregular, § 449, p. 458.  
     clerk, illegal, enrolls records, § 709.  
     making service, when law authorizes none, § 449.  
     makes return in his own name, § 449.  
     none in fact, § 448.

Description, highway route, of, defective, § 272.  
     width of, omitted, § 778, p. 837.

Description of land in administrator's petition to sell, omitted, but given in report of sale, confirmation cures, § 784.

**DESCRIPTION OF LAND IN ENTRY.** See also MISDESCRIPTION.

Discretion of officer selling, left to, § 777.

Extrinsic evidence to aid, when admissible, § 776.

Foreclosure, wrong in, § 752.

"Half," given as a, § 778.



**DESCRIPTION OF LAND IN ENTRY—Continued.**

Meaning obvious, although indefinite, § 776, p. 834.

Omitted entirely, § 778.

"Part" given as a, § 778.

Partition proceedings, defective in, § 776.

Reference to map, paper, plat or survey for, §§ 273, 774, 280.

person named as owner, for, § 775.

Deserted, adjudication that premises are, is conclusive, § 534, p. 554.

"Designated person," service for infant not made upon, § 457.

"Digging potatoes," larceny, wrongfully adjudged to be, § 206.

**DIRECT ATTACK.**

Appeal, is, § 2.

*Audita querela*, writ of, is, § 2.

*Certiorari*, writ of, is, § 2.

Defined and illustrated, § 2.

Error, writ of, is, § 2.

Modify, motion to, when is, § 2.

New trial, motion for, is, § 2.

Prohibition, writ of, is, § 2.

Rehearing, petition for, is, § 2.

Review, bill of, when is, § 2, and note 2

Vacate, motion to, when is, § 2.

Venire *de novo*, motion for, is, § 2.

Disability of married woman removed, § 622.

Discharge. See **BANKRUPTCY—INSOLVENCY—POOR DEBTORS.**

**DISCONTINUANCE IN INFERIOR COURTS, §§ 672-680.**

Adjournment by consent, § 672.

indefinite, § 673.

too long, § 674.

omitted or unauthorized, § 675.

Judgment delayed, § 676.

Justice absent, § 677.

Plaintiff absent, § 678.

tardy, § 679.

Process delayed, § 680.

Viewers absent, § 680.

**DISCONTINUANCE IN SUPERIOR COURTS, §§ 681-685.**

Delay in criminal case, § 681.

filing pleadings, § 682.

publication, 683.

rendering judgment, § 682.

revivor, § 683, p. 733.

Irregular revivor, § 683, p. 733.

Removal to another court, § 684.

from state to United States court, § 685.

Dismissal and reinstatement, notice of, wanting, § 707.

Dismissal of appeal, is judicial action, § 800, p. 860.

entry of, informal, § 768, p. 825.

merits, on the, record cannot be contradicted as to, § 543.

Disorderly persons. See **CRIMINAL PLEADINGS.**

- Disqualification of judge. See JUDGE DISQUALIFIED.
- Dissolution of corporation, decree of, in private suit, § 94.
- Distress warrant, garnishment based on, by misconstruction of statute, § 132.
- Distributees, errors concerning, §§ 611-612.
- Distribution of funds, merits of judgments cannot be inquired into, § 543-  
made on constructive service, § 389, pp. 375-376.  
to wrong persons, §§ 611-612.
- District, bankruptcy record shows service made outside of, § 463.
- Disturbing public meeting. See CRIMINAL PLEADINGS.
- Ditch assessment against township, cannot be questioned in mandamus, § 543-  
errors in, do not avoid, § 724, p. 779.  
prematurely made, § 712.
- Ditch constructed upon railway by misconstruction of statute, § 142.  
established within a city, by overlooking the statute, § 216.
- Dividing cause of action in order to sue before justice, § 581.
- Division of damages between landlord and tenant, § 543.
- DIVORCE PROCEEDINGS.** See also SERVICE, sub-title, UNAUTHORIZED PROCEEDINGS, AS TO DEFENDANT.
- Alimony granted eighteen years afterwards, § 698.  
in gross, instead of in payments, § 733.  
in lieu of dower by misconstruction of statute, § 94.
- Causes for, occurring in another state, § 521.
- Collusive and fraudulent, §§ 434, 533. § 550, p. 576.
- Constitution violated in, § 80.
- Constructive service, granted upon, § 389, pp. 374, 375. §§ 390, 391.
- Defendant's admissions, granted upon, § 695.
- Duress prevents appearance in, § 434, p. 442.
- Excessive relief granted wife in, § 733.
- Foreign, effect of, § 851.
- Fraud in, §§ 434, 533. § 550, p. 576.
- Other state, errors of fact in, do not make void, § 544.
- Outside of issues, relief granted, void, § 749, p. 805.
- Personal service out of state, granted on, by a mistake of law, 115.
- Petition in. See PETITION IN GENERAL CIVIL PROCEEDINGS.
- Plaintiff's testimony, granted upon, § 695.
- Presumptions concerning, § 840.
- Property instead of money granted wife in, § 733.
- Residence. See RESIDENCE IN DIVORCE PROCEEDINGS.
- Resident, against, upon constructive service, § 397.
- Res judicata*, when not, § 17, p. 20.
- Statute construed in Wisconsin in, § 89.
- Testimony of complainant or confession of defendant, granted upon, § 695.
- DOCKET OR RECORD, IRREGULAR, §§ 686-692.**
- Appearance of plaintiff before justice, hour of, not shown in, § 686.
- Continuances, failure to enter in, § 687.
- Costs, itemized bill of, not entered in, § 687.
- Deposit of docket with town clerk, failure to do, § 687.
- Indexing, omitted from, § 687.
- Kind of record used, wrong, § 692.
- Paper instead of docket, used, § 688.

**DOCKET OR RECORD, IRREGULAR—Continued.**

*Placita* omitted from record, § 689.

Pleadings omitted from record, § 689.

Process omitted from record, § 689.

Seal omitted after signature to record, § 689.

Signature of judge or justice, omitted from record, § 690.

Verdict omitted from record, § 691.

Wanting entirely, § 692.

Wrong record or wrong kind used, § 692.

"Document," criminal jurisdiction taken upon misconstruction of, § 202.

"Dollars," attachment affidavit, omitted from, § 260.

entry of, cannot be shown to be depreciated dollars, § 773, p. 830.

Domestic record, service in. See SERVICE.

subject-matter in, contradiction as to, §§ 526–586.

Domicile. See RESIDENCE.

Domicile, change of, attachment affidavit fails to state an intent to, § 261.

Donation, highway established upon condition that it be made, § 723, p. 778.

ward's land, donation of, instead of sale, § 280, p. 266.

**DOWER.**

Alimony given in lieu of, by a misconstruction of the statute, § 94.

Assigned without notice, § 415, p. 417.

Description of land assigned as, omitted from petition, § 752.

Disregarded in probate proceedings, is decree void? § 659.

Divorce in other state, how affects dower, § 391.

Fee ordered to be sold subject to, § 733.

Partition of reversion after, made by misconstruction of statute, § 154.

Reversion decreed to eldest son during, by mistake of law, § 154.

Unassigned, partition sale made of remainder, by mistake of law, § 152.

Drain. See Ditch.

Dredge boat, attachment issued against, by misconstruction of statute, § 133.

Drunk, confession of judgment by person who is, § 434, p. 442.

Drunkenness, conviction for, in violation of the constitution, § 78.

Dual capacity of party, both plaintiff and defendant, § 598.

Due, not yet. See PREMATURE PROCEEDINGS.

"Due application of this notice" instead of "due notice of this application,"  
having been given, entry of, is not void, § 769.

"Due process of law," jury wrongfully discharged, detention, § 86, p. 117.  
what constitutes, § 387.

Duress, appearance in divorce suit, prevented by, § 434, p. 442.

power of attorney obtained by, § 558, p. 588.

Duty of court, discourages collateral attacks, § 1, p. 3.

power, must use its, § 1, p. 2.

"Dwelling house," instead of "last and usual place of abode," at, § 462, p. 674.

Ejectment, title questioned in, is a collateral attack, § 3.

Electoral college of United States, committed by state court, § 515, p. 524.

Election contest decided, when senate has exclusive jurisdiction, § 515.

decree holding to be valid, not void for errors, § 544.

returns, city council enjoined from canvassing, § 515.

time of holding, overlooked in criminal prosecution, § 224.

Eluding service, false recital of, in probate record, § 474.

"Entering on docket," entry made upon a misconstruction of these words, § 18a.  
Enticed into state, and then service made upon, § 435.

Entitling of cause in affidavit to authorize publication, omitted, § 331  
petition, wrong, § 229.

Entry, informal, §§ 762-770.  
uncertain, §§ 742, 771-780.

Equitable claim, wrongfully assessed as a debt, § 724, p. 779.  
instead of legal procedure, § 324.  
interest attached as legal, when equitable not liable, § 561, p. 591.  
relief, void as to some defendants for want of service, § 745.

"Equitably divided amongst the heirs or devisees," probate order to sell made  
upon a misconstruction of this phrase, § 165.

#### **EQUITY.**

Aids records assailed collaterally, when. See **PRACTICE AND EVIDENCE.**  
Court of, legal cause adjudicated by, § 100.  
Decree for complainant in, over a good answer without reply, § 660, p. 710.  
Errors of fact in, do not make void, § 544.  
Law, judgment at, not overhauled in equity, for errors, § 724, p. 779.  
Relief outside of issues, given in, § 750.

Error, writ of, is a direct attack, § 2.

Escheated lands, administrator's sale of, by misconstruction of statute, § 160.

"Estate," administrator appointed upon a misconstruction of this word, § 164.

"Estate lies," wrong court acts upon misconstruction of, § 164.

"Estate of decedent," meaning of, misconstrued, § 281.

Estate of deceased partner, jurisdiction taken over, in bankruptcy, § 137.

"Estate of," process so names defendant, § 358.

"Estate shall be," wrong court acts, upon misconstruction of, § 164.

Estate or executors, which liable, § 725.

#### **ESTOPPED TO CONTEST VOID PROCEEDING, §§ 860-867.**

Appeal from, and trial on merits, estops, § 861.

Attaching plaintiff, when sued on bond, is, § 862.

Attorney is, as to judgment procured by him, in suit with client, § 862.

Costs, plaintiff who causes, is, § 862.

Creditor of poor debtor is, by conduct of his attorney, § 267, p. 253.

Garnishee who waives process, is, § 863.

Guardian, when sued on his bond, is, § 863, p. 929.

Injunction, signer of bond is, when sued on it, § 863, p. 929.

Judge is, as to judgment rendered by him, § 863, p. 929.

Principle involved in this matter, § 860.

Ratification by using judgment as a defense, estops, § 864.

Replevin, signer of bond is, when sued on it, § 865.

Set off, second attempt to use after procuring its illegal allowance, § 866.

Trustee, when sued on his bond, is, § 867.

Unconstitutional statute. conviction under, bars second prosecution, § 867.

Usury allowed in, second attempt to obtain will be defeated, § 867.

Estoppel against estoppel, "setteth the matter at large," § 862.

#### **EVIDENCE.**

*Aliunde*, inadmissible against a record, § 526.

Collateral actions, in. See **PRACTICE AND EVIDENCE.**

Conclusive but disregarded, §§ 693, 694.

**EVIDENCE—Continued.**

Illegal, judgment based upon, § 695.

Insufficient, judgment based upon, § 696.

Judgment used as, disregarded, § 693.

None heard, § 697.

Oral instead of written, § 695, p. 745.

Undisputed evidence, disregarded, § 694.

Examination, preliminary, in criminal proceedings, wrong, § 298.

Examining magistrate, errors of, do not avoid proceeding, § 724, p. 779.

Exchange ordered, when "sale" authorized by statute, § 170.

Excess of relief only, is void, when, §§ 740-743, § 751, p. 809.

Excessive relief granted, effect of, §§ 730-738.

Excusable neglect, suit to set aside judgment for, when collateral, § 5.

"Execution awarded," conviction upon misconstruction of, § 195.

Execution, failure to issue and return before publishing summons, § 342.

irregularly issued, confirmation cures? § 786.

issuing of, is judicial in Mississippi, § 800, p. 860.

time of return of, false recital as to, § 482.

Executor. See ADMINISTRATOR.

Executor, one appointed where others have not declined to act, § 592, p. 624.

Executor of executor recognized as executor by misconstruction of law, § 158.  
or estate, which liable, § 725.

**EXEMPTION.**

Court in which proceedings taken for, wrong, § 222.

Petition for, describes articles too generally, § 274.

**EXEMPT PROPERTY.**

Bankrupt wrongfully given property as, § 545.

Garnished, by overlooking the law, § 215, p. 208, § 547.

Homestead. See HOMESTEAD.

Justice orders it to be sold, § 545.

Probate order to sell, § 545.

Receiver ordered to take, § 545.

Supplementary proceedings, taken in, § 545.

Taxed wrongfully, §§ 223, 546.

Wages garnished, when exempt, § 547.

Exercise of jurisdiction, adjudicates the right to do so, § 62, pp. 83-85.

Exhibits and schedules omitted from administrator's petition to sell land, § 283.

Expenses, statute misconstrued in order to pay, § 94, p. 129.

of street improvement, errors of fact as to, § 548.

*Ex post facto* law, conviction under, § 74. § 81, p. 110.

Extradited for one crime and tried for another, § 435, p. 443.

Extraordinary proceedings. See Civil proceedings, special.

Extrinsic evidence, attempt to use, is a collateral attack, § 4.

description of land in entry, aided by, § 776.

to aid or defeat record. See PRACTICE AND EVIDENCE.

Fact, mistake of, as to subject-matter, §§ 60, 526-586.

False pretenses. See CRIMINAL PLEADINGS.

Father, mother or guardian, service upon, defective, § 458, wanting, § 459.

**FEDERAL COURT.**

Disregards state court judgment, § 693, p. 742.

C. A.—61.

**FEDERAL COURT—Continued.**

- Fugitive from justice, jurisdiction taken over, by mistake of law, § 121.
- Process of, enforcement enjoined in state court, § 515, p. 524.
- State court, interferes with, § 117.
- State instead of federal statute applied by mistake of law, §§ 122, 123.
- Federal officer, imprisoned by state court, § 515, p. 524.
  - statute conflicts with state statute, wrong one applied, § 119.
  - instead of territorial, applied, § 126.

**FEES.**

- Constitution violated in their allowance, § 71.
- Referee's, failure to pay, wrongly adjudged to be a contempt, § 196.
- Statute misconstrued in allowing, § 94, p. 129.
- Surveyor's, paid from assessments instead of from treasury, § 611, p. 648.
- Taxation of, is a judicial act, § 800, p. 860.
- "Feloniously," omitted from charge of felony, § 311.
- Felony or misdemeanor, power of justice to determine which it is, § 520.
- Female imprisoned on civil process contrary to statute, § 611, p. 648.
- Fence viewers, action of, is judicial, § 804.
- Fermor's case, fraud, as to, § 550.
- Ferry license, confirmed by mistake of fact, § 548.
  - granted without notice, § 411, p. 412.
- Fictitious indictment, trial on, § 299.
  - name given defendant in criminal charge, § 301, p. 285.
  - in process, § 358.
- Figures instead of words used in justices' entries, § 765.
  - without dollar marks, in entries, § 772.
- Filing of affidavit to authorize publication, too late, § 332.
  - answer, record cannot be contradicted as to, § 548.
  - papers in special proceedings at wrong time, §§ 244, 249.
- Final decree. See RELIEF.
- FINAL JUDGMENT. See also RELIEF.
  - Informal, §§ 762-770.
  - Interlocutory order mistaken for, in contempt proceedings, § 195.
  - Proceedings afterwards*, §§ 698-701.
    - Notice given of, § 698.
    - none given of, § 699.
    - Reversal, proceedings afterwards, § 700.
    - Second judgment, § 700.
      - sentence, § 700, p. 754.
    - Setting aside judgment by inferior court, § 701.
  - Uncertain, §§ 742, 771-780.
- Final sentence. See RELIEF.
- Findings, construed wrongly, § 725.
  - defective or omitted, § 702.
- Fine assessed, or imprisonment if not paid, § 739, p. 795.
  - contempt proceedings, inflicted in, by misconstruction of law, § 190.
  - exceeds highest limit allowed for justices, is it void? § 739, p. 794.
- Firm name of parties, given in caption to entry, which adjudges that "plaintiffs recover of defendants," etc., § 780, p. 840.
- Firm name of parties, judgment against them, in, § 779, p. 838.

**Firm name of parties, process gives, §§ 358, 365.**

**Foreclosure decree, debt not due, § 566.**

informal, § 768, p. 825.

subsequent action after term has passed, § 699.

too limited, § 757, p. 813.

**Foreign, adjudication that vessel is, is conclusive, § 534, p. 554.**

consul, service made upon, § 435, p. 444.

corporation, agent provided by, to receive service, § 418.

agent removed, service on officer found in state, § 418.

agent, service made on, by misconstruction of statute, § 113.

courts, presumptions concerning, §§ 845-851.

**FOREIGN JUDGMENTS, §§ 483, 845-851.**

Complaint upon, § 855, p. 919.

Defense made under, merits of, cannot be examined, § 849, p. 907.

Divorce by means of, § 851.

Errors of law or fact in, The old cases, § 849.

The new doctrine, § 850.

Presumptions concerning, §§ 845-847.

Principle involved in the consideration of, § 848.

Service in, proof of, false in fact, § 483. See also, **SERVICE**, sub-title, **UN-AUTHORIZED PROCEEDINGS, AS TO DEFENDANT.**

Subject-matter, contradicting, as to, § 389, p. 376.

**FORFEITURE. See CONFISCATION PROCEEDINGS.**

Bond in criminal case, forfeiture of, adjudged to be a contempt, § 193.

errors of fact, do not avoid, § 548.

Delivery bond, of, upon illegal evidence, § 697, p. 749.

Goods, of, for breach of revenue laws, protects officers for seizing, § 548.

Title, of, errors do not avoid, § 725.

**"Forfeit his vessel," jurisdiction exercised by misconstruction of, § 145.**

**FORGED.**

Cause of action, judgment upon, § 549.

Entries, attorney, by, § 549, p. 572.

clerk, by, § 549, p. 572.

justice, by, § 549, p. 572.

principle involved in, § 549, p. 571.

Evidence, judgment upon, § 696.

Letter, stay of execution entered upon, § 430, p. 437.

Will, probate of, § 549.

**Forgery, what constitutes, jurisdiction taken by mistake as to, §§ 202, 203.**

**Formal defects in petition. See PETITION—FORMAL DEFECTS IN.**

**Former conviction, demurrer sustained to plea of, §§ 83, 84.**

**Fornication. See CRIMINAL PLEADINGS.**

**Forthcoming bond, partner executes without authority, judgment upon, § 429.**

statute dispenses with notice, in suit upon, § 499, p. 511.

vold for want of a seal, judgment on, § 236, p. 223.

**"Forthwith," requirement that judgments shall be entered, § 676, p. 727.**

**FRAUD IN DOMESTIC JUDGMENTS, §§ 550-557.**

Administrator's appointment, fraud in, § 551.

final settlement, fraud in, § 551, p. 579.

order to sell land, fraud in, § 552.



**FRAUD IN DOMESTIC JUDGMENTS—Continued.**

Administrator's purchase at his own sale, § 553.

Pennsylvania cases, § 553, p. 581.

sale, fraud in, § 553, p. 581.

Arbitration, submission to, induced by fraud, § 433.

Bankrupt's composition or discharge, fraud in, § 554.

failure to list property, § 554.

fraudulent conveyance, § 554.

Collusion in. See COLLUSION.

Creditors, frauds concerning, § 554.

Crime, fraudulent acquittal of, § 555.

Criminal case carried on fraudulently, § 423.

Debt, mistaken for contract procured by fraud, § 147.

Divorce, in, § 550, p. 576.

Divorce, carried on by fraud, § 434.

Fermor's case, § 550.

Insolvent withholds assets by fraud, § 561.

Insurance, fraud in, § 550, p. 577.

Judge, fraud of, does it make judgment void ? § 5.

Justice's record, fraudulent, §§ 554, 556.

*Lis pendens* agreement, fraud in, § 557.

Naturalization, fraud in, § 550, p. 577.

Negligence, action for, fraud in, § 550, p. 577.

Partition proceedings, fraud in, § 550, p. 577, and § 557, p. 585.

Petitioners, obtained by fraud, § 557, p. 585.

Principle involved, § 550.

Sheriff's deed, fraud in, § 550, p. 578.

Suit to set aside judgment for fraud, when collateral, §§ 5, 12.

Trustee, fraudulent sale by, § 557, p. 585.

**FRAUD IN FOREIGN AND OTHER STATE JUDGMENTS, § 550.**

Adoption of child, fraudulent, § 558, p. 587.

Cause of action, fraudulent, § 558, p. 586.

*Cognovit*, obtained by fraud and duress, § 558, p. 588.

Conduct of party, fraudulent, § 558, p. 586.

Court deceived, § 558, p. 587.

Defendant absent from sickness, § 558, p. 586.

Duress, *cognovit* obtained by, § 558, p. 588.

Guardian's fraudulent conduct, § 558, p. 586.

Perjured evidence, judgment obtained by, § 558, p. 586.

Power of attorney, obtained by fraud, § 558, p. 588.

Record itself, fraudulent, § 558, p. 586.

Will, obtained by fraud, probated, § 558, p. 589.

Fraudulent conveyance by bankrupt, effect of, upon discharge, § 554.

Freeholder, assessors, commissioners or viewers, not, § 662.

*capias* affidavit fails to show that defendant is not a, § 270.

juror is not a, § 705.

Fugitive from justice, state court takes jurisdiction by mistake of law, § 120.

Functions of commissioners or of the court of another government, or of the governor or legislature, usurped, § 515.

Future installments on mortgage, personal judgment rendered for, § 566.

- Future time, criminal charge laid at a, § 320, p. 296.
- Gambling debt, judgment founded upon, not void, § 559.
- GARNISHMENT PROCEEDINGS.** See also **ATTACHMENT.**
- Attachment fails, garnishee wrongfully held, § 693, p. 743.
- City garnished by mistaking public policy, § 215.  
overlooking the statute, § 215.
- Collusion of garnishee with plaintiff, § 533.
- Conditional judgment against garnishee, § 732.
- Evidence conclusive in favor of garnishee, still held, § 694, p. 744.
- Exempt person garnished, § 215, p. 208.  
wages, garnished, § 547.
- Half of debt garnished because one debtor partner was served, § 725.
- Legacy, wrongfully garnished, § 215.
- Personal judgment instead of order to deliver goods, § 732.
- Premature suit in, § 240, p. 227.
- Presumptions concerning, § 838.
- Refusal of garnishee to comply with order on account of error in the main proceeding, is a collateral attack, §§ 3-7.
- Residence of defendant in, § 634.
- Service wanting on adverse claimant, in, § 496.
- Service wanting on garnishee in, § 496.  
principal debtor in, § 496.
- Waiver of process by garnishee in, § 863.  
service by garnishee in, § 428, p. 432.
- General allegations, assault and battery affidavit, in, § 305.**  
*capias* affidavit, in, § 269.  
exemption petition, in, § 274.
- General informalities in entries of superior courts, § 769.**
- General proceedings.** See **Civil proceedings, general.**
- General subject or class—particular case, § 66, p. 96.**
- German paper, publication made in, § 446, p. 454.**
- Government, unconstitutional or revolutionary, effect upon judgments, § 19.**
- GRAND JURY.**
- Committed for ordering arrest of judge, § 198, p. 196.
- Impaneled by wrong judge, § 299.
- Number of, wrong, § 299.
- Power to impanel erroneously adjudged to exist, § 204.
- Talesmen selected wrongfully, § 300.
- Grand Larceny.** See **LARCENY.**
- Gravel road assessment, notice wanting, § 496, p. 508.**
- Gross amount given instead of itemized or separate amounts, § 758.**
- GUARDIAN.** See also **ADMINISTRATOR.**
- Appointment of. See **GUARDIAN, APPOINTMENT OF, infra.**
- Bond of. See **BOND IN SPECIAL PROCEEDINGS.**
- Colludes with adverse party, § 533.
- Constructive service against, personal judgment upon, § 394.
- Exchanges ward's land upon an order to sell, § 170.
- Estopped to deny validity of proceeding when sued on bond, § 863, p. 929.
- Fraudulent conduct of, in other state, § 558, p. 586.
- Justice of the peace wrongfully entertains suit against, § 518.

**GUARDIAN—Continued.**

Official capacity of, not mentioned in suit against him, § 599.

Ordered to exchange land, when statute only authorized a sale, § 170.

Orphans' court orders sale of land of infants not "orphans," § 174.

Order to sell, appraisal before making, irregular or not signed, § 664.  
inherent power of the court, § 166.

special guardian to care for and preserve, obtains an, § 162.

Personal judgment against, upon constructive service, § 394.

Petition to sell land. See **GUARDIAN'S PETITION TO SELL LAND**, *infra*.

Presumptions concerning his proceedings, § 841.

Removal of, irregular proceedings in the, § 593, p. 628.

marriage of female does not operate as a, § 593, p. 627.

misconstruction of statute, by means of a, § 157, p. 165.

notice wanting, void in Indiana, § 592.

Resignation of, allowed by misconstruction of law, § 157, p. 165.

Sales made by. See **GUARDIAN'S SALE OF LAND**, *infra*.

**GUARDIAN, APPOINTMENT OF.** See also **ADMINISTRATOR.**

Administrator of ancestor of ward appointed, void in Ohio, § 590, p. 619.

Consent of ward required, but wanting, void, § 589.

*De facto* officer, does the unlawful appointment or recognition of a person  
as guardian, make a, § 591, p. 622.

Natural guardian acting without appointment, § 589, p. 618.

Notice to ward wanting when his age entitled him to have, § 596.

Petition for, bad in substance, § 256, p. 241.

jurat wanting to, § 253.

Predecessor not removed, § 593, p. 627.

Questioned in another proceeding, is a collateral attack, § 3.

Residence of ward. See **RESIDENCE OF DECEDENT OR WARD.**

Wanting, does recognition by court bar proof of that fact? § 589, p. 617.

**GUARDIAN'S PETITION TO SELL LAND.**

Joinder in, by guardians of different wards, § 592, p. 624.

Non-joinder in, of co-guardian, § 592, p. 624.

Strangers unite in, with guardian, § 589, p. 618.

Verification of, by attorney, § 252.

wanting, § 251.

**GUARDIAN'S SALE OF LAND.** See **ADMINISTRATOR.**

Appraisal by householders instead of freeholders, § 664, p. 717.

Bond defective or wanting. See **BOND IN SPECIAL PROCEEDINGS.**

Confirmation of, what shows a, § 791. See **CONFIRMATION DECREE.**

'Court of competent jurisdiction' in statute, by, § 795.

Inherent power of court to order, § 166.

"Made satisfactorily to appear that he took the oath," §§ 796, 797.

Notice of, defective or wanting, § 706.

**Guardian *ad litem***, appointment of, irregular, § 703, p. 756.

omitted, § 703.

confesses for infant, § 695.

service of, omitted, § 459, p. 465.

**HABEAS CORPUS PROCEEDINGS.**

Collateral attack, are, §§ 3, 12.

"Criminal matter," arrest upon irregular process, adjudged to be, § 146.

**HABEAS CORPUS PROCEEDINGS—Continued.**

Debt, erroneously held to be fraudulent and party imprisoned, § 147.

Erroneous discharge in, § 148.

**HEIR AND HEIRSHIP.**

Administrator sells lands of heir to pay debts of ancestor, § 173.

Age of heir inferentially shown, § 596, p. 631.

Ejectment by, barred by probate of will devising land to another, § 585.

Errors concerning heirs and their rights, § 612.

Heirship adjudicated without notice to heirs, § 497.

Process names parties as "heirs," §§ 359, 365, p. 348.

Revivor of judgment against, when original did not bind them, § 580.

Service wanting upon heirs, in proceeding to determine heirship, § 497.

Unborn child treated as an heir in probate proceedings to sell land, § 165.

**Highway.** See CONDEMNATION PROCEEDINGS.

**Holiday,** court held on, § 33.

**HOMESTEAD.**

Allowed, by a mistake of law, § 726.

overlooking the statute, § 217.

Denied, by a mistake of fact, § 545, pp. 566-569, § 559.

Life estate instead of fee, granted as a, § 757, p. 813.

Principle involved in, § 545.

Sale of, ordered by overlooking the statute, § 217.

at wrong time by misconstruction of statute, § 172.

Set apart, by overlooking the statute, § 217.

Widow, sale ordered by administrator subject to her right of, § 288.

set off to her through an error as to a retrospective statute, § 112.

**Hour, extra,** not given before justice of the peace, § 489, p. 500.

process omits, § 376.

wrong in record. See DATES AND TIME.

**Householders,** highway petitioners not shown to be, § 272, p. 259.

instead of freeholders act as appraisers, § 664, p. 717.

**Husband and wife,** administrator appointed jointly for, § 721.

**Husband,** wrongful judgment against, for wife's debt, § 613.

**Identity of causes** adjudicated, is conclusive, § 560.

person served with real defendant, § 474, p. 477.

**Illegal evidence,** judgment based upon, § 695.

"Immediate view and presence of the court," conviction of contempt for, § 192.

"Immediately," requirement that judgment shall be entered, § 676, p. 727.

**Implied power in contempt proceedings,** §§ 189, 190, 197.

of probate court, §§ 92, 166.

**Implied repeal of law,** §§ 97, 160, 519-513. See page 513.

statute, court organized under mistake as to, § 97.

probate sale made afterwards, § 160.

**Imprisoned defendant,** attorney for, not appointed, § 667.

**IMPRISONMENT.**

Contempt proceedings, in, with no express power, § 197.

Indefinite and indeterminate sentence of, § 742.

Instead of fine, when no power to imprison, § 739, p. 794.

Objection to judgment to justify, is collateral, § 3.

Place of, wrong, § 737.

**IMPRISONMENT—Continued.**

Time of commencement of, uncertain, § 742, p. 798.

Uncertain, §§ 771-780.

"Until the further order of the court," is void, § 742.

"Inability to endure" punishment, discharge, by misconstruction of, § 138.

"Incidentally cognizable," meaning of, § 17, p. 18.

Incomplete relief given, §§ 757-761.

Inconsistent positions. See **ESTOPPED, ETC.**

"Indebted," jurisdiction taken upon misconstruction of, § 95.

Indebtedness adjudicated in supplementary proceedings, § 560, p. 590.

Indefinite imprisonment, sentence to an, § 742.

"Independent executor" sells land by misconstruction of statute, § 162, p. 170.

Indexing of docket or record, omitted, § 687.

Indian, exempt from jurisdiction, administrator appointed for, § 613.

judgment against upon contract in New York, § 613.

Indictment. See **CRIMINAL PLEADINGS—CRIMINAL PROCEDURE.**

Indictment, amended by court, § 87, p. 119.

information used instead of, § 87, p. 119.

second, for same offense, § 83, p. 112.

Indirect contempt adjudged to be direct, § 192.

**INFANT.**

Appearance for, illegal, §§ 427, 428.

Confession by, not void, § 614.

Confession by guardian *ad litem*, for, § 695.

Day in court after coming of age, not given, § 703, p. 756, § 758.

Disability of, removed before he reaches years of discretion, § 615, p. 653.

family meeting to recommend, illegal, § 592.

judicial action, is it? §§ 800, 860.

Evidence, none heard against, § 697, p. 749.

False recital of appearance by, § 475.

Guardian *ad litem* for, not appointed, § 703. See also **GUARDIAN AD LITEM.**

Justice of the peace, infant acts as, § 48.

Petition of, to sell land in New York, reference to a master omitted, § 671.

Plaintiff, cannot overhaul decree for errors, § 726.

Plaintiff, carries on suit in his own name, instead of by next friend, or by next friend instead of guardian, etc., is it void? § 615.

Recital of appearance of, false, § 475.

Record not showing him to be an, it cannot be shown that he was, § 614.

Served, but "designated person," not served, § 457.

father, not served, § 459.

guardian *ad litem* not served, § 459, p. 465.

Service made upon guardian for, § 460.

wanting upon, § 412.

Unauthorized suit on behalf of, §§ 421, 422.

Voidable contract of, judgment against, upon, is not void, § 614.

Inferential allegations, *capias* affidavit made by, § 268.

criminal charge made by, § 305, p. 289.

**INFERIOR DOMESTIC COURTS.**

Conclusiveness of their records, § 526, p. 538.

Constructive service in, too short, § 488.

**INFERIOR DOMESTIC COURTS—Continued.**

Discontinuances in, §§ 672-680. See DISCONTINUANCE.

Informal entries in, §§ 762-765.

Personal service in, too short, § 489.

*Presumptions concerning*, § 806-810.

Adjournments of, presumed to be regular, § 808, p. 871.

Appearance in, not presumed, § 808, p. 871.

Attachment, bond in, presumed, § 808, p. 871.

Change of venue, right to, not presumed, § 808, p. 871.

Highways, proceedings to establish in, § 809.

Interest of magistrate, presumed, when another appointed, § 810.

Location of property, not presumed to be within jurisdiction, § 810.

Personal judgment on publication, presumed to be rightful, § 810.

Place of holding court, not presumed to be rightful, § 810.

Quorum of justices, not presumed, § 810.

Time of rendering judgment, presumed to be rightful, § 810, p. 874.

Record fails to show jurisdiction, presumptions, § 807.

shows jurisdiction, presumptions, § 806.

Residence of parties, is it jurisdictional? §§ 652, 653.

Respected collaterally the same as a superior court, § 1, p. 2.

**INFERIOR AND SUPERIOR COURTS—WHAT ARE INFERIOR AND WHAT SUPERIOR.**

County commissioners, § 812.

courts, § 812.

Court-martial, § 812.

Justices of the peace, §§ 813, 814.

*Probate courts in various states*, §§ 815-827.

Alabama, § 815.

Arkansas and California, § 816.

Connecticut and Georgia, § 817.

Idaho, Illinois, Indiana and Iowa, § 818.

Kansas and Kentucky, § 819.

Louisiana and Maine, § 820.

Maryland, Massachusetts, Michigan and Minnesota, § 821.

Mississippi, § 822.

Missouri, § 823.

New York, Ohio and Tennessee, § 824.

Texas, § 825.

Vermont and Virginia, § 826.

Wisconsin, § 827.

Quarter sessions court in Tennessee, § 828.

United States courts and vice-chancellor's court in New York, § 826.

"Inferred by argument," meaning of, § 305, p. 289.

Informal final entries, §§ 762-780.

Informal entries of inferior courts, §§ 762-765.

probate courts, § 766.

superior courts, § 767.

Information. See CRIMINAL PLEADINGS—CRIMINAL PROCEDURE.

"INFORMATION AND BELIEF."

Affidavit for publication of summons, in, § 333.

**"INFORMATION AND BELIEF"—Continued.**

Attachment affidavit, made on, § 245.

*Capias* affidavit, made on, § 246.

Confession by agent, made upon, § 247.

Criminal charge, made upon, § 301.

Guardian's sale, report as to propriety of, § 247.

Petition for appointment of administrator in, § 247.

Information instead of indictment, used, § 87, p. 119.

Inherent power of court in contempt matters, §§ 189, 190, 197.  
probate matters, § 92, 166.

Initial of first name of defendant used in judgment, § 779, p. 838.

Initials of defendant, process gives, § 360.  
plaintiff, process gives, § 365.

**INJUNCTION.**

Affidavit for, defective, § 278, p. 264.

Bond for. See **BOND IN SPECIAL PROCEEDINGS.**

City officer, against removing from office, § 515.

Constitution violated by, § 80.

Corporate officers, issued against, by misconstruction of statute, § 149.

Crime, issued against commission of, § 218.

Errors in, not considered in proceeding for contempt, § 726.

Estopped to contest, when sued on bond, § 863, p. 929.

Federal process, issued against, by state court, § 515, p. 524.

Judgment, against, what warrants. See **PLEADING IN COLLATERAL ACTION.**

Judgment obtained in violation of, § 560, p. 590.

Managing officers of corporation, against, § 149.

Municipal corporation, against, by misconstruction of law, § 150.

Vacation, issued in, by misconstruction of statute, § 128.

Injured person, absent on trial for assault and battery, § 714, p. 769.

*In personam*, *in rem*, distinguished, § 17, p. 21.

*In rem*. See **SERVICE**, sub-title, **IN REM**, ETC.

**INSANE PERSON.**

Inquest held upon, without notice to, § 413.

Judgment against, not void, § 616.

Presumptions concerning inquest upon, § 841.

Record silent as to condition of, bars proof that he was insane, § 616.

Served, but committee not served, § 459.

Wife, imprisoned by husband, divorce against her, § 434, p. 441.

*In solido* instead of separate relief given, § 758.

**INSOLVENCY PROCEEDINGS.**

Assignor and assignee collude in, § 533.

not insolvent, in fact, § 561.

Clerk in, prematurely appointed, § 239.

Collusion between assignor and assignee in, § 533.

Creditor, name of, fraudulently withheld in, § 410.

refused permission to examine debtor, in, § 697, p. 749.

Discharge in, fraudulent, § 550, p. 577.

prematurely granted, § 712.

Entry in, informal, § 769, p. 826.

Implied repeal of state insolvent law by bankruptcy statute, § 502.



**INSOLVENCY PROCEEDINGS—Continued.**

- Jurisdiction taken over, by a mistake of fact, § 532.
- Name of creditor fraudulently withheld in, § 410.
- Non-resident creditor, carried on against, upon constructive service, § 392.
- Notice of, wanting, § 410.
- Petition in, false in fact, § 561.
- Petition for discharge in, verified before wrong officer, § 254, p. 239.
  - verified, not, § 251, p. 236.
  - verified, prematurely, § 255.
- Prospective statute in, mistake as to, § 111.
- Protection granted in, by misconstruction of statute, § 134.
- Residence of petitioner in, § 635.
- Statute concerning, repealed by federal bankrupt law, § 502.
- "Instrument in writing," jurisdiction taken upon mistake as to, § 96.
- Insufficient evidence, judgment upon, § 696.
- Insurance, fraud in obtaining, judgment upon, § 550, p. 577.
- "Intent to defraud," attachment affidavit fails to state an, § 261.
  - capias* affidavit, defectively states, § 268, p. 254, § 270.
- Interest on judgment fixed at ten per cent. when six highest allowed, § 740, p. 796.
  - money, errors in computing, not void, § 726.
  - greater rate awarded than permitted by statute, § 516.
- Interest in property, misdescribed in administrator's petition to sell, § 561, p. 591.
- Interested judge. See JUDGE DISQUALIFIED.
- Interlineations in justice's records, § 765, p. 820.
- Interlocutory decree, appeal from, § 90.
  - omitted, § 704.
  - order bars a collateral attack, § 17, p. 26.
  - contempt adjudged, by mistaking it for final, § 195.
  - res judicata*, is not, § 17, p. 23.
- International law, sentence in violation of, § 74, p. 103.
- Interrogation of prisoner before sentence, omitted, § 715.
- Interstate commerce laws, constitution violated by, § 80.
- Intoxicating liquor condemned, constitution violated, § 80, p. 109.
  - conviction for selling under unconstitutional statute, § 72.
  - license to sell. See Liquor license.
- Intoxication. See CRIMINAL PLEADINGS.
- Inventory wanting, judgment against independent executor, § 704, p. 757.
- Island of Jersey, court of, interferes with process of English court, § 515, p. 524.
- Issues, absence of, collaterally, is of no concern, § 17, p. 15.
  - nothing is *res judicata* in, § 17, p. 15.
  - outside of, relief given, §§ 746-756. See section headings, page 793.
- Jeopardy, placed in, twice, by discharge of jury, §§ 85, 86.
  - by splitting cause, §§ 83, 84.
- Joinder of cause where no jurisdiction, with one where there is, § 231, p. 218.
- Joint administrators, one alone procures an order to sell, § 167.
- Joint instead of separate sale made by referee, § 662, p. 714.
  - instead of several relief given, § 758.
  - judgment against several, some of whom were not served, §§ 744, 745.
- JUDGE. (JUSTICE OF THE PEACE, same in principle.)
  - Absent, clerk's entries, § 54.

**JURISDICTION—Continued.***Allegations, not facts, confer—Continued.*

Petition false in fact, gives, § 60, pp. 76, 78.

gives jurisdiction over plaintiff, § 60, p. 75.

gives jurisdiction to determine as to service, § 60, p. 76.

gives jurisdiction to determine its truth, § 60, pp. 76, 78.

Place where crime committed, justice can determine, § 60, p. 75.

Residence can be determined when alleged, § 60, p. 77.

Taxes, allegations give jurisdiction to determine, § 60, p. 77.

Value, allegations give jurisdiction to determine, § 60, pp. 77, 78.

*Allegations, sufficiency of, to confer, § 61, pp. 79–83.*

Allegations show that no cause of action exists, give, § 61, p. 80, § 136.

Inferential allegations, give, § 61, p. 79.

Petition, "any at all," gives, § 61, p. 81.

Petition which "calls upon the court to act," or "causes the judge to act," or "challenges the attention of the court," or "fairly informs," or "states something to amend by," or "tends to show each necessary fact," gives jurisdiction, § 61, p. 81.

Colorable authority for, sufficient, § 1, p. 3.

wanting, §§ 514–525.

Common law misconstrued by exercise of, §§ 89–212. See section headings on pages 122, 123, 187, 192 and 198; and title headings on page 151.

Constitution misconstrued by exercise of, §§ 68–88. See section headings on pages 99, 103, 111.

Debatable authority for, sufficient, § 1, p. 3.

Defined and illustrated, § 58, pp. 70–72.

Law repealed by implication, exercised under, §§ 97, 501–513. See section headings on page 513.

*Loss of, after being fully acquired, §§ 660–791.*

Confirmation irregular or wanting, by. See headings on page 840.

Informal entries of inferior courts, by. See headings on page 817.

Informal entries of probate courts, by. See headings on page 822.

Informal entries of superior courts, by. See headings on page 823.

Procedure irregular, by. See headings on pages 711, 712.

Refusal to take bail to transfer cause, § 200, p. 199.

Relief excessive, by. See section headings on pages 784, 788, 793.

Uncertainty in final entry, by. See section headings on page 827.

Mistake as to party or person, exercised under a, §§ 587–659. See section headings on pages 613–615.

Mistake of fact as to subject-matter, exercised under a, §§ 526–586.

Party, mistake of law or fact as to, exercised by a, §§ 587–659. See section headings on pages 613–615.

Principle involved in jurisdiction, discussed, §§ 64–67.

Process, sufficiency of, to confer. See PROCESS.

Repeal of law by implication, exercised afterwards, §§ 501–513. See section headings on page 513.

Service, sufficiency of, to confer. See SERVICE.

Statute misconstrued by exercise of, §§ 89–212. See section headings on pages 122, 123, 187, 192 and 198; and title headings on page 151.

Subject-matter, allegations of petition give, over, § 60.

**JURISDICTION—Continued.**

Subject-matter, colorable authority over, § 1, p. 3.  
     colorable authority over, wanting, §§ 514-525.  
     debatable authority over, § 1, p. 3.  
     mistake of fact as to, exercised by a, §§ 526-586.

*Test of the right to exercise*, § 61.

Power to "amend" is a, § 61, pp. 82, 83.

    "do the act under any circumstances," is a, § 61, pp. 82, 83.

    "enter upon the inquiry," is a, *id.*

Undisputed law overlooked by exercise of, §§ 212-224.

"Jurisdiction" used in a statute, how construed, § 792.

**JURY.**

Committed in criminal case for returning perverse verdict, § 198.

Denied, and *vice versa*, § 88.

Discharged in criminal case, defendant absent, § 86.

    verdict void, § 86.

    wrongfully, §§ 85, 86.

Dispensed with unlawfully in civil case, § 88, p. 120.

Impaneled in criminal case, prisoner absent, not void, § 714.

    record conclusive as to, § 562, p. 592.

*Incompetent or irregular*, § 705.

    Aliens sit upon, § 705.

    Freeholders, not composed of, § 705.

    Oath of, irregular, § 705.

    Refused or not used, § 705.

    Waived, unlawfully, § 705, p. 758.

Service upon refused, adjudged a contempt, by mistake of law, § 199.

**JUSTICE OF THE PEACE. (JUDGE, same in principle.)**

Absent, at hour set for trial, § 677.

Conclusive, his record is, § 526, p. 538.

Constitution violated by his exercise of criminal jurisdiction, § 79.

    increase of jurisdiction of, § 81.

*De facto.* See DE FACTO PROCEEDINGS.

Disqualified. See JUDGE DISQUALIFIED.

Entries of, informal, § 765.

Excessive relief granted by, void as to excess, §§ 740-743.

Interested. See JUDGE DISQUALIFIED.

Judgment, entry of, "forthwith," or "immediately," § 676, p. 727.

    exceeds highest limit allowed by law, §§ 739-743.

Judicial, all his acts are, in Missouri, § 804, p. 866.

Jurisdiction of, increased by violating constitution, § 81.

Liability of, for official acts. See LIABILITY OF JUDICIAL OFFICERS.

New trial granted by, under a misconstruction of the statute, § 106.

Record of, entries in, by stranger, § 668, p. 719.

Record of, fraudulent, §§ 554, 556.

Setting aside of judgments by, § 701.

Stranger makes entries of, § 668, p. 719.

Unauthorized entries by, § 549, p. 572.

Warrant returnable before wrong one, by overlooking statute, § 220, p. 211.

"Just" attachment affidavit fails to state that claim is, § 262.

- "Justify belief," facts necessary to, *capias* affidavit, in, § 270.  
 "Justly due," attachment affidavit fails to state claim to be, § 262.  
 Kidnaping, §§ 383, 435.  
 Kind of a case, power to determine, §§ 520, 539, p. 561.  
 "Known agent," return of service fails to show there was no, § 452, p. 461.  
 "Laborer," jurisdiction taken by misconstruction of word, §§ 63, p. 88, § 99.  
**LAND.**  
     Contract, misconstrued by probate court, § 281.  
     In another county, adjudicated upon, § 524.  
     Described, not, relief concerning, § 752.  
     Outside of state, adjudication concerning, § 521.  
     Owners not all made parties to suit affecting it, §§ 745, 758, p. 814.  
     Sea or, goods seized upon which, is record conclusive upon? § 576.  
     Taken by railway, damages awarded for, when commission has exclusive jurisdiction, § 515, p. 524.  
     Under water, assessed under a misconstruction of the statute, § 99.  
 Landlord and tenant, relation of, impliedly adjudicated, § 617.  
**LARCENY.** See **CRIMINAL PLEADINGS.**  
     Constitution violated by a conviction for, § 78.  
     Grand or petit, mistake as to, by misconstruction of statutes, § 207.  
     Potatoes in the ground, adjudged to be objects of, § 206.  
     Ship, in, conviction for, by overlooking the statute, § 220.  
 "Last resided," attachment affidavit defective as to, § 262.  
 Last and usual place of abode "known to me," instead of "last and usual place of abode," return so made, § 462, p. 467.  
 "Last usual place of abode," instead of "usual place of abode," return so made, § 462.  
 Law, action at, upon equitable cause, not void, § 626.  
     court of, equitable cause adjudicated by, § 100.  
     impliedly repealed, §§ 501-513. See section headings on page 513.  
     joint relief, void as to some for want of service, § 744.  
     matter of, equity court adjudicates, § 100.  
 Legacy crossed out of will as probated, is conclusive, § 585, p. 610.  
     used by administrator for unlawful purpose, cured by confirmation, § 782.  
 Legal instead of equitable procedure used, § 325.  
 Legal title, implied adjudication that executor and not legatee has, § 618.  
     implied adjudication that married woman has not, § 617, p. 655.  
 Legatee, errors concerning amount due to, § 726.  
     mistake concerning his rights in Alabama, § 618.  
 Levy on defunct execution held valid, is conclusive, § 562, p. 592.  
**LIABILITY OF JUDICIAL OFFICERS, §§ 852-854.**  
     Corruption of inferior judges, does not make them liable, § 853.  
     Court or no court, not the criterion, but the nature of the duties is, § 852.  
     *Judge of inferior court.*  
         Corruption or error, not responsible for, § 853.  
         *De facto*, is responsible for errors, § 854.  
         Misconstruction of statute, not responsible for, § 853.  
         Service by private person, not responsible for, § 853.  
         Superior judge, is on same plane with, § 853.  
         Unconstitutional statute, acting under, not liable for, § 853.

**LIABILITY OF JUDICIAL OFFICERS—Continued.**

Judge of superior court, has never been held liable in any case, § 852.

Overseer of highways adjudging one in default, not liable for error, § 852.

Road commissioners exempt person wrongfully, not liable, § 852.

Tax assessors, official acts of, no liability for, § 852, p. 911.

Trustees of school district assessing one wrongfully, not liable, § 852.

Libel of corporation, criminal jurisdiction taken for, by mistake of law, § 208.

License for ferry. See Ferry license.

to do business, conviction for want of, violates constitution, § 78.

to sell liquor. See Liquor license.

Lien declared by bankrupt court on land of stranger, § 497.

under a misconstruction of the statute, § 101.

errors in apportioning, § 726.

foreclosed, constitution violated, § 81.

priority of, erroneously adjudicated, is conclusive, § 579, p. 604.

procedure to declare, not warranted by statute, § 106, p. 135.

Limitations, administrator appointed when right barred by, § 563.

administrator's sale to claim barred by §§ 231, 284.

appeal allowed after bar of, § 231, p. 218.

cause of action, barred by, § 563, p. 593.

crime barred by, conviction for, §§ 209, 314.

stay of execution, barred by, § 231, p. 218.

Liquor. See Intoxicating Liquor.

Liquor license, bond exacted under unconstitutional statute, judgment on, § 72.

granted in district where prohibition existed, effect of, § 562, p. 592.

implied repeal of law authorizing, granted afterwards, § 507.

*Lis pendens* agreement, fraudulent disregard of, § 557.

violated, can not be shown, § 564, p. 557.

Living person, administrator appointed for, §§ 608—610.

Loan of money by administrator ordered under mistake of law, § 159.

Location. See PLACE OR LOCATION OF RES.

"Locator" of land, jurisdiction taken upon mistake as to who is a, § 96.

Logical sequence, judgment is not a, from opinion, § 726.

"Long" summons issued instead of "short," § 351.

Loss of jurisdiction. See JURISDICTION, sub-title, *Loss of, etc.*

Lost note or record, established without notice, § 497.

Lottery, matter adjudged to be a, under a misconstruction of the statute, § 101.

Lunatic. See INSANE PERSON.

Mail coach, attached, by overlooking the statute, § 215.

Mailing copy of process to defendant, contradicting record as to, § 477, p. 482.

non-resident, omitted or wrong, § 438.

published notice to defendant, omitted, § 345.

Malicious mischief. See CRIMINAL PLEADINGS.

act adjudged to be, by a mistake of law, § 210.

Malicious prosecution, *capias* issued for, by overlooking the statute, § 220.

premature, not void, § 15.

"Managing agent," return of service upon, false in fact, § 452, p. 461.

Mandamus, city officer, issued against, by overlooking the statute, § 220.

errors in, do not avoid, § 726.

jurisdiction taken by, under a misconstruction of statute, § 102.

C. A.—62.

- Mandamus**, to enforce judgment, it cannot be controverted, § 564, p. 594.
- "Manifest injury to service,"** record of court-martial that it could not be organized differently without, is conclusive, § 564, p. 594.
- Manner of making service.** See **SERVICE**, sub-title, **MODE OF SERVICE**.
- Map of railway route** alleged to be filed, is conclusive, § 565.  
referred to for description, § 774.
- MARRIED WOMAN.**
- Arbitration by, without consent of husband, § 240, p. 227.
  - Confiscation proceedings against, § 274.
  - Coverture erroneously adjudicated not to exist, § 619.
  - Coverture of, not shown by the record, § 620.
  - Coverture of, shown by the record, but disregarded, § 621.
  - Disabilities of, removed, § 622.
  - Enabling act for, misconstrued, § 103.
  - Error in subjecting her land to her debts, not void, § 726.
  - False return of service upon, in New York, § 475, p. 478.
  - Land of, probate order to sell, made by misconstruction of statute, § 168.
  - Liability of, not shown by the record, § 623.
  - Property of, attached, where only an equitable charge against it, § 322.
  - Sues in her own name instead of by next friend, § 623, p. 661.
  - Void contract of suretyship of, judgment upon, § 621, p. 659.
  - Void will of, probated, § 621, p. 660.
- Marshal.** See **SERVICE**, sub-title, **PERSON MAKING SERVICE**.
- Marshal's sale**, appraisal omitted in, § 666, p. 718.
- Master**, failure to refer civil cause to, § 661, p. 713.  
failure to refer infant's application to sell land, to, § 661.  
instead of administrator, sells, § 709, p. 764.  
unauthorized reference to, § 661, p. 713.
- Material allegation omitted**, administrator's petition to sell, from, § 285.  
assault and battery charge, from, § 305, p. 289.  
*capias* affidavit, from, § 270.  
forfeiture affidavit, from, § 274.  
highway petition, from, § 272, p. 259.  
insolvent's petition, from, § 265, p. 251.  
larceny charge, from, §§ 311-313.
- Maturity of claim.** See **PREMATURE PROCEEDINGS**.
- Mayor**, action of, in calling out militia to quell a riot, is judicial, § 804, p. 866.
- Mayor's court**, jurisdiction given to, in violation of the constitution, § 81.
- Meaning obvious in attachment affidavit**, § 264.  
in entry, § 776, p. 834.
- "Member of family,"** return fails to show copy left with, § 487, p. 494.
- Minister of the gospel**, implied adjudication that person is not, § 624.
- Minor.** See **INFANT**.
- Misdemeanor or felony**, power of court to determine which it is, §§ 520, 539, p. 561.
- Misdescription of land in foreclosure proceedings**, § 752. See **DESCRIPTION**.  
property, process gives a, § 370.
- Misjoinder of parties**, devisees in remainder joined with *ad. d. b. n.*, § 592, p. 624.  
guardians, several, join in petition to sell, § 592, p. 624.  
proceedings, § 325.
- Mistake**, suit to set aside judgment for, when collateral, § 5.

- Mistake of fact as to person.** See headings on pages 613-615.  
as to subject-matter. See §§ 526-586.  
comments of author upon, § 586.
- Modify, motion to, is a direct attack,** § 2.
- Money judgment instead of a revivor on *scire facias*,** § 756, p. 812.
- Monition.** See PROCESS.
- Month, process omits,** § 377.
- Mortgage instalment not due, personal judgment rendered for,** § 566.  
municipal, void, but foreclosed, § 104.  
ordered, when "sale" authorized by statute, § 170, p. 175.  
probate court orders, under misconstruction of statute, § 163.  
void for defective acknowledgment, judgment upon, § 236, p. 223.
- Mortgaged premises wrongfully ordered to be sold on execution,** § 103.
- Motion, bars a collateral attack,** § 17, p. 26.  
court in which made, wrong, § 222.  
in cause, notice of, defective or wanting, § 708.  
instead of suit or action, § 326.  
irregular, to set aside judgment, is collateral, § 6.  
title adjudicated upon a, § 326.  
to vacate judgment, denial of, bars a collateral attack, § 17, p. 26.
- Municipal corporation, injunction issued against, by mistake of law,** § 150.  
mortgage, void, but foreclosed, § 104.  
precincts, assessed, by misconstruction of statute, § 105.
- Names.** See PROCESS, sub-title, *Names*, §§ 356-367.
- Naturalization judgment, conclusive as to facts,** § 567.  
fraud in, § 550, p. 577.
- Nature of claim, attachment affidavit, defective as to,** § 263.
- "Near relatives" of infant, service not made upon,** § 459, p. 465.
- "Nearest county seat," cause not sent to, on change of venue,** § 717, p. 771.
- "Nearest justice," cause not sent to, on change of venue,** § 717, p. 771.
- Necessary parties omitted, effect of,** § 745.
- Necessity of administrator's sale of land, not shown,** § 286.
- Negligence, judgment for, fraudulent,** § 550, p. 577.
- Newly discovered evidence, no ground for collateral attack,** § 568.
- Newspaper, order for publication in, designates defectively,** § 346.  
with "patent inside," publication made in, § 352.
- New trial, justice grants by misconstruction of statute,** § 106.  
motion for, is a direct attack, § 2.
- Next of kin, funds ordered to be paid to, instead of administrator,** § 611.
- Non-joinder of co-administrator or co-guardian in petition,** § 592, p. 624.
- Non-repair of highway.** See CRIMINAL PLEADINGS.
- Non-residence, attachment affidavit defective, as to,** § 264.
- NON-RESIDENT.** See SERVICE, sub-title, CONSTRUCTIVE, ETC.  
Appearance for or service upon, illegal, § 429, p. 435. § 430.  
Creditor, attorney for, not appointed, § 667.  
Defendant, contradicting record in foreign court as to subject-matter,  
§ 389, p. 376.  
Divorce granted against, on constructive service, §§ 390, 391.  
children, how affected, § 391.  
property, how affected, § 391.



**NON-RESIDENT—Continued.**

False return or recital of service upon, in domestic court, § 476.

Insolvent's discharge against, on constructive service, § 392.

Land of, lien fixed upon in manner not warranted, § 106.

Plaintiff, unauthorized suit on behalf of, § 421.

Revivor against, upon constructive service, § 395.

Non-suit shown by record, is conclusive, § 568.

Note, void from alteration, judgment upon, § 549.

Notice. See **PROCESS—SERVICE**.

**NOTICE, NOT ORIGINAL, DEFECTIVE OR WANTING, §§ 706-708.**

Administrators' and guardians' sales, of, § 706.

settlement of, § 706.

Application for judgment, of, § 706.

Benefits assessed to land, of, § 706.

Damages assessed to land, of, § 706.

Dismissal and reinstatement, of, § 707.

Final decree, public notice of, § 708.

Motions in cause, of, § 708.

Reinstatement of cause, of, § 707.

Reversal, proceedings afterwards, of, § 708.

Stay order made, of, § 708, p. 763.

*Nul tiel record*, only plea allowed against a record, § 526.

*Nunc pro tunc*, confirmation entered thus, § 790.

entries, how and when made. See **PRACTICE AND EVIDENCE**.

Oath, see **Verification**.

Oath, administrator or guardian, of, statutes concerning, affect how, §§ 796, 797.

Object of appointing administrator, illegal, § 156.

administrator's sale, unlawful, §§ 166, 287.

proceeding, process misdescribes, § 355.

tax assessment, unlawful, § 291.

Obstructing highway. See **CRIMINAL PLEADINGS**.

Obvious meaning of attachment affidavit, § 264.

entry, § 776, p. 834.

Occupant of land, implied adjudication as to, § 63, p. 89. § 625.

premises, return of posting fails to show as to, § 487, p. 495.

Occupied, adjudication that premises are, is conclusive, § 534, p. 554.

"Office" instead of "residence," service by copy left at, § 464.

**OFFICER.**

Appointed to execute order, improper, § 709.

Deputed in blank, to serve process, § 349, p. 333.

Federal court, of, imprisoned by state court, § 515, p. 524.

Judgment ordering him to do what law prohibits, § 739, p. 794.

Legislative, declared to be elected or removed, § 515.

Present, adjudicated to be rightful in each case, § 1, p. 2.

Process directed to wrong, § 350.

State court, of, enjoined by federal court, § 515, p. 524.

Official acts, responsibility for. See **LIABILITY OF JUDICIAL OFFICERS**.

misconduct, jurisdiction taken over, by mistake of law, § 107.

plaintiff, wrong, is judgment void? § 627.

Option of plaintiff to serve summons out of state, omitted, § 346, p. 330.

- Oral** instead of written evidence heard, § 695, p. 745.  
**Order for execution** instead of order to sell, made, § 734.  
     to sell added to decree declaring priority of judgment lien, § 734.  
     departures from, confirmation cures, § 788.  
     instead of order to issue execution, § 734.  
**Ordinance, conviction for violating**, is conclusive of that fact, § 568.  
     constitution violated, § 81.  
     impliedly repeals statute, conviction under statute afterwards, § 508.  
     statute not authorizing, judgment enforcing, § 108.  
     void, conviction for violating, § 236, p. 223.  
**Ordinary proceedings.** See Civil proceedings, general.  
**Organization of corporation** impliedly adjudicated, is it conclusive? § 601.  
     court, adjudicated in each case, § 1, p. 2.  
**Orphan, apprenticeship proceeding** fails to show that ward is an, § 285, p. 270.  
     implied adjudication that person is, is not conclusive, § 624.  
**"Orphan," probate sale** ordered upon a misconstruction of this word, § 174.  
**OTHER STATE.**  
     Court of, having a seal is presumed to be superior, § 845.  
     Fraud in proceedings of, § 558.  
     Fraudulent will probated in, § 558, p. 589.  
     Inferior court, in, presumption as to jurisdiction over subject-matter, §§ 845-847.  
     Judgment of, complaint upon, § 855, p. 919.  
         errors in, do not avoid, § 729, p. 783.  
         perjury in, § 558, p. 586.  
         record of, conclusive, § 526, p. 539.  
         fraudulent, § 558, p. 586.  
     Superior court, jurisdiction of, over the person, presumed, § 846.  
         mailing notice in divorce not shown, § 846.  
         presumed to have jurisdiction, §§ 845-847.  
         special judge presiding, presumed right, § 847.  
         substituted service in, presumed right, § 846.  
**Outside of issues, relief given**, §§ 746-756. See section headings on page 793.  
**Overseer of highway, liability of**, does not arise from errors, § 852.  
     plaintiff is not, judgment in his favor, as such, § 627.  
**Owners of land** not all made parties to suits as to, §§ 745, 758, p. 814.  
**Ownership of cause of action**, plaintiff has not, § 626.  
     goods, implied adjudication of, § 625, p. 663.  
     land attached, implied adjudication of, § 625.  
         at ferry terminus, adjudication of, § 625.  
     property, attachment return fails to show, § 487.  
**Paper** instead of book used for docket, § 688.  
     publication made in wrong one, § 446.  
**Pardon, disregarded by the courts**, § 190, p. 191.  
**Parol trust, title quieted upon**, § 236, p. 223.  
**"Part," construed to mean "undivided" part**, § 171.  
**Partial relief only, given**, §§ 757-761.  
**Particular case—general class**, § 66, p. 96.  
**PARTITION PROCEEDINGS**, §§ 151-155.  
     Assignment to eldest son, bond not taken to secure others, § 758, p. 814.

**PARTITION PROCEEDINGS—Continued.**

- Consent to relief not provided for by statute, § 175, p. 180.
- Description, variance between stakes set and boundaries given, parol evidence may aid, § 776.
- Dower unassigned, sale unlawfully made subject to, § 152.
- Errors in, do not avoid, § 726.
- Fee unlawfully ordered sold subject to dower, § 733.
- Fraud in, § 550, p. 577. § 557, p. 585.
- Highway erroneously laid out across land, divided, § 733, p. 787.
- Interlocutory decree in, omitted, § 704.
- Jurisdiction taken in, by overlooking the statute, § 220, p. 211.
- Land not owned by tenants included in, effect of, §§ 154, 631.
- Necessary parties omitted in, effect of, § 745.
- Owners not all parties in, effect of, § 745.
- Persons having no right to partition, decree for, §§ 151, 628.
- Petition for, fails to describe the interest of the tenants, § 631.
- Plaintiff, wrong, is judgment void? §§ 151, 628.
- Premature decree in, § 712.
- Purchase money of infant's share wrongfully ordered paid, § 734, p. 788.
- Purchaser from tenant, in possession, not notified of, § 498.
- Sale in, administrator instead of heir procures, § 592, p. 624.
  - bond wanting, § 292, p. 278.
  - property of, which is not subject to, §§ 152, 153.
  - will disregarded, § 178, p. 182.
- Service on cotenant wanting, § 498.
- Tenants, mistakes of fact in stating their interests, § 631.
  - not all interested in all the land, in New York, § 631, p. 669.
- Time of granting decree, wrong, § 154.
- Title to property partitioned, party has no, §§ 154, 631.
  - wanting to part of land divided, not void as to remainder, § 740, p. 796.
- Unassigned dower, sale unlawfully made subject to, § 152.
- Partly void judgment, not necessarily wholly void, §§ 740-745.
- Partner confesses for firm without authority, § 429.
  - deceased, estate of, placed in bankruptcy, by mistake of law, § 137.
  - one served, judgment against firm by virtue of statute, § 419.
- Partnership, insolvency petition in, fails to give individual assets, § 266, p. 252.
- Party aiding wrongful judicial proceedings, not responsible for damages, § 854.
  - capacity of, misdescribed or not described, § 599.
  - mistake of law or fact concerning, §§ 587-659.
  - necessary one omitted, effect of, § 745.
- Past time, process fixes, for appearance, § 377, p. 358.
- Pauper removed, without notice, § 414.
- Payment before suit brought, judgment not void, § 569.
  - of claim does not make an allowance, award, foreclosure, judgment on a note, of revivor, street assessment, or tax foreclosure, void, § 569.
- "Payment of money," jurisdiction taken upon a misconstruction of, § 109.
  - original cause is no defense to suit to revive, § 580.
  - taxes in Minnesota, makes judgment for, void, § 569, p. 597.
- Payments, disregarded by justice of the peace, § 694.
  - no proofs as to, in case of constructive service, § 697, p. 749.

- Penalty given by unconstitutional statute, judgment on, § 72.**  
     informal entry in action upon bond with a, § 773, p. 830.
- Pending suits, repeal of law, judgment afterwards, § 109.**
- Pennsylvania confessions before clerk, proof of. See PRACTICE AND EVIDENCE.**  
     vacation entries, are they judicial? § 802.
- Perishable goods, sold without notice, § 414.**
- PERJURY.** [p. 524-  
     Congressional election contest, in, conviction for in state court, §§ 120, 515,  
     False swearing adjudged to be, upon a misconstruction of statute, § 210.  
     Judgment obtained by, is not void, § 571.  
         bars another action, § 571.  
         evidence in another case, is, § 571.  
         garnishee thus discharged, is protected, § 571.  
         guilty party is protected by, in suit for damages, § 571.  
     U. S. commissioner, before, conviction for in state court, § 515, p. 524.
- Permissive statute, probate sale ordered because compulsory, § 169.**
- Person against whom judgment is rendered, uncertain, § 779.**  
     aiding wrongful judicial proceedings, not responsible for damages, § 854-  
     for whom judgment is rendered, uncertain, § 780.  
     jurisdiction over, wanting, not void when, § 16.  
         taken over, by defective process or service, §§ 329-500.  
     mistake of law or fact concerning, §§ 587-659.  
     partition granted to, by mistake of law, §§ 151, 155.
- Personal judgment instead of order to sell, § 734.**  
     what entry is not a, § 770.  
     what is, § 393, p. 386.
- Personal service out of state instead of publication, § 440.**
- "Persons interested," process so names defendants, § 362.**
- Petit larceny. See LARCENY.**
- PETITION OR AFFIDAVIT IN ATTACHMENT, §§ 257-264.**  
     Absconds from county instead of state, alleged in, § 258.  
     Agent, person making, not shown to be an, § 252.  
     Alternative charge in, § 258.  
     Amount of claim, defectively stated in, § 259.  
     Amount of claim, failure to state in, § 259.  
     "Apprehensive" instead of "verily believed," used in, § 260.  
     Attorney, made by, § 252.  
     Cause of action, nature of, failure to state in, § 263.  
     Claim, nature of, failure to state in, § 263.  
     Conjunctive instead of disjunctive charge made in, § 258, p. 245.  
     "Disinterested person," maker of, not a, § 252.  
     "Dollars," omitted from affidavit in, § 260.  
     Domicile, intent to change, not stated in, § 261.  
     "Due," failure to allege that claim is, § 260.  
     "Due," "indebted" used instead of, § 260.  
     Equitable charge, attachment upon an, § 322.  
     Executed too long before filing, § 249.  
     Firm name signed to, § 252.  
     Fraud, facts constituting, inferentially stated in, § 261.  
         not stated in, § 261.

**PETITION OR AFFIDAVIT IN ATTACHMENT—*Continued.***

- Fraud, intent to commit, failure to state in, § 261.
- Indebtedness stated inferentially in, § 260, p. 247.
- "Information and belief," made upon, § 245.
- Intent to defraud, failure to allege in, § 261.
- Jurat, omitted from, § 253.
- "Just," claim not stated to be, § 262.
- "Justly due," claim not stated to be, § 262.
- "Justly indebted" used instead of "just," § 262.
- "Last resided," departure from, not stated, § 262, p. 258.
- "Lien," failure to state that plaintiff has no, 262.
- Meaning of, is obvious, § 264.
- Nature of claim, failure to state in, § 263.
- Non-residence, alternatively stated in, § 264.
- informally stated in, § 264.
- Obvious, meaning is, § 264.
- Official before whom made, wrong, § 254.
- Premature verification of, 255.
- Principle involved in, § 257.
- "Recently" instead of "secretly" departed, charged in, § 264.
- Recital instead of positive allegation in, § 262, p. 248.
- Signature of affiant to, omitted, § 251, p. 236.
- Statutory language used in, § 258, 260.
- Test in Wisconsin is, Can perjury be predicated on the affidavit? § 258.
- Venue, omitted from, § 250.
- Verification of, omitted, § 251.
- "Vexing," failure to state that proceeding is not for, § 264.
- "Voluntary," failure to allege that remaining away is, § 264.

**PETITION IN BANKRUPTCY, INSOLVENCY AND POOR DEBT-****ORS' PROCEEDINGS, §§ 265-267.**

- Amount of debts, fails to show, §§ 265, 277.
- "Attached on contract," fails to show, § 265, p. 251.
- Consideration of claim, not stated in, § 265, p. 251.
- Defective, merely, § 278, p. 264.
- General allegations as to property, in, § 276.
- Inability to pay, poor debtor's petition fails to show, § 278, p. 264.
- Material allegation omitted from, § 265, p. 251.
- Names of creditors, insolvency petition fails to state, § 266.
- Partnership insolvency petition, fails to give individual assets, § 266, p. 252.
- Premature new petition in poor debtors' proceeding, § 267.
- Schedule of debts and assets, not annexed to petition, § 270, p. 257.
- wanting, § 270, p. 257.

Signed by poor debtor after service of citation, § 249.

**PETITION IN CAPIAS PROCEEDINGS, §§ 268-271.**

- "Abscond," "leave" used instead of, § 270.
- Amount due, defectively stated in, § 270.
- Colorable allegations in, § 268.
- Fraudulent intent, defectively stated in, § 270.
- Freeholder, failure to allege that defendant is not a, § 270.
- General allegations in, § 269.

**PETITION IN CAPIAS PROCEEDINGS—Continued.**

- Inferential allegations in, § 268.
- "Information and belief," made upon, § 246.
- Intent to defraud, defectively stated in, § 268, p. 254, § 270.
- "Justify belief" in fraudulent intent, fails to state facts to, § 270.
- Material allegation omitted from, § 270.
- Omission of affidavit in, § 271.
- Statutory language followed in, § 269.
- "Suspects" instead of "believes" used in, § 268, p. 254.
- Wanting entirely, § 271.

**PETITION, FORMAL DEFECTS IN, §§ 242-255.**

- Address of petition, wrong, § 243.
- Administrator, appointed on petition on "information and belief," § 247.
- Attachment affidavit, executed too long before using, § 249.
  - made on "information and belief," § 245.
- Capias* affidavit, made on "information and belief," § 246.
- Confession by agent made on "information and belief," § 247.
- Filing of petition, omitted, or done at wrong time, §§ 244, 249.
- Guardian's petition to sell, report of propriety of, on "belief," § 247.
- Heading to tax-collector's report, omitted, § 244.
- Poor debtor's petition, signed after service of citation, § 249.
- Prayer, alternative which court has no power to grant, § 248.
  - defective, § 248.
  - omitted, § 248.
- Signature to affidavit, wanting, § 251, p. 236.
- Venue, omitted from affidavit, § 250.
- Verification, affiant improper, § 252.
- Verification, jurat wanting, § 253.
  - official before whom made, wrong, § 254.
  - prematurely made, § 255.
  - wanting, § 251.

**PETITION IN GENERAL CIVIL PROCEEDINGS, §§ 226-236.**

- Age of plaintiff, allegation as to, omitted in petition for partition, § 226.
- Appeal, petition for, wanting, § 226, p. 214.
- Cause of action, affirmatively shown not to exist, § 236.
  - failure to state any, § 227.
- Citizenship, allegation as to, omitted in U. S. court, § 226, p. 214.
- Cognovit, bond not referred to, in, § 226, p. 214.
- Condition, illegal, contained in petition to subscribe for stock, § 227.
  - omission to set out, in foreclosure complaint, § 227.
- Confession, statement in, defective concerning purchase, § 232.
  - fails to show consideration, § 227, p. 215.
  - informal, § 227, p. 215.
- Consideration, failure to show a, § 227, p. 215.
- Defects, mere, do not affect, § 227, p. 215.
- Demand, failure to allege a, § 227, p. 215, § 232.
- Divorce, absence from state, omission to allege, § 226.
  - false in fact, allegations are, § 544.
  - residence, omission to allege, § 226, p. 214.
  - verification of petition, omitted, § 251, p. 236.

**PETITION IN GENERAL CIVIL PROCEEDINGS—Continued.**

Due or not. See **PREMATURE PROCEEDINGS.**

Enjoining judgment, for. See **PLEADING IN COLLATERAL ACTIONS.**

Entitling of cause, wrong, § 229.

Equity, bill shows no, § 232.

Exhibition of license, allegation concerning, wrong, § 230.

Exhibits, omitted from, § 230.

Fence, omission of allegation concerning, § 230.

Herd law, omission of allegation concerning, § 230.

Judgment, complaint upon, shows it to be void, § 236.

Limitations, administrator's petition to sell for cause barred by, § 231.

complaint shows that cause is barred by, § 231.

stay of execution barred by, § 231, p. 218.

Mechanic's lien, petition fails to specify kind of material, § 227, p. 215.

Ordinance, allegations show it to be void, § 236, p. 223.

Partition petition, age of plaintiff, failure to allege in, § 226.

Partly void, allegations show claim to be, § 231, p. 218.

Prayer of, defective, § 231, p. 218.

excessive, § 231, p. 218.

Removal to U. S. court, petition for, shows no valid cause, § 233.

Request, failure to allege that goods were sold upon, § 232.

omission to allege a, before suit, § 227, p. 215, § 232.

Residence, omitted in petition to appoint administrator, § 226, p. 214.

divorce petition, allegation of, omitted, § 226, p. 214.

*Scire facias*, petition for, based on copy instead of original, § 227, p. 215.

petition for, uncertain as to parties, dates and amounts, § 234.

Statute of limitations. (See Limitations above.)

Stockholder's suit, petition in, fails to show a cause of action, § 233, p. 220.

Street assessment, petition for, shows no cause, § 233.

Title to land before justice, allegations as to, held bad, § 233, p. 220.

Uncertain amount, "dollars" omitted, § 234.

Uncertainty as to parties in revivor, § 234.

Venue, change of, jurisdiction taken on imperfect papers, § 235.

Will, petition to probate, shows it to be void, § 236, p. 224.

set aside probate of, shows no valid cause, § 233.

Petition in summary proceedings, verified three years before using, § 255.

**PETITION IN TAX PROCEEDINGS, §§ 289-291.**

Amounts, gross instead of separate, § 290.

Cause for assessment, unlawful, §§ 290, 291.

Due, taxes not yet, § 289. See also **PREMATURE PROCEEDINGS.**

Exempt property, assessor's affidavit as to, § 290.

Immaterial allegations in, § 290.

Increase of assessment, cause for, unlawful, § 290.

Lien, none shown in, § 290, p. 276.

Object or purpose of assessment, unlawful, § 291.

"Personally examined," not shown in, § 290, p. 276.

Prematurely brought, § 289.

Petitioners. See **Signature—Signers.**

Petitioners, fraud in procuring names of, § 557, p. 585.

road, for, appointed commissioners to lay it out, § 709.



**Petitioners, withdrawal of, wrongfully refused, § 719.**

**Pilot commissioners, action of, is judicial, § 800, p. 860.**

**Pilotage, state court takes jurisdiction over by misconstruction of law, § 119.**

## **PLACE.**

Appearance of, process omits or gives wrong, § 369.

Assets of decedent, none in county, § 573.

none in state, § 573.

Contradicting record as to place of occurrence of event, § 477.

Court, place of holding, §§ 27, 28, 574.

Crime, place where committed, laid wrong, § 60, p. 75.

Event, place of occurrence of, § 63, p. 90, §§ 571, 572.

Highway, is locus a? § 63, p. 87, § 575.

Imprisonment at wrong place, § 737.

Jurisdiction, does it depend on? §§ 60, 317, 572, 573-578.

Land or water, contradicting record as to existence of goods upon, § 576.

Railroad, place of existence of, § 577.

Spring, place of existence of, § 578.

Taxable property, place of existence of, § 578.

*Placita*, omitted from record, § 689.

**Plaint.** See **PETITION.**

## **PLAINTIFF.**

Absent at time set for trial before justice, § 678.

Administrator instead of heir procures partition sale, or removes cloud from title, § 592, p. 624.

Administrator instead of creditor procures order to sell decedent's land, § 592, p. 624.

Appearance of, before justice in Michigan, hour of, not shown, § 686.

Cause of action, does not own, § 626.

Defendant, same person as, § 598.

Death of, before suit brought, § 604.

pending suit, § 607.

Jurisdiction over, given by filing complaint, § 60, p. 75.

Official, wrong, is judgment void? § 627.

Partition, wrong, is judgment void? § 628.

Process misnames. See **PROCESS**, sub-title, *Name of plaintiff*.

Revivor, in name of wrong, § 657.

Serves his own writ, § 449.

Service of copy of process made upon, for defendant, § 461.

Tardy at trial before justice, § 679.

Platted, adjudication that land was not, is conclusive, § 535.

**Pleading, civil.** See **PETITION.**

**Pleading, criminal.** See **CRIMINAL PLEADINGS.**

## **PLEADING IN COLLATERAL ACTIONS, § 855.**

Answer to suit on domestic judgment must allege what the record shows concerning service or appearance, § 855.

Foreign superior court judgment, complaint upon, need not show jurisdiction, § 855, p. 919.

Inferior court judgment, complaint to enjoin must show a want of jurisdiction, § 855.

Inferior court judgment, complaint upon, must show jurisdiction, § 855.

**PLEADING IN COLLATERAL ACTIONS—Continued.**

- Injunction against inferior court judgment, bill must show the want of jurisdiction specifically, § 855.
- Other state superior court judgment, complaint upon, need not show jurisdiction, § 855, p. 919.
- Other state superior court judgment rendered by special judge, complaint upon, need not show that he was authorized to act, § 855, pp. 919, 920.
- Superior court judgment, complaint upon, need not show jurisdiction, § 855.
- Pleadings, omitted from record, § 689.
- Police board, action of, in discharging officer because too old, is judicial, § 566.
- court, abolished by implication, action afterwards, § 504, p. 515.
- Poor assessments authorized once a month, made for six months, § 739, p. 794.
- POOR DEBTORS' PROCEEDINGS.** See **BANKRUPTCY PROCEEDINGS.**
- Creditors, service not made on all, § 456.
- Discharge in, when no evidence was heard, § 697, p. 749.
- prematurely granted, § 713.
- Full disclosure not made in, as shown by record, § 696, p. 747.
- Jurisdiction in. See **TITLE B**, p. 152.
- Lien of creditors, error as to, § 726.
- Oath administered in, in form prescribed by a repealed statute, § 695.
- Petition in. See **PETITION IN BANKRUPTCY, ETC.**
- Poor persons, tax levied to support, when beneficiaries are not poor, § 632.
- Possession, person adjudged to be in, conclusive, § 535.
- Possible power of the court, relief given beyond, is void, §§ 739-743.
- Possibly right, judgment which is, is not void, § 150, n. 2.
- Posting of notices, false recital of, § 479.
- instead of publication, § 441.
- occupation of premises, as to, § 487, p. 495.
- "public place," instead of "most public place," § 464.
- Power, same as jurisdiction, § 58.
- Power of courts, same in all, collaterally, § 1, p. 2, § 16.
- Power of attorney. See **Service**, sub-title, **UNAUTHORIZED PROCEEDINGS AS TO DEFENDANT—CONFESSION OF JUDGMENT**, sub-head, **Warrant**.
- PRACTICE AND EVIDENCE IN COLLATERAL ACTIONS, §§ 856-859.**
- Amended, return of service may be amended at any time, § 858.
- Date of process, contradicted by parol to sustain judgment, § 859, p. 925.
- Equitable aid and extrinsic evidence, competency of, § 859.
- Extrinsic evidence to aid or defeat record, competency of, § 856.
- Nunc pro tunc* entries may be made to aid record collaterally, § 858.
- notice of, is it necessary? § 858.
- Pennsylvania confession before clerk, proof of, § 857, p. 922.
- Proof of judgment of inferior court, pleading and judgment necessary, § 856.
- competency of extrinsic evidence, § 856.
- Proof of judgment of superior domestic court, nothing but final judgment necessary, § 857.
- Proof of judgment of superior foreign court, pleadings and judgment necessary, § 857.
- Publication of summons, parol evidence admissible to aid, § 859, p. 925.
- Restraining inferior court judgment, burden lies on plaintiff although record is defective, § 856, p. 921.

**Prayer**, relief given outside of, § 753.

special proceedings, in, defective or omitted, § 248.

**Precinct**, municipal, assessed, by misconstruction of statute, § 105.

**Preēemption** of land, is the decision of the register conclusive as to ? § 579.

**PRELIMINARIES IN SPECIAL PROCEEDINGS**, §§ 238-241.

Attachment writ issues before complaint filed, § 238.

Attachment writ issues before summons, § 238.

Bail, proceedings taken against, before issuing of execution, § 238, p. 226.

Bond for costs, proceedings taken before filing, § 239.

Examination, defective, § 298.

evidence not heard in, in violation of statute, § 697.

judicial action, is it ? § 800, p. 860.

Garnishment issued before return of execution, § 240, p. 227.

Publication. See **SERVICE, PUBLICATION, AFFIDAVIT TO AUTHORIZE.**

Receiver appointed in supplementary proceedings begun before the return of execution, § 240, p. 227.

Sewer rate established without presentment of jury, § 241.

Tax foreclosure proceedings begun before return of execution, § 241.

**PREMATURE PROCEEDINGS.**

Action, §§ 228, 260.

Administrator's petition to sell land, § 288.

Attachment proceedings, § 260.

Clerk's appointment in insolvency, § 239.

Contempt proceeding, § 240.

Foreclosure before claim is due, § 566.

Garnishment proceeding, § 240, p. 227.

Judgments, §§ 710-713.

Partition decree, § 712.

Poor debtors' second petition, § 267.

Receiver's appointment, § 240, p. 227.

Tax foreclosure proceedings, §§ 241, 289.

**Presence of defendant**, false recital of, in *capias* case, § 477, p. 481.

false recital of, in criminal case, § 473,

**Presence of justice**, record can not be contradicted as to, § 540.

**Presumptions**, §§ 805-847. See **INFERIOR DOMESTIC COURTS—SUPERIOR COURT—FOREIGN JUDGMENTS.**

general rules as to, § 805.

time of holding courts, as to, § 30.

**PRINCIPLE INVOLVED IN.**

Administrator, appointment of, § 588.

Attachment affidavit, bad in substance, § 257.

Clerk's vacation entries, § 802.

Collateral attack, § 1, p. 1.

Confirmation, § 781.

Confirmation omitted, § 790.

Constitution violated, §§ 68, 75.

Contempt of inferior courts, § 185.


Criminal pleading, § 304.

Criminal proceedings, § 200.

Dead person treated as living, § 602.

**PRINCIPLE INVOLVED IN—Continued.**

- Divorce against non-resident upon constructive service, § 390.
- Due, petition shows that claim is not, § 228.
- Estoppel against contesting void proceeding, § 860.
- Foreign judgments, effect of, § 848.
- Forged entries, § 549, p. 571.
- Fraud in domestic judgments, § 550.
- Implied repeal of law, jurisdiction exercised under, § 501.
- Inferior and superior courts, distinction between, § 811.
- In rem*, or *quasi in rem*, § 399.
- Judicial action, §§ 799, 804.
- Jurisdiction exercised by reason of a mistake of law, §§ 65, 66.
- Jurisdiction taken by misconstruction of statute or common law, § 89.
- Law repealed by implication, jurisdiction exercised under, § 501.
- Liability of judicial officers for official conduct, § 852.
- Loss of jurisdiction, § 660.
- Mistakes as to party or person, § 587.
- Naming of parties in process, § 367.
- Outside of issues, relief granted, § 746.
- Petition in special proceedings, defective in form, § 242.
- Petition in special proceedings, defective in substance, § 256.
- Preliminary matters to issuing process, § 330.
- Premature action before claim is due, § 228.
- Presumptions concerning inferior domestic courts, §§ 806, 807.
- Presumptions where record is silent, § 805.
- Probate petitions to sell, mortgage, etc., § 275.
- Process, defective or wanting, § 329.
- Proof of service in domestic court, false in fact, § 468.
- Relief exceeds possible power of court, § 739.
- Relief exceeds power of court in any case of that species, § 730.
- Relief outside of issues, § 746.
- Residence of decedent or ward, in respect to the appointment of administrator or guardian, § 637.
- Residence in tax proceedings, § 655.
- Service, defective or wanting, § 329.
- Service, proof of, in domestic court, false in fact, § 468.
- Service, substituted, § 417.
- Service wanting in proceedings, *in rem*, § 399.  
not *in rem*, § 494.
- Special proceedings, § 834.
- Statutes declaring the effect of judicial proceedings, § 792.
- Subject-matter, jurisdiction over, wanting, § 514.
- Substituted service, § 417.
- Unauthorized proceedings, § 420.
- Undisputed law, overlooked, § 214.
- Verification of pleadings, § 251.
- Priority, erroneous adjudication as to, § 579, p. 604.
- Prisoner, absent on criminal trial, § 714.
  - arraignment of, omitted, § 715.
  - interrogation of, omitted, § 715.

- Prisoner, of war, service on, wanting, § 498.**  
    or person injured absent on criminal trial, § 714.
- Private person serves process, §§ 449, 450, p. 459.**
- Privateer, prize of, condemned, by overlooking the statute, § 221.**
- Privies in contract, errors concerning, § 633.**
- Privileged person, sued, § 435.**
- Prize, condemned by overlooking the statute, § 221.**
- Prize court, errors of, not void, § 726.**  
    sentence of, conclusive evidence of the facts upon which it is  
    based, § 399, p. 395. *Contra*, as to the government, § 399, p. 395.
- Probate courts, are they inferior or superior? §§ 815-827.**  
    presumptions indulged concerning their action, §§ 815-827.
- Probate entries, informal, § 766.**
- Probate proceedings. See ADMINISTRATOR—GUARDIAN—TUTOR.**
- Probate of will. See WILL, PROBATE OF.**
- PROCEDURE, WRONG, §§ 321-328.**  
    Affidavit instead of complaint, injunction issued on, § 118.  
    Attachment proceedings instead of personal, § 322.  
    Civil proceedings instead of criminal, §§ 95, 323.  
    Corporation dissolved in private instead of public suit, § 94.  
    Description of land in complaint instead of attaching, in order to acquire a  
    lien, § 106, p. 135.  
    Equitable proceedings instead of legal, § 324.  
    Implied repeal of statute authorizing procedure, § 510.  
    Insanity inquest, procedure in, unconstitutional, § 74, p. 103.  
    Legal proceedings instead of equitable, § 325.  
    Loss of jurisdiction by, §§ 661-719. See headings on pages, 711, 712.  
    Misjoinder of proceedings, § 325.  
    Motion instead of suit or action, § 326.  
    title adjudicated upon a, § 326.  
    Private suit instead of public by state, § 94.
- Proceedings *in rem*. See SERVICE, sub-title, IN REM.**
- Proceedings, common, general or ordinary. See Civil proceedings, general,**  
    §§ 90-129, 222-236.
- Proceedings, special or summary. See Civil proceedings, special, §§ 130-148;**  
    237-297.
- PROCESS, DEFECTIVE OR WANTING.**  
    Address to defendant, wrong, § 348.  
    Alterations and amendments of, § 375.  
    Amendments and alterations of, § 375.  
    Amount of demand, in figures only, § 354, p. 337.  
    omitted, § 354.  
    Appearance, place of, omitted or wrong, § 369.  
    Blanks in, filled by improper person, § 349.  
    left unfilled, § 373.  
    Cause of action, misdescribed in, § 355.  
    new one added to, § 355.  
    Dates in, irregular, § 329, p. 306, § 350.  
    Defendant's name in. See *Name of defendant, infra*.  
    Definition of, § 347.
- 

**PROCESS, DEFECTIVE OR WANTING—Continued.**

- Delayed before justice, § 680.
- Deputation of officer, in blank, § 349, p. 333.
- Directed to defendant instead of officer, § 350.
- Directed to wrong officer, § 350.
- Filing of complaint, omits to state, § 350.
- Form of, defective, § 329, p. 308, §§ 348–354.
- Inferentially good, is sufficient, § 329, p. 307.
- Information as to pending suit given by, is good, § 329, p. 305.
- In rem.* See SERVICE, sub-title, IN REM OR QUASI IN REM.
- Kind of, wrong, §§ 351, 355.
  - appearance waives, § 385, p. 364.
- Language in which written, wrong, § 352.
- “Long” instead of “short,” issued, § 351.
- Meaning of word “process,” § 347.
- Misdescription of property in, § 370.
- Misleading, good, if not, § 329, p. 308.
- Name of defendant, wrong or wanting, §§ 356–364, 367.*
  - Capacity in which sued, ambiguous, § 458.
  - Christian, § 356.
  - Comments of author, § 367.
  - Corporate, § 357.
  - Described, but not named, § 361.
  - “Estate” of, so given in, § 358.
  - Fictitious, § 358.
  - Firm, § 358.
  - “Heirs” of, so given in, § 359.
  - Initials only, given in, § 360.
  - Omitted, but described, § 361.
  - Omitted from pleading, but given in process, § 361, p. 345.
  - “Persons interested,” so named in, § 362.
  - Principle involved, § 367.
  - Surname, wrong, § 363.
  - “Unknown” children, so named in, § 364.
- Name of plaintiff, wrong or wanting, § 365–367.*
  - Christian, § 365.
  - Comments of author, § 367.
  - Firm, § 365.
  - “Heirs” of, so given in, § 365, p. 348.
  - Initials only, given in, § 365.
  - Middle name, wrong, § 365.
  - Principle involved, § 367.
  - Surname, wrong, § 366.
- Newspaper with “patent inside,” summons published in, § 352.
- Object of proceeding, misdescribed in process, § 355.
- Omitted from record, § 689.
  - in *capias* and criminal cases, § 383.
- Order for publication misdescribed in process, 368.
- Person signing, wrong, § 372.
- Place of appearance, omitted from, or wrong, § 369.

**PROCESS, DEFECTIVE OR WANTING—Continued.**

Plaintiff's name. See *Name of plaintiff, supra*.

Preliminaries. See SERVICE, PUBLICATION, AFFIDAVIT TO AUTHORIZE.

Principle involved in, § 329.

"Process," jurisdiction taken by misconstruction of this word, § 110.

Property misdescribed or not described in, § 370.

Purpose of proceeding, misdescribed in, § 355.

Scope of word "process," § 347.

Seal, omitted from, or wrong, § 353.

"Short used instead of "long," § 351.

Signature of officer issuing, changed afterwards, § 375, p. 356.

defective, § 371.

wanting, § 373.

State, style fails to run in name of, § 374.

Style, name of state omitted from, § 374.

Subpœna in chancery used instead of summons, § 351.

Substance of, defective, § 255-382.

Summons used instead of warrant, § 351.

*Time for appearance, uncertain or wrong in, §§ 376-382.*

Hour, omitted from, § 376.

Month, omitted from, § 377.

Omitted entirely, § 381.

Past time fixed, § 377, p. 358.

Sunday, on, § 278.

Term of court, changed by law after issuing, § 378.

wrongly given in, § 378.

Too distant, § 379.

Too soon, § 380, and p. 360.

Wanting entirely, § 381.

Year omitted, § 382.

Unverified as to amount involved, § 351.

Validity of, is impliedly adjudicated in each proceeding, § 1, p. 2.

Wanting in *capias* and criminal cases, § 383.

Warning to appear and show cause, omitted from, § 354.

Profane swearing. See CRIMINAL PLEADINGS.

Profanity, second conviction for same offense, § 84.

Prohibition, writ of, is a direct attack, § 2.

Proof of judgments of foreign courts. See PRACTICE AND EVIDENCE.

inferior courts. See PRACTICE AND EVIDENCE.

superior courts. See PRACTICE AND EVIDENCE.

Proof of service. See SERVICE, sub-title, PROOF OF SERVICE.

"Proper authority," discharge of poor debtor by misconstruction of, § 139.

Prospective statute, jurisdiction taken by, mistake as to, §§ 111, 203.

Public benefit, adjudication that a matter is of, is conclusive, § 535.

Public office, contestants for, collude, § 533.

"Public place" instead of "most public place," posting done at, § 464.

Public policy, city garnished, contrary to, § 215.

Publication. See SERVICE, PUBLICATION.

Punishment excessive, or wrong in kind, § 738.

excess void, § 743.



- Punishment implied repeal of law authorizing, § 511.  
     required, exceeds jurisdiction of court, § 516, p. 526.  
     too light, § 761.
- Purchaser at execution sale, attack by, is collateral, § 3.  
     judicial sale, attack by, when collateral, §§ 3, 7.  
     when direct, § 8.
- Purpose. See Object.
- Quarter sessions court in Tennessee, presumptions concerning, § 828.
- Quasi in rem*. See SERVICE, sub-title, IN REM OR QUASI IN REM.
- Question to witness illegal, commitment for refusing to answer, § 696, p. 745.  
     outside of issues, § 754.
- Quieting title, decree of, conclusive on the facts, § 583.  
     judgment questioned in a suit for, is a collateral attack, § 3.
- Quo warranto*, ouster by, upon erroneous view that statute was repealed, § 512.
- Railroad. SEE CONDEMNATION PROCEEDINGS.
- Ratification of void judgment by using it, estops from contesting, § 864.
- Reading process to defendant instead of delivering a copy to him, § 443.
- Real estate. See LAND.
- Reason given for judgment, outside of issues, § 755.
- Receipt, construed to be a "document" in a criminal case, § 202.
- RECEIVER, APPOINTMENT OF.  
     "An action," meaning of, in statute concerning, § 179.  
     Equity wanting in bill for, § 232.  
     Errors in, do not avoid, § 726.  
     Oath of, omitted, § 251, p. 236.  
     Premature, § 240, p. 227, § 713.  
     Questioned in another proceeding, is a collateral attack, § 3.  
     Special proceeding, done in, when statute required an "action," § 179.
- Recital of appearance, insufficient in law, § 486.
- Recital of appearance or service in domestic record, false in fact. See SERVICE, sub-title, PROOF OF SERVICE IN DOMESTIC RECORD, FALSE IN FACT.
- Recital of disqualification of judge, conclusive, § 562.
- Recital of service. See SERVICE, sub-titles, PROOF OF SERVICE, FALSE IN FACT—PROOF OF SERVICE INSUFFICIENT IN LAW.
- Record, blanks in, in criminal case, § 660, p. 709.  
     book in which kept or manner of keeping, improper or irregular.  
     See DOCKET, etc.  
     *nul tiel record*, only plea admissible against, § 526.  
     stranger writing justice's, under his supervision, § 54, p. 66.  
     tried by inspection, only, § 526.
- Redemption, barred wrongfully, § 735.
- Referee, rejection of report of, because not signed by all, § 662, p. 715.  
     fees of, failure to pay, adjudged to be a contempt, § 196.  
     instead of sheriff, sells, § 709.
- Reference, adm'r's petition to sell, refers to other papers, § 277, p. 263, § 280.  
     entry, in, to complaint for amount, § 773, p. 830.  
     map, plan or plat, to, for description, § 774.  
     person named as owner, to, for description, § 775.  
     pleadings, to, for description, § 774, p. 832.

"Refused to relinquish right of way," omitted from petition, § 273.

Rehearing, petition for, is a direct attack, § 2.

Reinstatement of cause, notice of, defective or wanting, § 707.

at subsequent term, notice wanting, § 498, p. 509.

Relationship of judge or justice. See JUDGE DISQUALIFIED.

#### RELIEF ERRONEOUS.

Demanded, exceeds possible power of court, §§ 514-525.

Erroneous, generally, §§ 720-729.

Exceeds possible power of the court, §§ 739-743. See page 793.

Exceeds possible power of the court in civil cases, excess void, §§ 740, 741.

Exceeds possible power of court in criminal cases, excess void, §§ 742, 743.

Exceeds power of court in any case of that species, §§ 730-738.

Joint against all, some of whom were not served, §§ 744, 745.

Kind of, wrong, §§ 730-738.

Outside of issues, §§ 746-756. See section headings on page 793.

Partial, incomplete, irregular or too limited, §§ 757-761. See page 793.

Uncertain, §§ 742, 762-780.

*Rem, in.* See SERVICE, sub-title, IN REM OR QUASI IN REM.

Remonstrance, waives process and service, § 385, p. 364.

Removal of cause to another court, action of first court afterwards, § 684.

to United States court, action afterwards, § 685.

statute authorizing impliedly repealed, § 513.

officer restrained, when city council has exclusive jurisdiction, § 515

Repeal of law, directly, action afterwards, § 525.

implication. See section headings, page 513.

pending suit, judgment afterwards, § 109.

#### REPLEVIN.

Alternative judgment, omitted in, § 759.

Bond, approval of, is judicial in Iowa, § 800, p. 861.

law dispenses with notice to surety, judgment without, § 499, p. 511.

refusal to give, erroneously held to be a contempt, § 188.

Error of law in defeating action of, does not authorize trover, § 726.

Estopped, signer of bond is, to contest void proceeding of, § 865.

False return that no bond was given in, bars suit on it, § 481.

Judgment in, outside of issues, § 756.

too limited, § 759.

Order for return of goods made in, under a misconstruction of law, § 111.

Right derived through a judgment, questioned in, is a collateral attack, § 3.

adjudicated in, as shown by record, bars contradiction, § 583..

Value not shown by affidavit in, § 277, p. 263.

Verdict, defective in, § 718, p. 772.

Replevin-bail in Indiana, entry of, is it a judgment? § 803, p. 865.

time of entry of, too late, § 180.

Report of referee, etc., construed wrongly, § 725.

*Res*, place of its existence, does jurisdiction depend upon? §§ 573-578.

#### RESIDENCE.

Attachment and garnishment proceedings, in, § 634.

Bankruptcy, insolvency and *capias* proceedings, in, § 635.

Criminal proceedings, in, § 636.

**RESIDENCE—Continued.**

*Decedent or ward, of* (as to appointment of adm'r or guardian), §§ 637-647.

Principle involved in, § 637.

*United States, and in England*, §§ 638-647.

Alabama, California and Colorado, in, § 638.

Connecticut and Georgia, in, § 639.

Illinois and Indiana, in, § 640.

Kentucky and Louisiana, in, § 641.

Maine, Maryland, Mass., Miss. and Mo., in, § 642.

New York, in, § 643.

North Carolina, Oregon and Rhode Island, in, § 644.

Tennessee and Texas, in, § 645.

Vermont, Virginia and Wisconsin, in, § 646.

United States courts and England, in, § 647.

*Divorce proceedings, residence in*, §§ 648-651.

Principle involved in, § 648.

Resident of a state procures a divorce in another state, by default, upon constructive service—Validity of, in state of residence, § 649.

in state where procured, § 650.

Resident of state procures divorce in another state after contest, § 651.

Inferior courts, in, judgment not void for error as to, § 652. *Contra*, § 653.

Petition gives jurisdiction to determine, § 60, p. 77.

Superior courts, in, § 654.

Tax proceedings, in, § 655.

United States courts, in, § 656.

Resident, divorce against, upon constructive service, § 397.

partition against, upon constructive service, § 397.

proceeded against as a non-resident, § 341.

proceeded against as a non-resident, upon constructive service, § 398.

*Res judicata*, collateral attack distinguished from, § 17.

divorce, when not, § 17, p. 25.

*in rem*, judgment in, is not, except on points contested, § 17, p. 21.

matters contested and decided are, only, § 17, p. 15.

rule in, § 17, p. 29.

Restraining order. See INJUNCTION.

Retrospective statute, jurisdiction taken under a mistake as to, §§ 112, 113.

service made by an error as to, § 113.

widow's allowance made by mistake as to, § 112.

homestead, set off by mistake as to, § 112.

Return day or time for answering, not arrived, judgment rendered, § 713.

Return of service, ambiguous, explained in collateral suit, § 329, p. 309.

"executed, and copies of within writ delivered," § 437, p. 446.

false, or insufficient in law. See SERVICE—PROOF, ETC.

misconstrued by justice, § 329, p. 309.

refusal to quash, effect of, § 329, p. 309.

Reversal, proceedings afterwards, with notice, § 700.

without notice, § 708.

Reversion, dower existing, set off by misconstruction of statute, § 154.

Review, bill of, attempt to contradict record by, is collateral, § 6.

is a direct attack, § 2 and note 2.

**REVIVOR OF JUDGMENT.**

Barred by bankrupt's discharge, § 580.

Death of party, notice to administrator of, wanting, § 498, p. 509.  
delay in, § 683, p. 733.

Dormant, of, § 236, p. 222.

Heirs, against, when not bound, § 580.

Irregular, of, § 683, p. 733.

Merits of original cause cannot be investigated in, § 580.

Non-resident, against, on constructive service, § 395.

Plaintiff in suit for, wrong, § 657.

Recital of, is conclusive that evidence was sufficient, § 580.

Repeal of law authorizing, pending suit for, § 109.

Settlement of original cause before judgment, § 580.

Usury in original cause of action, § 580.

Void judgment, of, § 236, p. 222.

**Revoked will, probate of, § 585, p. 610.**

**Riot, jurisdiction taken over, as a "breach of the peace," § 201.**

**Road commissioners, errors do not make them liable, § 852.**

**Runaway slave. See CRIMINAL PLEADINGS.**

**Sabbath breaking, second conviction for same offense, § 84. See SUNDAY.**

**"Sale" authorized, but exchange ordered instead of, § 170.**

**"Sale" authorized, but mortgage ordered instead of, § 170, p. 175.**

**Sale on constructive service, refunding bond wanting, § 292, p. 278.**

**Same or similar import as statute, allegations having, § 288, p. 274.**

**School trustees, act judicially, when, § 804, p. 866.**

***Scire facias*, failure to issue before issuing attachment, § 342.**

false return of "*nihil*," in, § 481.

**Sea or land, goods seized upon which, is record conclusive upon? § 576.**

**Seal omitted from forthcoming bond, judgment upon, § 236, p. 223.**

justice's record, § 689.

process, or wrong one used, § 353.

transcript on change of venue, § 302.

**Seaman adjudged to have signed shipping contract when he did not, § 538.**

**Seaman's wages not due, judgment for, § 566.**

**Second application by insolvent, discharge granted upon, § 140.**

judgment on the same cause, § 660, p. 710, § 693, p. 743, § 700.

sentence, § 700, p. 754.

sentence after discharge on *habeas corpus*, § 693.

sentence to begin at expiration of first, § 742, p. 798.

suit while first is pending, collateral effect of, § 580.

which is void? § 693, p. 741.

**"Secretly departed," attachment affidavit defective as to, § 264, p. 250.**

**Seizure and sale ordered, the seizure alone may be void, § 740, p. 796.**

**Selectmen, action of, in deciding upon qualifications of voters, or in assessing taxes, or in laying out highways, is judicial; § 804.**

**"Sell the whole or part," authorized, undivided part sold, § 171.**

**SENTENCE.**

Exceeds power of court in that case, § 730.

Final. See **RELIEF ERRONEOUS.**

Indefinite and indeterminate, void, § 742.

**SENTENCE—Continued.**

Indeterminate, in violation of constitution, § 74, p. 103.

Outside of issues, § 748.

Second. See Second sentence, *supra*.

Time of commencement of, uncertain, § 742, p. 798.

Too severe, excess void, § 743.

Unwarranted thing added to, void as to it, § 743.

Separate instead of joint relief given, § 758, p. 814.

judgments rendered against joint defendants in contract, § 700.

"Servant" or "laborer," adjudication as to, § 657, p. 702.

**SERVICE, §§ 384-500. See APPEARANCE—DUE PROCESS OF LAW.**

Constructive. See SERVICE, CONSTRUCTIVE, *infra*.

Contradicting, when a collateral attack, § 9.

direct attack, § 10.

Defective, gives notice which cannot be disregarded, § 329, p. 309.

suit to set aside for, is collateral, § 11.

Foreign corporation, made upon, by misconstruction of statute, § 113.

*In rem*. See Service, *In rem*, *infra*.

Length of time required for, statute as to, misconstrued, § 114.

Mode, wrong. See SERVICE, MODE OF, WRONG, *infra*.

Person making, improper. See SERVICE, PERSON MAKING, IMPROPER, *infra*.

Person served or accepting service, improper. See SERVICE, PERSON SERVED OR ACCEPTING SERVICE, IMPROPER, *infra*.

Personal, out of state, made by misconstruction of statute, § 115.

Place of service or acceptance of service, wrong. See SERVICE, PLACE OF, SERVICE OR ACCEPTANCE OF SERVICE, *infra*.

Principle involved in service, § 329.

Proof of. See SERVICE, PROOF OR ADJUDICATION OF, ETC., *infra*.

Publication. See SERVICE, PUBLICATION, *infra*.

Substituted. See SERVICE, SUBSTITUTED, *infra*.

Time of. See SERVICE, TIME OF MAKING, IMPROPER, *infra*.

Unauthorized. See SERVICE, UNAUTHORIZED, ETC., *infra*.

Wanting. See SERVICE, WANTING, ETC., *infra*.

**SERVICE, CONSTRUCTIVE, EFFECT OF, §§ 388-398.**

Bastardy, personal judgment in, upon, § 389, p. 376.

Change of law pending, § 109.

Children, how affected by divorce granted upon, § 391.

Collateral validity of judgments upon, § 389.

Definition of, § 388.

Distribution made upon, § 389, pp. 375, 376.

Divorce granted upon, § 389, pp. 374, 375; §§ 390, 391.

Dower in foreign state, how affected by divorce upon, § 391.

Errors in, effect of, § 388.

How made. See PUBLICATION, *infra*.

Insolvent's discharge granted upon, § 362.

Jurisdiction to adjudicate upon errors in, § 388.

Law changed pending, § 109.

Non-resident, contradicting record as to, § 476, p. 480.

contradicting record as to subject-matter, § 389, p. 376.

**SERVICE, CONSTRUCTIVE, EFFECT OF—*Continued.***

- Non-resident, divorce against, upon, § 391.
  - insolvent's discharge against, upon, § 392.
  - personal judgment against, upon, §§ 393, 394.
  - revivor against, upon, § 395.
  - title of, adjudicated, upon, § 396.
- Personal judgment against non-resident, upon, § 393.
  - leading cases, § 393, p. 387.
- Power of court to disregard errors in, § 388.
- Presumptions concerning, in superior courts, §§ 835, 836.
- Property in divorce, how affected by decree granted upon, § 391.
- Protection afforded by judgment upon, § 389.
- Resident, divorce against, upon, § 397.
  - partition against, upon, § 397.
  - proceeded against as a non-resident, upon, § 398.
- Revivor upon, § 395.
- Specific performance granted upon, § 389, p. 374.
- Statute changed pending, § 109.
- Title quieted upon, § 389, p. 374; § 396.
- Too short in inferior courts, § 488.
  - in superior courts, § 490.

**SERVICE, IN REM OR QUASI IN REM, PROCEEDINGS IN, §§ 399-416.**

- Appearance in, denied, § 386, p. 366.
- Criminal proceeding, judgment *in rem* is no evidence in, § 17, p. 18.
- Definition of, § 399, p. 394.
- Effect of, § 399, pp. 394, 395.
- Evidence, is not, in criminal proceeding, § 17, p. 18.
- Foreign prize court, sentence of, conclusive as to facts, § 399, p. 395.
- Notice wanting in proceeding in rem or quasi in rem*, §§ 400-415.
  - Administrator, appointment of, § 401.
    - claim allowed against, § 402.
    - custom of London, § 400, p. 397.
    - distribution by, § 403.
    - final discharge of, § 404.
    - petition to sell land by, § 405, 406.
    - removal of, § 407.
    - second sale by, §§ 405, p. 403.
  - Adoption of child, parents not notified, § 408.
  - Bankruptcy proceedings, in, § 410.
  - Bond to release boat from attachment, judgment upon, § 402, p. 401.
  - Composition meeting in bankruptcy, in, § 410, p. 408, n. 3.
  - Condemning or assessing for public purpose, in, § 411.
    - name of owner, omitted, § 411, p. 411.
    - wrong, § 411, p. 410.
  - Dower assigned, § 415, p. 417.
  - Ferry license granted, § 411, p. 412.
  - Guardian appointment of, § 401.
    - final discharge of, § 404.
    - petition to sell land by, § 405, p. 404.
  - Infants, proceedings against, § 412.

**SERVICE, IN REM OR QUASI IN REM—Continued.***Notice wanting in proceedings in rem or quasi in rem—Continued.*

Insanity inquest held, § 413.

Insolvency proceedings, § 410.

Pauper removed, § 414.

Perishable goods sold, § 414.

Widow's rights set off, § 415.

Will probated, § 416.

Principle involved in proceedings *in rem* or *quasi in rem*, § 399.**SERVICE, MODE OF, WRONG, §§ 436-446.**

Copy of complaint omitted, § 437, p. 446.

Copy of process, amount of demand, not indorsed upon, § 436, p. 445.  
certifying omitted, § 436.

"each" defendant, not left for, § 436, p. 445.

mailing to non-resident, omitted or wrong, § 438.

mother of infant, extra one for, omitted, § 459.

offered, but not read, § 436, p. 445.

omitted, § 437.

*served on*, instead of *delivered to*, § 437, p. 446.

"Executed," return of, § 439.

German paper, publication made in, § 446, p. 454.

Mailing copy of process to non-resident, omitted or wrong, § 438.

Manner of making personal service, wrong, § 430.

"*Nihil*," one return of, instead of two, § 441, p. 450.

Order for publication, varied from, § 446, p. 454.

Paper, publication made in, unlawful, § 446.

Personal service out of state, instead of publication, § 440.

Posting of notice, defective, § 441.

false recital of, § 479.

instead of publication, § 441.

"public place," instead of "most public place," § 464.

Publication, paper in which made, wrong, § 446.

instead of personal service, § 442.

instead of posting, § 442.

without personal service, § 442.

without posting, § 442.

Reading, instead of copy, 443.

"Served," return of, § 439.

"Served by reading," return of, § 439, p. 448.

Substituted service by copy, defective, § 444, p. 452.

instead of personal, § 444.

"Summoned," return of, § 439, p. 448.

Summons instead of warrant, § 445.

Sunday paper, publication made in, § 446, p. 454.

**SERVICE, PERSON MAKING, IMPROPER, §§ 447-450.***Capias* proceedings, in, § 447, p. 456.*De facto* officer, § 447.

Deputy, appointment of, irregular, § 449, p. 458.

makes return in his own name, § 449.

none allowed by law, § 449.



**SERVICE, PERSON MAKING, IMPROPER—Continued.**

Deputy, serving process, none in fact, § 448.

Plaintiff serves his own writ, § 449.

Principle involved, § 447.

Private person, by, §§ 449, 450, p. 259.

Sheriff, wrong one serves, § 447, p. 456.

Special constable, appointment of, irregular, § 450.

warrant served by, § 447, p. 456.

**SERVICE, PERSON SERVED OR ACCEPTING SERVICE, IMPROPER, §§ 451-461. See SUBSTITUTED SERVICE, *infra*.**

Acceptance of service by agent or attorney, § 451.

Agency of person served, adjudicated on plea, § 453, p. 462.

Agent foreign corporation, return may be controverted, § 453.

served, fact of agency adjudicated, § 453, p. 462.

instead of president, § 452.

return so showing, false in fact, § 452.

return fails to show proper person, § 452, and p. 453.

Attorney in fact, service made upon, § 454.

Corporation officer served, when he is plaintiff, § 461.

Corporation officer, wrong one served, §§ 452, 455.

Creditors of poor debtor, all not served, § 456.

Father, mother or guardian, service upon, defective, § 458.

wanting, § 459.

Guardian served, infant not, § 460.

Infant served, "designated person," not, § 457.

guardian *ad litem* not, § 459, p. 465.

"Known agent," return fails to show there was no, § 452, p. 461.

Lunatic served, committee not served, § 459.

"Managing agent," return of service upon, false in fact, § 452, p. 461.

"Near relatives" of infant not served, § 459, p. 465.

Plaintiff, service made upon, for defendant, § 461.

"Station agent," return fails to show person to be, § 452, p. 461.

**SERVICE, PLACE OF, OR OF ACCEPTANCE OF, §§ 462-467.**

Corporation officer served outside of state, § 467.

County, justice's record fails to show service in, § 463.

District, bankruptcy record shows service made outside of, § 463.

"Dwelling house," copy left at, instead of at "last and usual place of abode," § 462, p. 467.

Last and usual place of abode "known to me," copy left at, instead of at

"Last and usual place of abode," § 462, p. 467.

"Last usual place of abode," copy left at, instead of at "usual place of abode," § 462.

"Office" instead of "residence," copy left at, § 464.

Omission to state place of service, § 465.

"Place of service" required to be shown, return of made "at her residence," § 462, p. 467.

"Public place" instead of "most public place," posting at, § 464.

State, acceptance outside of, no statute so providing, § 466.

corporation officer served outside of, in domestic suit, § 467.

"Store," copy left at, instead of at "house," § 464.

**SERVICE, PLACE OF, OR OF ACCEPTANCE OF—Continued.**

"Usual place of abode," return fails to show copy left at, § 462, p. 467.

"Usual place of abode in A," copy left at, instead of "usual place of abode," § 462, p. 467.

"Usual place of abode in said county," copy left at, instead of "usual place of abode," § 462, p. 467.

**SERVICE, PROOF OR ADJUDICATION OF, IN DOMESTIC COURT.****FALSE IN FACT, §§ 468-482.**

Absence from state, contradicting return as to, § 477, pp. 481-482.

Attachment of goods, false return of, § 459.

Attachment writs, time of levying, false return of, § 482.

"Concealed" debtor, absent person sued as a, § 469, p. 470.

Copy of process served, contradicted by return, § 472.

Execution, time of return of, false recital as to, § 482.

Identity of defendant, as to, § 474, p. 477.

Mailing to address of defendant, contradicting record, § 477, p. 482.

Married woman, may contradict return in New York, § 475, p. 478.

Non-resident, false return of service upon, § 476.

Place, false recital of place where event occurred, § 477.

Poor debtors' notice, too short in fact, cannot be shown, § 482, p. 486.

Presence of defendant, false recital of, in *capias* case, § 477, p. 481.

criminal case, § 473.

Principle involved in this sub-title, § 468.

Publication, recital of, bars contradiction, §§ 479-489.

Recital of appearance of infant, false, § 475.

in justice's record, false, § 468.

in vacation entries, false § 468, p. 473.

Recital of confession in justice's record, false, § 471.

eluding service by an administrator, false in fact, § 474-

personal service, contradicted by return, § 480.

upon infant, false, § 475, p. 478.

posting of notices in commissioners' court, false, § 479-

presence of defendant in criminal case, false, § 473-

publication, bars contradiction, §§ 479, 480.

contradicted by proof of, § 480.

service in justice's record, false, §§ 468, 470.

probate record, false, § 478.

superior court record, false, § 468, p. 471.

Replevin, false return that bond was not given, § 481.

Residence or place of abode, contradicting record as to, § 477, p. 481.

"Resident" at defendant's house, contradicting return, § 477, p. 482.

Return of service before justice, false, § 468, p. 571.

*Scire facias*, false return of "*nihil*" in, § 481.

Sunday, service made on, contradicting return to show, § 482, p. 486.

Time of levying attachment writs, false return of, § 482.

Too short, that poor debtors' notice was, cannot be shown, § 482, p. 486.

**SERVICE, PROOF OF, IN FOREIGN OR OTHER STATE COURT,****FALSE IN FACT, § 483.**

*Prima facie* correct, but can be contradicted by parol, § 483.

Resident of other state, actually there, can contradict the return of service when sued in another state, § 483, p. 487.

**SERVICE, PROOF OF, INSUFFICIENT IN LAW, §§ 484-487.**

Administrator's report shows posting of notices, confirmation of the report is an adjudication that notices were posted, § 486, p. 493.

Publication, affidavit of, cause in which made, uncertain, § 484.  
 affidavit of, is not entitled, § 484.

venue omitted from, § 484.

verification omitted from, § 484.

person making proof of, improper, § 485.

**Recital of appearance, ambiguous, § 486.**

"citation having been published for six weeks as required by law,"  
 is proof of both publishing and posting, § 486, p. 492.

"due advertisement," "due notice," "due and legal notice," "pub-  
 lication as required by law," § 486, p. 492.

publication, dates left in blank, § 486, p. 492.

service on "foregoing defendants," § 486, p. 492.

service, insufficient, § 486.

uncertain, § 486, p. 493.

when shows a want of service, § 486, p. 493.

**Return, attachment, of, fails to show ownership, § 487.**

delivery of copy, inferentially shown, § 487, p. 494.

deputy makes, in his own name, § 449.

"member of family," fails to show copy left with, § 487, p. 493.

name of person with whom copy left, not shown, by, § 487, p. 495.

posting, fails to show premises not occupied, § 487, p. 495.

service of, insufficient in law, § 487.

signature of officer to, wanting, § 487, p. 495.

time of service not shown by, § 487, p. 496.

too late, § 487, p. 496.

**SERVICE, PUBLICATION. (This is a branch of CONSTRUCTIVE SERVICE, *supra.*)**

***Affidavit to authorize, defective, §§ 330-346.***

Ability to find defendant in state, not negatived in, § 336.

Cause of action, omitted from, or described too generally, § 335.

Curative statute of Wisconsin, § 340.

Diligence to find defendant, general allegations of, § 337.

inferential allegations, § 337.

satisfaction of judge, as to, § 338.

sheriff's return as to, § 339.

Entitling of, omitted from, § 331.

Execution not first issued, § 342.

False in fact, as to absence or non-residence, § 341.

Filed too late, § 332.

Information and belief, made on, § 333.

Knowledge of all the plaintiffs, not shown in, § 333.

Made too long before using, § 332.

Material allegation, omitted from, § 340.

Non-residence, affidavit of, made by wrong person, § 330, p. 311.

Non-residence alleged, false in fact, § 341.

Person making, wrong, § 334.

**SERVICE, UNAUTHORIZED PROCEEDINGS, ETC.—Continued.**

- Power of attorney, clerk instead of attorney confesses on, § 424, p. 428.
  - foreign state, confession entered upon, in, may be controverted when sued elsewhere, § 432, p. 439.
  - lunatic, given by, confession upon, § 428, p. 433.
  - note misdescribed in, § 424.
  - proof of execution of, wanting, § 424.
  - too comprehensive, § 424.
  - uncertain as to persons making, § 424, p. 428.
- Principle involved in this branch, § 420.
- Privileged person sued and served, § 435.
- Soldier in military service sued and served, § 435, p. 444.
- Stay of execution entered on forged letter, § 430, p. 437.
- Widow, consent of, to administrator's sale, defectively signed, § 425.
  - notice waived by, irregularly, § 425, p. 429.

**SERVICE, UNAUTHORIZED PROCEEDINGS AS TO PLAINTIFF,**

§§ 421-425.

- Appeal taken by unauthorized person, § 422.
- Appearance of, falsely recited in justice's record, § 421.
- Attorney brings suit without authority, §§ 421, 422.
- Bastardy judgment, consent of relatrix to, obtained by fraud, § 423.
- Confession unauthorized by creditor, § 422, p. 424.
  - void as to others until ratified, *id.*
- Corporation, bankruptcy proceedings on behalf of, § 421, p. 422.
- Criminal case, consent of state, wanting, § 423.
- Divorce granted to wife confined in an asylum, § 434, p. 442.
- Dower, proceedings for, unauthorized, § 422.
- Infant plaintiff, unauthorized suit for, §§ 421, 422.
- Non-resident plaintiff, unauthorized suit brought for, judgment not void where rendered, but defense can be made against, when he is sued at home, § 421.
- Principle involved in this branch, § 420.
- Prosecuting attorney withdraws, conviction afterwards, § 423, p. 426.

**SERVICE, WANTING IN PROCEEDINGS NOT IN REM, §§ 494-498.**

- Absent person, no notice to, § 494, p. 506.
- Appeal bond, judgment on, no notice, § 494, p. 506.
- Contempt proceedings, no notice, § 494, p. 506.
- Criminal conviction, accused absent, § 494, p. 506.
- Cross-bill against plaintiff, no notice, § 495, p. 507.
  - between defendants as to matters in bill, § 495, p. 507.
- Cross-complaint between defendants, no notice, § 495.
- Garnishment, adverse claimant, not notified, § 496.
  - garnishee, not served, § 496.
  - principal debtor, not served, § 496.
- Gravel road assessment, without notice, § 496, p. 508.
- Heirship adjudicated, without notice, § 497.
- Highway vacated, without notice, § 497.
- Lien declared, without notice, § 497.
- Lost note or record, restored without notice, § 497.

**SERVICE, WANTING IN PROCEEDINGS, ETC.—Continued.**

Partition, purchaser in possession, no notice, § 498.

tenant not notified, § 498.

Principle involved in this branch, § 494.

Prisoner of war, no notice, § 498.

Reinstating cause at subsequent term, without notice, § 498, p. 509.

Revivor after death, administrator not notified, § 498, p. 509.

Sheriff, failure to return execution, judgment against, § 498, p. 509.

Suretyship on cross-complaint, judgment without notice, § 495.

Vacating judgment at subsequent term, no notice, § 498, p. 509.

Vacating justice's judgment by default, no notice, § 498, p. 509.

**SERVICE, WANTING IN PROCEEDINGS WHERE IT IS DIS-  
PENSED WITH BY STATUTE, §§ 499-500.**

Appeal bond, judgment on, § 499.

Bail bond, judgment on, § 499, p. 510.

Contributor to corporation, judgment against, § 499, p. 510.

Cost bond, judgment on, § 499, p. 511.

Delivery bond, judgment on, § 499, p. 511.

Forthcoming bond, judgment on, § 499, p. 511.

Replevin bond, judgment on, § 499, p. 511.

Stayor of execution, judgment against, § 499, p. 511.

Surety in judgment, judgment in favor of, § 500.

Set-off, unlawful use of, merges it, § 866.

Setting aside decree instead of opening to let in defense, not void, § 660, p. 710.

judgment by commissioner or justice when no statute permits, § 518.

judgment by inferior court, § 701.

probate of will, cause for, not good, § 233.

will, when cannot be done, § 416, p. 418.

"Settled," entry of, is conclusive, § 770, p. 827.

"Settled as per agreement filed," recital of, is conclusive, § 580, p. 605.

Severable cause, removal into U. S. court through mistake concerning, § 233.

Sewer rate, unlawfully established without presentment of jury, § 241.

Sheriff. See SERVICE, sub-title, PERSON MAKING SERVICE.

Sheriff, bond of, decree approving by a misconstruction of the statute, § 107.

deed of, fraudulently obtained, but confirmed, § 550, p. 578.

judgment against, for failure to return writ, no notice, § 498, p. 509.

motion against, in wrong court, by overlooking the statute, § 222.

sale by, appraisement omitted, § 666, p. 718.

wrong one makes service, § 447, p. 456.

Ship, larceny in, conviction for, by overlooking the statute, § 220.

"Short" summons, instead of "long," § 351.

Signature of judge or justice, omitted from record, § 690.

officer to return of service, wanting, § 487, p. 495.

Signature to petition in special proceedings, omitted, § 251, p. 236.

time of, wrong, § 249.

process, changed, § 375, p. 356.

defective, § 371.

by wrong person, § 372.

wanting, § 373.

- Signers to a petition to relocate a county seat, to establish a ditch or grade, to discharge an insolvent, to grant a dramshop license, to issue town orders to improve a street, improper, or too few, does not make the order valid, § 629-630. See Petitioners.
- Sister states. See OTHER STATE.
- Slave, person adjudged to be a, without notice, § 414.
- Soldier, age too great, is his conviction as a, void? § 595.  
     conviction of person as a, when he had no right to enlist, § 600.  
     sued, served, and judgment rendered against, § 435, P. 444.
- Spanish title adjudicated, commission has exclusive jurisdiction, § 515, P. 515.
- Special administrator, sale by, upon authority to "care for and preserve," § 450.  
     constable, appointment of, irregular, § 450.  
     findings, construed wrongly, § 725.  
     defective or omitted, § 702.  
     judge appointed, is conclusive that regular judge had not resigned, § 450.  
     appointed by overlooking the law, § 219.  
     appointment shown, cannot be contradicted, § 562.  
     consent of parties to his acting, §§ 35, 41.  
     presides in other state, presumed rightful, § 847.  
     selected by wrong person, § 35.
- Special proceedings. See Civil proceedings, special.  
     adjudication of jurisdiction in, § 62, pp. 85, 86.  
     bond in. See BOND IN SPECIAL PROCEEDINGS.  
     preliminaries in. See PRELIMINARIES, ETC.  
     principle involved in, § 834.  
     superior courts, presumptions concerning, in § 834.
- Special term of court, notice for, too short, § 31.
- Specific performance, administrator not allowed option, in § 169.  
     administrator wrongly makes, § 160, p. 168.  
     decree of, conclusive that evidence was sufficient, § 581.  
     granted on constructive service, § 389, p. 374.
- "Spirituous liquor," conviction for keeping, is conclusive, § 581.
- Splitting cause of action in order to sue before justice, effect of, § 581.
- Spring, place of its existence, record conclusive as to, § 578.
- Stare decisis*, application of, to collateral attacks, § 1, p. 4.
- "State," meaning of, in statute, § 116.
- State, another, of Union. See OTHER STATE.
- State court, interferes with process of federal court, § 514, p. 524.  
     federal court, interferes with, § 117.  
     jurisdiction taken by, over fugitive by mistake of law, § 121.  
     jurisdiction taken by, over perjury in federal election, § 120.  
     jurisdiction taken over pilotage by misconstruction of law, § 119.  
     usurps power of federal court, §§ 117, 119, 120, 121.
- State statute, conviction under, constitution of U. S. violated, § 81.  
     federal conflicts with, wrong one applied, § 119.  
     federal court applies, by misconstruction of law, §§ 122, 123.  
     not yet in force, but applied, § 118.
- State stay law, federal court applies by misconstruction of statute, § 123.
- "Station agent," return fails to show person served to be the, § 452, p. 461.

# STATUTE.

- Declaring effect of judicial proceedings, collateral effect of, §§ 792-798.**
- Implied repeal of, §§ 97, 160, 501-513.**
- Jurisdiction exercised in violation of, § 67.**
- Jurisdiction taken upon a misconstruction of, §§ 89-212.**
- Limitations. See LIMITATIONS.**
- Misconstrued as to number of judges necessary, § 55, p. 67.**
- Other state, of, misconstrued, § 118.**
- Permissive, held to be compulsory, § 169.**
- Prospective, but construed to be retrospective, § 203.**
- jurisdiction taken under a mistake as to, § 111.**
- Publication of, defective, § 118.**
- Repealed by implication, §§ 501-513.**
  - court organized under mistake as to, § 97.
  - probate sale made under, § 160.
- Repealed directly, action afterwards, § 525.**
- Retrospective, jurisdiction taken by mistake as to, §§ 112, 113.**
  - service made, by mistake as to, § 113.
  - widow's allowance, by error as to, § 112.
  - homestead, by error as to, § 112.
- Supreme court takes jurisdiction by misconstruction of, § 124.**
- Wrong one applied, § 118.**
- Wrong one, condemnation proceedings taken under, § 221.**
- Statutory language, followed in attachment affidavit, §§ 258, 269.**
  - followed in *capias* affidavit, § 269.
  - same import, used, § 288, p. 274.
- Stay of execution, forged letter, entered on, § 430, p. 437.**
  - limitations, barred by, § 231, p. 218.
  - persons name entered as, in his absence, § 468, p. 471.
  - time of entry, too late, § 180.
  - too long a time, taken for, § 741
  - too short a time, taken for, § 741.
  - witnessed informally, § 765, p. 822.
- Stay law of state, federal court applies by mistake of law, § 123.**
- Stay order made in pending cause, notice of, defective or wanting, § 708, p. 763.**
  - wrought by demand for bill of items, judgment disregards, § 660, p. 710.
- Stayer, new one given without notice, § 342, p. 327.**
  - of execution, law dispenses with notice, judgment without, § 499, p. 511.
- Stipulation filed to exclude land from decree of foreclosure, § 670, p. 721.**
- Stockholder's suit, petition in, fails to show a cause of action, § 233, p. 220.**
- "Store" instead of "house," service by copy left at, § 464.**
- Stranger appointed to collect bond, instead of prosecuting attorney, § 709.**
  - attacks by, when collateral and when direct, § 12.
  - instead of sheriff, sells, § 709.
  - writing record of justice, § 54, p. 66.
- Strays, proceedings to impound and sell, § 181.**
- Street assessment, owner misnamed, § 183.**
  - petition for, shows no cause, § 233.
  - resolution ordering, invalid, § 241.



- Street condemnation for, by railway, by misconstruction of statute, § 143.
- Strict foreclosure, consent to, wanting, is erroneous but not void, § 670, p. 722.
- Style of process, fails to run in name of state, § 374.
- Subject-matter, in another county, § 524.  
     jurisdiction taken over, by mistake of fact, §§ 526-586.  
     jurisdiction over, wanting, §§ 514-525.  
     outside of limits of state, §§ 521-523.  
     place of existence, does jurisdiction depend on, §§ 573-578.  
     in superior court, presumptions concerning, § 833.
- Subpœna in chancery. See PROCESS.
- Subsequent agreement, used to defeat action on judgment, not collateral, § 13.  
     proceedings, after judgment and after term, §§ 698-701.  
     unlawful alterations of record, § 549, p. 573.
- Substitution of, defendant, wrong, § 716.  
     plaintiff, wrong, § 716.  
     different person as purchaser, § 662, p. 714.
- "Sufficient to set the judicial mind in motion," criminal charge which is, gives jurisdiction, § 304.
- Suit on judgments. See PLEADING IN COLLATERAL ACTIONS.
- Summary proceedings. See Civil proceedings, special.  
     sheriff's bond, on, by misconstruction of law, § 107.  
     presumptions concerning, § 843.
- Summary process. See PROCESS.
- Summons. See PROCESS.
- Summons instead of warrant used, § 445.
- Sunday, court held on, § 33.
- Sunday labor. See CRIMINAL PLEADINGS.  
     note executed upon, judgment upon, § 236, p. 223.  
     paper, publication made in, § 446, p. 454.  
     process fixes appearance on, § 378.  
     service made on, § 492, p. 504.  
     service made on, contradicting record to show, § 482, p. 486.
- SUPERIOR COURT.**  
     Constructive service in, too short, § 490.  
     Entries in, informal, § 767.  
     Personal service in, too short, § 491.  
     Presumptions as to. See section headings on pages 888, 889.  
     Residence of parties, is it jurisdictional in? § 654.  
     Respected no more collaterally, than inferior courts, § 1, p. 2.
- Supplementary proceedings, affidavit made on "information and belief," § 247.  
     presumptions concerning, § 843.
- Supreme court, errors of, not void, § 727.  
     Indiana, of, jurisdiction taken by, mistake of law, § 125.  
     jurisdiction taken by, under misconstruction of law, § 124.
- Surety, error in discharging, not void, § 727.  
     error in order to sue, not void, § 727.  
     in judgment, statute dispenses with notice, judgment without, § 500.  
     on quashed bond, judgment against, not void, § 727.
- Suretyship between defendants adjudicated on an answer, instead of a cross-complaint, § 660, p. 711.

- Suretyship**, married woman's void contract of, judgment upon, § 621, p. 659.  
     on cross-complaint, service wanting, § 495.
- Surname of defendant**, process gives wrong, § 363.  
     plaintiff, process gives wrong, § 366.
- Surplusage** in guardian's petition to sell, § 288, p. 274.
- Surprise**, suit to set aside judgment for, when collateral, § 5.
- Surveyor**, acts judicially in repairing ditches, in Indiana, § 804, p. 866.
- "Suspects"** instead of "believes" used in *capias* affidavit, § 268, p. 254.
- Suspending**, instead of adjourning proceedings, not void, § 660, p. 711.
- Tax assessment**, constitution violated by, §§ 73, 82.  
     county court's action in laying, is judicial, § 804, p. 867.  
     errors in, do not avoid, § 773, p. 778.  
     exempt property, of, by a mistake of fact, § 546.  
         by overlooking the statute, § 223.  
         assessor's affidavit, as to, § 290.  
     increased, cause for, unlawful, § 290.  
     increased without authority, § 518.  
     levied without authority, § 518.
- Tax assessors**, act judicially, § 804, p. 867.  
     liability of, not for errors, § 852, p. 911.
- Tax bill**, errors in, do not make judgment void, § 727.
- Tax boards**, act judicially, § 804, p. 867.
- Tax foreclosure**, begun before return of execution, § 241.  
     notice of, failure of clerk to record, § 344, p. 328.  
     presumptions concerning, § 844.  
     taxes not delinquent, § 566.
- Tax judgment**, founded on illegal evidence, void, § 695.  
     in figures, only, § 772.  
     in Illinois, void if taxes were illegal or paid, § 582.  
     in Illinois, term at which rendered, not shown, § 721, p. 777.  
     jurisdiction, petition gives, § 60, p. 77.  
     jurisdiction taken on a mistake of law. See headings, p. 184.  
     lands in two counties ordered sold, § 741, p. 797.  
     list, order for publication of, not filed with clerk, § 344, p. 328.  
     official plaintiff, wrong, not void, § 627.  
     petition for. See PETITION IN TAX PROCEEDINGS.
- Tax, railroad aid**, collection ordered under mistake of law, § 182.
- Tax, void**, proceedings to examine as to property, upon, § 236, p. 223.
- Tax purchase**, barred by limitation, confirmation does not cure, § 782.
- Taxable property**, place of its existence, is record conclusive upon? § 578.
- Temporary restraining order**, errors in, not void for, § 727.
- "Tenant,"** jurisdiction taken upon a misconstruction of this word, § 184.
- Territorial statute**, instead of federal, applied, § 126.
- Term**, wrong in record. See DATES AND TIME.
- Term of court**, constitution violated by holding, § 82.  
     process issued, changed afterwards by statute, § 378.  
     gives wrong term, § 378.
- Test of jurisdiction**, amendability is, § 61, p. 82.  
     is power to act under any circumstances, § 61 p. 83, § 704.  
     enter upon inquiry, § 61, p. 82.

- Testamentary trustee, administrator treated as, by mistake of law, § 172, p. 177.
- Theory of judicial proceedings, § 1, pp. 1-3.
- Thing, place of its existence, does jurisdiction depend upon? §§ 573-578.
- TIME.** See **DATES AND TIME—COURT**, sub-title, *Time, etc.*
- Appearance, for, process gives wrong. See **PROCESS**, sub-title, *Time, etc.*
  - Contempt proceeding carried on at wrong, § 191.
  - Court's sitting, time of, adjudicated in each case, § 1, p. 2.
  - Creditor's election, time of, wrong, confirmation cures, § 789.
  - Crime, time when committed. See **CRIMINAL PLEADINGS**.
  - Executing or filing papers in special proceedings, time of, wrong, § 249.
  - Holding election, of, conviction by overlooking statute as to, § 244.
  - Occurrence of event, time of, false recital of, in record, § 482.
  - Partition decree made at wrong, § 154.
  - Probate sale granted too late by misconstruction of statute, § 172.
  - Probate settlements made at wrong, by mistake of law, § 172, p. 177.
  - Service, time of, return fails to show, § 487, p. 496.
- TITLE.** See **Ownership**.
- Adjudicated upon a motion, § 326.
    - in replevin, as shown by record, conclusive, § 583.
  - Bond for, as construed erroneously, not void, § 727.
  - Decedent of, settled in probate court by misconstruction of statute, § 173.
  - Land in another county, adjudicated, § 524.
    - in another state, adjudicated, § 521.
    - before justice, adjudicated, § 518, p. 528.
    - before justice in dispute, erroneous decision that is not, § 583.
    - before justice, erroneously held not to be in issue, § 233, p. 220.
    - before "superior court" in dispute, decision that it is not, § 583.
    - in partition, §§ 154, 631, 740, p. 796.
  - Quieted on constructive service, validity of, § 389, p. 374, § 396.
    - decree of, conclusive on the facts, § 583.
    - on void parol trust, § 236, p. 223.
    - bars probate of a will settling it differently, § 585, p. 611.
- Tort**, attachment based on, by misconstruction of statute, § 132.
  - for, by overlooking the statute, § 215.
  - insolvent discharged from, by misconstruction of statute, § 141.
  - justice's judgment for, conclusive that cause not a contract, § 584.
- Transfer of cause.** See **REMOVAL**.
- Treasurer of hospital**, assessment against as a tenant, § 184.
- Trespass.** See **CRIMINAL PLEADINGS**.
- Trespass**, objection to use of judgment to justify, is collateral, § 3.
- Tribunal.** See **COURT**.
- Trover**, right derived through judgment, questioned in, is collateral, § 3.
- Trust**, deed of, construed erroneously, not void, § 727.
- Trust**, deviated from by misconstruction of law, § 127.
- Trustee.** See **ADMINISTRATOR—GUARDIAN**.
- Trustee**, estopped to contest proceeding when sued on his bond, § 867.
  - fraudulent sale by, confirmed, § 557, p. 585.
  - school district of, liability of, for wrongful assessment, § 852.
- Tutor.** See **ADMINISTRATOR—GUARDIAN**.
- Tutor**, appointment of, without advice of family meeting, § 589.

- Tutor, father acting as, second appointment is void, § 593, p. 627.  
     questioned in another proceeding, is a collateral attack, § 3.  
     stranger appointed instead of father, § 590, p. 620.
- Unassigned dower, unlawful sale in partition subject to, § 152.
- Unauthorized proceedings. See SERVICE, sub-title, *Unauthorized*, etc.
- Unborn child, probate sale ordered upon the ground that it is an "heir," § 165.
- Uncertainty, "dollars" omitted from note before J. P., § 234.
- Uncertainty in final entry, §§ 762-780.  
     imprisonment, § 742. See Imprisonment.
- Unconscionable claim, judgment upon, is not void, § 584.
- Unconstitutional statute. See Chapter II, §§ 18-25; and Chapter V, §§ 68-88.
- Under-tutor, appointment of, errors in, do not make void, § 773, p. 778.
- Undisputed evidence, disregarded, § 694.
- Undivided interest, partition sale made of, by misconstruction of statute, § 153.
- Undivided part, probate sale of, ordered by misconstruction of statute, § 171.
- Undue influence, will obtained by, probate of, is not void, § 585, p. 611.
- Unfounded claim, judgment upon, is not void, § 584.
- United States courts, presumptions concerning their action, § 829.  
     residence in, § 656.
- "Unknown" children, process so names defendants, § 364.
- Unknown heir, attorney for, not appointed, § 667.
- Unknown owners, affidavit to authorize publication for, defective, § 343.
- Unlawful preference, does not make a discharge in bankruptcy void, § 584.
- "Unlawfully," omitted from charge of misdemeanor, § 321.
- Unreasonable refusal of a town to allow a highway, judgment as to, § 584.
- "Usual place of abode in A," or "usual place of abode in said county," instead  
     "usual place of abode," service by copy left, so made, § 462.
- "Usual place of abode," return fails to show copy left at, § 462, p. 467.
- Usury, illegal allowance of, bars second suit for, § 867.
- Usury in cause of action*, § 584, p. 699.  
     Confession upon, not void, § 584, p. 609.  
     Creditor's bill to enforce judgment, no defense to, § 584, p. 609.  
     Foreclosure of mortgage given to secure such a judgment, no defense to, § 584.  
     Revivor, no defense against, § 580.
- Vacate, motion to, is a direct attack, § 2.
- Vacating, judgment at subsequent term, notice wanting, § 498, p. 509.  
     justice's default judgment, notice wanting, § 498, p. 509.
- Vacation, consent to judgment in, § 32.  
     conviction in, § 32.  
     mistake as to, in records. See DATES AND TIME.
- Vacation order, power to make, exercised by misconstruction of statute, § 128.
- Vagrant, convicted of, constitution violated, § 78, p. 107.  
     person adjudged to be, upon a misconstruction of statute, § 211.
- "Value," decree rendered upon a misconstruction of this word, § 177.
- Value, petition gives jurisdiction to determine, § 60 pp. 77-78.
- Values. See Amount.
- Venire *de novo*, motion for, is a direct attack, § 2.
- VENUE, CHANGE OF.  
     Jurisdiction taken on imperfect, § 235.  
     "Nearest county seat," or "nearest justice," not sent to, § 717, p. 771.

**VENUE, CHANGE OF—Continued.**

Seal omitted from transcript, § 302.

Second, is erroneous but not void, § 670, p. 721.

Transcript imperfect, § 250, p. 235.

Transcript wanting, § 302.

Wrongfully made or refused, § 717.

Venue of action, omitted from petition in special proceedings, § 250.

wrong, by misconstruction of statute, § 129.

Verdict before a justice, is equivalent to a judgment in California, Dakota,

Michigan and New York, § 765, p. 821.

Verdict, criminal case, in, amended, § 718.

directed, § 718, p. 772.

received when prisoner is absent, not void, § 714.

defective, § 718, p. 772.

omitted from record, § 691.

Verification. See Oath.

Verification, criminal pleadings, of, defective, or wanting, § 303.

official before whom made, wrong, § 254.

person making, improper, § 303.

special proceedings, in, improper person, by, § 252.

jurat wanting, § 253.

prematurely made, § 255.

wanting, § 251.

Vessel, adjudication that it is foreign, is conclusive, § 534, p. 554.

forfeited by misconstruction of statute, § 145.

lien upon, foreclosed, constitution violated, § 82.

"Vexing," attachment affidavit, defective as to, § 264, p. 250.

Vice-chancellor's court in New York, presumptions concerning, § 829.

**VIEWERS (of highways, gravel roads, ferries, etc.).**

Absent at time for assessing damages, § 680.

Erroneous rejection of report and appointment of reviewers, § 662, p. 715.

Examine all lands affected, failure to do, not void, § 662, p. 714.

Notice of time and place of meeting of, omitted, § 706, p. 760.

Oath of not in prescribed form, not void, § 662, p. 714.

Reference of ferry application to, omitted, § 661, p. 713.

Stranger acting, instead of one viewer, § 663, p. 716.

Surveyor acting as one, § 663, p. 716.

Void judgment, appeal from and trial on merits, estops party, § 861.

"Void" used in a statute, how construed, § 792, p. 852.

Void, when a judicial proceeding is, § 16.

"Voluntarily" absent, attachment affidavit fails to state, § 264, p. 250.

"Voluntarily" remains with enemy, confiscation petition fails to state, § 274.

Wages, garnished when exempt, § 547.

of seaman not due, judgment for, § 566.

Waiver. See APPEARANCE—CONSENT—ESTOPPEL.

"Ward," guardian's sale ordered upon a misconstruction of this word, § 174.

Ward, age of, final settlement before adult age, is it void? § 596.

guardian appointed for, by mistake as to, § 596.

Warning order. See PROCESS.

Warning to appear and show cause, omitted from process, § 354.

**Warrant.** See **PROCESS.**

**Warrant, defective or wanting,** § 329, p. 310.

for arrest, is action concerning, judicial? § 800, p. 861.

served by wrong person, § 447, p. 456.

"What might have been decided," meaning of, § 17, p. 27.

**WIDOW'S RIGHTS.**

Allowance, errors in, as to retrospective statutes, § 112.

Consent of. See **SERVICE**, sub-title, **UNAUTHORIZED PROCEEDINGS.**

Consent of, to administrator's sale of her interest in decedent's land, acted upon by a misconstruction of law, § 175.

Described as an heir, § 599.

Dower rights disregarded, is decree void? § 659.

Homestead, errors in, as to retrospective statute, § 112.

Land assigned to her, instead of to a child, § 631.

Notice, set off without, § 415.

Quantity of her interest in land, mistake as to, § 176.

Set-off, without notice, § 415.

Value of, given in land instead of money, § 177.

**Widow or no widow, implied adjudication of, is conclusive,** § 659.

**Wife appointed administratrix, is conclusive of husband's consent,** § 600, p. 635.

consent decree against, authorized by counsel, is conclusive, § 600, p. 635.

will of, probated, conclusive that she had husband's consent, § 600.

will of, void, probate of, is conclusive, § 621, p. 660.

**WILL.**

Construed erroneously as giving executor power to sell, § 728.

Construed erroneously as giving widow life estate, instead of fee, § 728.

Decree holding it void because property was communal, is not void because it was not, § 585, p. 610, 611.

Disregarded by decree, § 729.

Partition sale made in disregard of, § 178, p. 182.

**WILL, PROBATE OF.**

Appointment of an executor, is an implied probate, § 729.

Attesting witness, incompetent, not void, § 695, p. 745.

Barred by decree settling title differently, § 585, p. 611.

Capacity of testator, conclusive, as to, § 585.

Codicil admitted, is conclusive, § 585, p. 610.

Construction of obscure entry, as to, § 92.

Due execution of, settled by, § 585, p. 610.

Ejectment by heirs, in, is conclusive, § 585, p. 610.

Entry of, informal, § 766.

Errors in, do not avoid, § 729.

Evidence upon which made, conclusive as to its sufficiency, § 585.

Foreign will, conclusive as to, § 585.

Forged, probate of, § 549.

Fraudulent, probated in other state, § 558.

Legacy crossed out, conclusive as to, § 585, p. 610.

Married woman's void will, probate of, is conclusive, § 621, p. 660.

Notice of, wanting, § 416.

Rejected erroneously, not void, § 729, p. 783.

without hearing evidence, § 697, p. 750.

**WILL, PROBATE OF—Continued.**

- Revocation of, for any cause, conclusive as to, § 585, p. 610.
- Setting aside of probate of, for illegal cause, § 233.
- Title to land in another state, effect of probate of, upon, § 521, p. 531.
- Undue influence, conclusive as to, § 585, p. 611.
- Value of goods, too small, § 531, p. 552.
- Void, but probated, § 236, p. 224.
- Wife's will, probate of, conclusive as to husband's consent, § 600.
- Witnesses to will, conclusive as to their competency, § 585, p. 610.
- Withdrawal of petitioners, wrongfully refused, § 719.
- Witness, compelled to criminate himself, constitution violated, § 82.
  - compulsory process for, denied, § 88, p. 120.
  - incompetent, decree not void, § 695, p. 745.
  - question to, illegal, commitment for not answering, § 696, p. 745.
    - outside of issues, commitment, § 754.
- Witnesses to will, incompetent or insufficient, does not affect the probate, § 585.
- Witnessing confession, informal, § 762, p. 818.
  - stay of execution, informal, § 765, p. 822.
- Writing, complaint not in, conviction upon, by misconstruction of statute, § 212.
  - complaint not in, effect of, §§ 327, 328.
  - construed erroneously, not void, § 729, p. 783.
- Writs. See PROCESS.
- Year, process omits, § 382.











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